IN THE SUPREME COURT OF FLORIDA

CASE NO.02-1

AMOS KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

APRIL E. HAUGHEY
Florida Bar No. 0119180
Assistant CCC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

WARRANT SIGNED, EXECUTION IMMINENT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant, Amos King, in reply to the Answer Brief of Appellee, the State of Florida. Appellant will rely upon his arguments in the Initial Brief of Appellant on issues II, III, IV, V, VI, VII and VIII.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S CLAIM THAT THE STATE COMMITTED FUNDAMENTAL ERROR BY DESTROYING EXCULPATORY EVIDENCE.

The State argues that the circuit court's factual findings regarding the destruction of the vaginal washings of the murder victim is supported by the testimony of Larry Bedore, an employee of the medical examiners office today. Such an argument fails to recognize that Mr. Bedore was not an employee of the medical examiner's office until seven years after Dr. Joan Wood had the samples in her possession. In addition, there is no record or log as to the destruction of this evidence. Thus, Mr. Bedore's testimony regarding what happened in that office in 1977 is pure speculation. This speculation is the underlying basis for the court's decision regarding the destruction. This Court must examine the basis for Judge Schaeffer's decision and ensure that it is supported by competent, substantial evidence. Stephens v. State, 748 So.2d 1028 (Fla. 1999). An analysis of the basis of her findings based on the testimony of a person not involved with the

evidence who did not even work at the medical examiner's office during the time period in question will find that her findings are not supportable. Dr. Joan Wood, the person who was last in possession of the evidence, was not interviewed by the state. Further, a defense motion to take her deposition was denied by the circuit court. Thus, a conclusion that she threw the evidence out cannot be obtained.

An equally plausible scenario would be that Dr. Wood, following the language of the only statute in place at the time, turned the vaginal washings and the rectal swab over to a detective at the Pinellas County Sheriff's Office, who then destroyed the evidence without following procedures in place regarding the destruction of evidence. Fla. Stat. ch. 406.13 (1977). The circuit court's finding that such evidence was not turned over to the Sheriff's Office is not supported by competent, substantial evidence. To the contrary, a review of the property record held by the Sheriff's Office shows that two pieces of evidence in their possession were destroyed in 1987 and 1988. The only two pieces of evidence not accounted for in this case are the vaginal washings and the rectal swab taken from the victim. As shown in King's motion for post-conviction relief, all of the other evidence can be traced to, or located in, the Sheriff's Office today. There is no Court order in evidence nor is there a Property Release Receipt/Disposition Order to demonstrate that this evidence was

properly destroyed in accordance with policies in effect in 1987 and 1988. (EX. 9). Not one person could explain why there appear two entries in the evidence log which show evidence was destroyed. An employee of the Sheriff's Office, Lieutenant Colcord, speculates that such an entry was a "computer glitch." Colcord further testified that there was no computer system in 1977. (HR.84). The Lieutenant was not the person who made the entries of the destroyed evidence in 1987 and 1988 as he was not even employed by the office at that time. (HR.88). Such a speculation cannot be relied upon as a basis for a factual finding that the Sheriff's Office did not possess and destroy the evidence in this case in 1987 and 1988.

The exculpatory value of the vaginal washings and the rectal swab which contained evidence of the perpetrator was obvious in 1977, 1987 and 1988. However, because DNA testing became available in 1985, the exculpatory nature of the samples was more than evident by 1987 and 1988.

The following cases have been cited in State's response to Defendant's 3.850 motion and distinguished from the case at bar in Appellant's initial brief: Arizona v Youngblood[1], 488 U.S. 51

[1] In 1988, the United States Supreme Court denied relief to Mr. Youngblood on the basis that evidence was not destroyed in bad faith. Arizona v Youngblood, 488 U.S. 51 (1988). However, in August of the year 2000, after seventeen years, DNA analysis showed that Mr. Youngblood was not the perpetrator of the crime. Interestingly, the DNA evidence was then linked to the actual perpetrator who was incarcerated in the State of Texas. Barbara

(1988), Kelley v State, 569 So. 2d 754 (Fla. 1990), United States v Deaner, 1 F.3d 192 (3d Cir. 1993), Holdren v Legursky, 16 F.3d 57 (4th Cir. 1994), Rogers v State, 511 So. 2d 526 (Fla. 1987), United States v Vera, 2001 U.S. Dist. LEXIS 9337 (D. Oregon, June 26, 2001).

In United States v Boyd, 961 F. 2d 434,435 (3d Cir. 1992), the Court stated:

> A urine sample taken from Boyd on April 19, 1991 tested positive for cocaine metabolite. The sample was retested, and again the results indicated drug use. By standard procedure, the positive urine specimen was to be maintained by a private laboratory for two months and then destroyed on June 28, 1991.
>
> Id. at 435

The facts in *Boyd* differ from the facts in the case at bar due to the fact that the procedure in place in *Boyd* were followed. The only "standard procedure" governing the destruction of evidence by the medical examiner in 1977 was one statue, Fla. Stat. ch. 406.13 (1977). Under this statute, Assistant Medical Examiner Joan Wood was permitted to keep the sample or turn it over to law enforcement. The trial court found that she did neither. She destroyed it; Contrary to statute and contrary to the common sense assessment of evidence reasonably expected of a trained medical examiner.

Whitaker, DNA Frees Inmate Years After Justices Rejected Plea, N.Y. Times, August 11, 2000.

Counsel for the State also relies on United States v Crouch, 84 F. 3d 1497, 1506 (5th Cir. 1996). The *Crouch* court held:

> The Court also noted "we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution" and indicated such a determination "will necessarily involve a delicate judgement based on the circumstances of each case."(citing United States v Marion, 404 U.S. 307, 92 S. Ct. 455 (1971) *Id.* at 325, 92 S. Ct. at 466. The Court then proceeded to reverse the order of dismissal, holding there was no Sixth Amendment violation and that, as to due process: "nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them" *Id.* at 325, 92 S. Ct. at 466. The opinion's final sentence noted that "events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature."
>
> *Id.* at 1506.

The above case should not be applied to the case at bar in that the case at bar has nothing to do with pre-accusation delay. Furthermore the actual prejudice to Mr. King's case can be demonstrated by the lab report dated March 17, 1977. (See EX. 4). This report states that the vaginal wash was "very bloody, grossly hemologized very difficult to read." (EX. 4). Dr. Wood, as a trained medical examiner, knew that the vaginal wash was subject to attack either by trial counsel or post-conviction counsel, yet she

destroyed it in direct violation of statute and demonstrated a flagrant disregard for the common sense assessment of evidence reasonably expected of a trained medical examiner.

Counsel for the State contends that there was no reason to believe in 1977 that the vaginal washings could be subject to any further testing, or could provide any exculpatory value. (See Answer Brief of Appellee p. 25). Such an argument must fail in light of the nature of the sample and its obvious exculpatory value. Due to the questionable nature of the vaginal wash, known through the notations on the lab report, a prudent medical examiner would have tested it again or at least followed the law and kept the vaginal wash so it could be tested by another examiner. The exculpatory value of the vaginal wash was obvious and the act of destruction was willful.

On page 22 of Appellee's Answer Brief, counsel argues that by placing emphasis on the word "may" in the statute, and "shall" in the 1981 Administrative Code, somehow Dr. Wood was authorized to destroy the vaginal wash. The language of the statute is clear, Wood was permitted to keep the vaginal wash or she may turn it over to law enforcement. The statute does not state that a medical examiner may keep it and destroy if she feels the urge to destroy it. Mr. King contends that the discussion of the 1981 code is irrelevant in that the trial court found that the vaginal wash was destroyed between 1977-1979. In addition, if the medical examiner

had not destroyed it, and turned it over to law enforcement pursuant to statute, the Sheriff's Office would have had possession of the samples in 1981. Thus, the law enforcement agency's destruction policies would have to be followed, not the administrative code applying to the medical examiner. As argued previously, the Sheriff's Office destroyed two pieces of evidence in 1987 and 1988 without following their own procedures.

The State cannot sufficiently distinguish State v. Elliot, 83 F.Supp 2d 637 (E.D. Va. 1999). The District Court in Elliott held:

> Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test.

Id. at 647-648. An attempt is made to lessen the ruling in that case by pointing out that one jurist in Oregon "suggests" that Elliot does not follow Youngblood. (See Answer Brief of the Appellee p. 25). In fact, under Elliot, Mr. King is entitled to relief. The evidence destroyed in this case meets the standard put forth in Elliot. Given that the evidence was vitally important in securing a conviction in an otherwise weak circumstantial case, and given that the medical examiner knew this, the destruction of such

evidence by her in contravention of the statute in place at the time constituted objective bad faith.

Counsel's argument that Mr. King should be denied relief on the basis of laches is an attempt to divert this Court from the real issue at bar. As of October 1, 2001, the legislature of the State of Florida has specifically granted prisoners the right to have DNA testing done on any case where certain criteria are met. Fla. Stat. ch. 925.11 (2001). Mr. King meets all of the criteria necessary under this statute and is therefore granted a right to have DNA tests performed on evidence at this time. To say that his request to have DNA testing is barred ignores the Florida State Legislature's intention to provide testing on DNA evidence no matter how old the case is as long as certain criteria are met under the statute. It should be noted that nowhere in the statute are persons denied the right for this testing because their case is too old. Fla. Stat. ch. 925.11 (2001). Any further argument as to the DNA testing is another attempt to divert this Court from the issue at bar, to wit: whether the destruction of evidence which could be used to exonerate Mr. King was done in bad faith.

The State relies on Zeigler v. State, 654 So.2d 1162 (Fla. 1995) in arguing that Mr. King's claim for DNA testing is now procedurally barred. In Zeigler, there was no statute available allowing a prisoner to challenge evidence through DNA analysis. Thus, the claim should have been raised as newly discovered

evidence within two years of 1988, when DNA was first recognized as a valid test. *See*, Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988). That is not the case here. In Mr. King's case there is a statute specifically giving him an additional two years from October 1, 2001, in which to make a DNA claim. Fla. Stat. ch. 925.11 (2001).

The State argues that Mr. King has never requested DNA analysis prior to this date, and thus he should be barred from raising it at this time. Again, such reasoning overlooks the plain language of the statue providing this avenue of relief. In addition, Mr. King asked repeatedly for any and all forms of scientific testing from his lawyers throughout the pendency of his case. Attached is an affidavit from William Noles, attorney for Mr. King during the time period a claim could have been raised for DNA as newly discovered evidence. The affidavit clearly states that Mr. King repeatedly requested any scientific test of the evidence in this case. Mr. Nolas, who was without the resources necessary to conduct such an inquiry, failed to request DNA testing. Thus, Mr. King should not be accountable for a request which he made which was never acted on. Nevertheless, DNA testing is clearly available to Mr. King under the new statute, so the State's argument is meritless.

Finally, the State argues that Mr. King has not made a statement as to why this claim was not raised previously pursuant

to Fla. R. Crim. Proc. 3.851(e)(2)(B). Mr. King has made such a statement repeatedly. Florida Statue 925.11 (2001), effective October 1, 2001, gave prisoners the ability to request DNA testing as long as the criteria of the statute were met. Before this time, there was no statutory provision allowing this request. Thus, Mr. King's request is timely, anticipated, and intended by the legislature of the State of Florida.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. King's Motion for Postconviction Relief. This Court should order that his conviction and sentence be vacated and remand the case for a new trial, new evidentiary hearing, or such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been has been furnished by United States Mail, first class postage prepaid, hand-delivery and/or by electronic mail to all counsel of record on this 11 day of January, 2002.

Richard E. Kiley
Florida Bar No.0558893
Assistant CCC

April E. Haughey
Florida Bar No. 0119180
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

Copies furnished to:

Honorable Susan F. Schaeffer
Circuit Court Judge
545 1st Avenue North, Room 417
St. Petersburg, FL 33701

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Westwood Building, 7th Floor
2002 N. Lois Avenue
Tampa, FL 33607

C. Marie King
Assistant State Attorney
Office of the State Attorney
P.O. Box 5028
Clearwater, FL 33758-5028

Commission on Capital Cases
ATTN: Mary Jean
402 S. Monroe Street
Tallahassee, FL 32399-1300

Susan Schwartz
Assistant General Counsel
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399-2500

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
ATTN: Tanya Carroll
Supreme Court Building
500 S. Duval Street
Tallahassee, FL 32399-1927

United States Court of Appeals for the
Eleventh Circuit
ATTN: Joyce Pope
56 Forsyth Street N.W.
Atlanta, GA 30303

United States Supreme Court
ATTN: Cynthia Rapp
One 1st Avenue N.E.
Washington, D.C. 20543

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

Richard E. Kiley
Florida Bar No.0558893
Assistant CCC

April E. Haughey
Florida Bar No. 0119180
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

AFFIDAVIT/DECLARATION OF BILLY H. NOLAS, ESQUIRE PURSUANT TO 28 U.S.C. § 1746 AND 18 Pa.C.S. § 4904

AFFIDAVIT OF COUNSEL

The undersigned swears and affirms the following to be true under the penalties of perjury, pursuant to 28 U.S.C. § 1746 and 18 Pa. C.S. § 4904:

1. I was counsel of record for Amos Lee King in 1988 when he filed for post-conviction relief. I filed pleadings and briefs on behalf of Mr. King, including a motion for post-conviction relief and a state petition for writ of habeas corpus. I participated in the prior evidentiary hearing.

2. From the outset and then during the entire time of my representation of Mr. King, Mr. King repeatedly asserted his innocence and requested all possible scientific testing of the evidence in the case in order to establish his innocence. He told me over and over, on several occasions, that he was innocent. He asked over and over again if there was any way to scientifically examine and test the evidence in order to demonstrate that he was innocent. I believed then, and believe now, that Mr. King is innocent.

3. At the time, there was no provision in Florida law for a capital post-conviction petitioner to seek DNA testing of evidence. Florida law then allowed disclosure of documents as public records, and the trial transcript was available from the court file, but there was then no statute or rule allowing a Petitioner DNA testing as there is now. There was no statutory or rule mechanism at the time for forensic DNA testing, so this vehicle was not available for me to pursue Mr. King's explanations that he was innocent and requests that I act to show this.

4. It is also important to note that I was operating under strict restrictions at the time, which, I believe, created a conflict of interest. I did not disclose this conflict to Mr. King or the

courts. Specifically, I was then employed by the Office of the Capital Collateral Representative. We had severe budgetary limitations and I was litigating numerous death warrant cases at the time that I represented Mr. King. Given the limitations, I understood that I was only to raise issues relating to Mr. King's resentencing proceedings – i.e., I was to raise challenges to matters relating to the penalty phase resentencing, not to the original trial where Mr. King was convicted and originally sentenced to death. This is, in fact, what I did – the focus of my representation was on challenges to the results of the resentencing hearing. I did not inform Mr. King of these limitations upon my representation, nor did I inform the courts that my representation of this petitioner was limited. I should have, especially given Mr. King's steadfast assertions of his innocence. He deserved a counsel to investigate the conviction and test the evidence.

5. Mr. King requested all available means to demonstrate his innocence, but I knew of no way to seek DNA testing under Florida law at the time, while the task assigned to me was to raise challenges to the resentencing only. Had Florida law allowed for DNA testing at the time, I would have pursued it as an available state court mechanism notwithstanding the conflict noted above. Had my representation not been affected by the budgetary and time constrictions, and the resulting conflict noted above, I would have pursued an investigation into Mr. King's explanations that he was innocent by means independent of the right now afforded by the DNA statute and rule. I did not pursue statutory DNA testing because it was unavailable and did not pursue other means to demonstrate Mr. King's innocence because of the conflict.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge and belief, subject to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904.

Billy H. Nolas, Esquire

Dated: January 10, 2002