IN THE SUPREME COURT OF FLORIDA
CASE NO: SC03-2204

LORAN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. COLE'S 3.853 MOTION FOR POSTCONVICTION DNA TESTING.

Standard of Review

Citing to Blanco v. State, 702 So.2d 1250, 1252 (Fla.1997), and Diaz v. Dugger, 719 So.2d 865, 868 (Fla.1998), the state argues that the circuit court's denial of Mr. Cole's 3.853 motion "is supported by competent, substantial evidence, and should not be disturbed on appeal" (Answer at 8). That is the correct standard of review for circuit court findings of fact. Blanco v. State, 702 So.2d 1250, 1252 (Fla.1997), and Diaz v. Dugger, 719 So.2d 865, 868 (Fla.1998). However, as explained in Mr. Cole's initial brief, the circuit court's denial of Mr. Cole's 3.853 motion is based on a conclusion of law that there was not a reasonable probability of a different outcome. Therefore, the appropriate standard of review is de novo. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999).

Merits

The state's argument that Mr. Cole's 3.853 motion did not meet the requirements of Rule 3.853 because he alleged that DNA testing "*might* reveal evidence" is meritless (Answer at 7, emphasis supplied). First, the motion never

used the verbal auxiliary "might" or its present tense, may. The state may have referred to the portion of the motion that stated: "If DNA evidence revealed that Mr. Paul also had sexual relations with Ms. Edwards, the clarity of her recollection would be impeached. Because Ms. Edwards' testimony was crucial to the state's theories of guilt and death-eligibility, DNA evidence showing that Mr. Paul had sexual relations with the victim will exonerate Mr. Cole under the state's theory of guilt and mitigate his death sentence." (DNA 2-3). The conjunction "if" was the proper term to use. Mr. Cole could not claim, in good faith, that DNA testing *will* exonerate Mr. Cole or mitigate his sentence because Mr. Cole had no control over a number of variables that could affect the DNA testing. For example, the state could have stored the DNA improperly causing it to be too degraded for DNA testing, the amounts of semen collected could be insufficient for positive identification, or the existing technology may not reveal a positive identification. Thus, the state's semantic argument must fail.

The state argues that Mr. Cole's case is similar to Hitchcock v. State, 866 So.2d 23 (Fla.2004), in which this Court affirmed a circuit court's denial a 3.853 motion. In Hitchcock, the lower court denied the motion because Hitchcock gave only a general reference to the evidence to be tested and did not explain how testing the evidence could exonerate him or mitigate his sentence. Id. at 27-28. The

motion gave “only a general reference and identification of the type of item. . . without any other relevant information. Id. at 27. It did not explain “the evidentiary value of the evidence to be tested “ or “how the results would exonerate the Defendant or mitigate his sentence”. Id. at 28. This Court affirmed the lower court because Hitchcock did not “demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case”. Id. at 27.

Mr. Cole’s situation is not at all similar to Hitchcock. First, the lower court denied his motion for an entirely different reason: the legal conclusion that there was no probability of a different outcome. Second, Mr. Cole’s motion had the nexus this Court found lacking in Hitchcock. The motion specifically sought to test the semen found in and on three items of evidence: the sexual assault kit, Pam Edwards’ sweat pants, and Pam Edwards’ “panties”, as well as further testing of the blood samples taken from Mr. Cole and Paul, so that a DNA comparison to the DNA in the semen could occur (DNA 9-34). Mr. Cole’s motion explained the nexus between the potential results and the issues in the case:

> 2. No physical evidence connected Mr. Cole to the murder of the victim. The State’s case consisted of a carefully constructed web of circumstantial evidence and relied upon Ms. Edwards’ testimony to establish that Mr. Cole had the opportunity and premeditated design to kill John Edwards. The physical evidence did not prove that Mr. Cole killed John Edwards. The evidence proved that

> Mr. Edwards injured Mr. Paul, giving Mr. Paul a motive to attack Mr. Edwards. Mr. Cole had no such motive. Any impeachment of Ms. Edwards' testimony would establish a reasonable doubt that Mr. Cole was the killer and that he premeditated the murder. Such impeachment would also provide mitigation regarding his culpability for the first degree murder. There is a reasonable probability that the jury would have sentenced Mr. Cole to life if evidence revealed Ms. Edwards' memory was not entirely accurate and they could not believe, beyond a reasonable doubt, that Mr. Cole was the person who actually killed Mr. Edwards and that he did so by a premeditated design. Furthermore, such evidence would establish that Mr. Cole is innocent of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982).

(DNA 4-5). Mr. Cole's Reply to the state's Consolidated Response To Order To Show Cause And Memorandum Of Law further explained the nexus:

> The state relied on Ms. Edwards' testimony to establish that *only* Mr. Cole had the opportunity to commit the premeditated first degree murder of Mr. Edwards; *no physical evidence connected Mr. Cole to the murder of the victim.* Any impeachment of Ms. Edwards' testimony, including her testimony that *only* Mr. Cole sexually assaulted her, would establish a reasonable doubt that *only* Mr. Cole had the opportunity to commit the premeditated murder. Such impeachment would mitigate Mr. Cole's death sentence.
>
> In Gregg v. Georgia, the United States Supreme Court noted that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders". Gregg v. Georgia, 428 U.S. 153, 183 (1976). To justify imposition of the death sentence, the prosecution must prove that

> certain characteristics of an offender will serve those purposes. Id. For that reason, the United States Supreme Court has mandated that, in a capital case, "the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Locket v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978); See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. So. Carolina, 476 U.S. 1 (1986). Impeachment of Ms. Edwards' testimony that *only* Mr. Cole sexually assaulted her and *only* Mr. Cole had the opportunity to commit the premeditated murder are circumstances of the offense which would establish a reasonable doubt that Mr. Cole was the killer and that he premeditated the murder. Such impeachment mitigates Mr. Cole's culpability for the first degree murder. There is a reasonable probability that the jury would have sentenced Mr. Cole to life if evidence revealed Ms. Edwards' memory was not entirely accurate and they could not believe, beyond a reasonable doubt, that Mr. Cole was the person who actually killed Mr. Edwards. Furthermore, such evidence would establish that Mr. Cole is innocent of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982). "There is a reasonable probability that [Mr. Cole] would have been acquitted [of the death penalty] if the DNA evidence had been admitted at trial. Knighten v. State, 829 So.2d 249, 252 (Fla.2d DCA 2002).

(DNA 47-48).

The state also cites to Robinson v. State, 865 So.2d 1259 (Fla.2004), as precedent to affirm the lower court (Answer at 10-11). In Robinson, the lower court found that DNA evidence would not "in any way exonerate the Defendant nor

mitigate his sentence" because "Robinson does not dispute his involvement in this case, including the facts that he had sex with the decedent and that he fired the shots that killed her". Id. at 1264. Affirming the lower court, this Court noted, "Robinson failed to state in the motion how DNA testing of all the items listed would exonerate him or even mitigate his sentences for robbery, sexual battery, and first-degree murder." Id. at 1265.

Again, Mr. Cole's case is distinguishable. As explained above, his motion did explain how DNA testing would exonerate him and mitigate his sentence. DNA testing and impeachment of Pamela Edwards' testimony would create a reasonable doubt that the death sentence was appropriate.[1] Mr. Cole has maintained that he did not kill the victim; William Paul did. Pam Edwards was the state's only witness who refuted that defense, and the record clearly proves that the jury relied on her testimony in recommending the death sentence. The jury had the court reporter read back the portion of Edwards' testimony that the state used to argue that William Paul could not have killed John Edwards (TR V12 789; V17 1574-75; 1586-92). Minutes after the court reporter read that testimony to the jury, the jury

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[1]The state asserts that "The evidence was overwhelming that Cole murdered John Edwards", (Answer at 11), however, the state points to none of that "overwhelming" evidence. In fact, the only "evidence" that indicated that Mr. Cole and not William Paul killed John Edwards was the testimony of Pamela Edwards, from which that *inference* could have been made.

returned a unanimous recommendation that Mr. Cole be executed (TR V17 1592).

To the extent the state cites Tompkins v. State, 28 Fla.L.Weekly S767 (Fla. Oct. 9, 2003), and King v. State, 808 So.2d 1237, 1247-49 (Fla.2002), as precedent to deny relief, neither case is relevant. In Tompkins and King, requests for DNA testing were denied because the DNA evidence would identify the victim and DNA evidence would not exonerate the movants because there was substantial crime scene contamination. Id. In Mr. Cole's case, DNA testing could only identify the source of the semen, not the victim of the sexual assault, and there is absolutely no similar evidence of contamination, i.e., that semen from any number of unknown sources could have been left in the sexual assault kit and on Pamela Edwards' clothes during the course of the investigation.

Conclusion

Mr. Cole was tried and sentenced to death by inherently imperfect actors in a system that has been proven to be imperfect. See Smith v. State, 515 So.2d 182 (Fla. 1987); Sidney P. Freedberg, He didn't do it, St. Petersburg Times January 7, 2001; State v. Holton, 869 So.2d 269 (Fla.2002). These imperfect actors based their decisions on the testimony of one person whose mental state was clouded by injury, trauma, and drug use (TR V14 1186-87; 1188; 1189). DNA testing will reveal objective and compelling evidence of the accuracy of that person's

recollection. In a circumstantial death-penalty case, justice demands that accuracy.

ARGUMENT II

THE CIRCUIT COURT'S DENIAL OF MR. COLE'S MOTION FOR POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO HABEAS CORPUS RELIEF UNDER BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS

The state claims that this issue "has not been preserved for review on appeal" because the issue was not raised at the lower court (Answer at 13). The state is incorrect. After Mr. Cole filed his 3.853 motion, the lower court issued an Order To Show Cause (DNA 35). The Order directed the state to respond and file a memorandum of law, and allowed Mr. Cole to reply to the state's response (DNA 35). In its response, the state argued that Mr. Cole did not have the right to test the evidence pursuant to Rule 3.853. In his reply, Mr. Cole argued:

> Both the Florida Constitution and the United States Constitution provide a right to access evidence for the purposes of DNA testing if it could be used to prove one's innocence or to appeal for executive clemency. See Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636-37 (Fla. 2001), Anstead, J. (concurring in part and dissenting in part) ("At its core, access to DNA testing is simply a unique means of establishing a claim… under the constitutional writ of habeas corpus…. Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution…. The salient issue in such proceedings is

whether there is a credible claim that a fundamental injustice has occurred."). See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.); Cole v. State, 841 So.2d 409, 419 (Fla.2003)("We do not address Cole's request for relief at this time except to state that our decision should not be read to prohibit Cole from seeking such testing pursuant to the mandates of section 925.11 and rule 3.853."). Given the fundamental nature of the rights at issue in the 3.853 proceedings, the statute should be construed in Mr. Cole's favor. See State v. Winters, 346 So.2d 991, 993 (Fla.1977)("Penal statutes must be strictly construed in favor of the accused where there is doubt as to their meaning"). As the Third Circuit Court of Appeals noted:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission.

Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d Dist.Ct.App. 1982). This is particularly relevant in death penalty cases like Mr. Cole's, as the Florida Supreme Court has noted:

> [T]rial judges should be extremely cautious when denying

> defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

Guzman v. State, 644 So.2d 966, 1000 (Fla.1996).

(DNA 48-49). Thus, this precise issue was timely raised before the lower court. It was preserved.

CONCLUSION

This Court should reverse the circuit court's denial of Mr. Cole's Motion for Postconviction DNA Testing. Mr. Cole filed a properly pled motion following the law of this State and demonstrated a reasonable probability of acquittal as to guilt and the death penalty. He should be allowed to test the evidence used against him. Accordingly, he asks this Court to vacate the circuit court's order and remand the case for DNA testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of May, 2004.

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