IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant, **Case No. SC06-242**

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Brenda Rucker was murdered on February 14, 1982. Swafford was convicted after a jury trial in November 1985. His convictions were affirmed on direct appeal. *Swafford v. State,* 533 So. 2d 270 (Fla. 1988). Swafford filed his first motion for post-conviction relief and petition for writ of habeas corpus in 1990. Relief was denied in the trial court, and the denial of relief was affirmed that same year. *Swafford v. Dugger,* 569 So. 2d 1264 (Fla. 1990). Swafford's second habeas petition reasserting the issue of his trial attorney's status as a special deputy sheriff was also denied. *Swafford v. Singletary,* 584 So. 2d 5 (Fla. 1991). Swafford then filed a second motion for post-conviction in 1991. Relief was denied by the trial court after a partial hearing in 1992. On appeal from the denial of his second motion for post-conviction relief, the matter was temporarily relinquished to the trial court, but the second denial of relief was ultimately affirmed in 1994. *Swafford v. State*, 636 So. 2d 1309 (Fla. 1994). Swafford filed a third motion for post-conviction relief in 1994, which was denied in 1997 after an evidentiary hearing. The trial court's third denial of post-conviction relief was also affirmed on appeal. *Swafford v. State,* 828 So. 2d 966 (Fla. 2002).

Swafford filed a Motion for DNA Testing in October 2002.

The motion was denied in March 2003. Swafford filed a fourth motion for post-conviction relief in April 2003. The motion was dismissed in June 2003. Both the DNA and the post-conviction cases were appealed to this Court. Case No. SC03-931; Case No. SC03-1153. On March 26, 2004, this Court remanded to the circuit court for further proceedings in Case No. SC03-931. That same day this Court ordered any amendment to Swafford's fourth motion for post-conviction relief, Case No. SC03-1153, to be filed within sixty (60) days of the circuit court's order in Case No. SC03-931.

The circuit court held an evidentiary hearing on June 11, 2004, and additional hearings on March 11, 2005, June 27, 2005, October 6, 2005 and January 6, 2006. The circuit court entered an Order on January 25, 2006, finding that the court had complied with this Court's directives on remand. This appeal follows.

This Court remanded Case No. SC03-1153 to the circuit court with the following directions:

> (1) Hold an evidentiary hearing to determine which pieces of evidence that appellant moved to have tested are capable of being tested for DNA
>
> (2) The evidence which the Court determines to be capable of being tested is to be tested pursuant to Florida Rule of Criminal Procedure 3.853(7).[1]

[1] Rule 3.853(c)(7), Florida Rules of Criminal Procedure provides:

> (3) The results of the tests shall be provided in writing pursuant to rule 3.853(8).[2]
>
> (4) The circuit court shall then enter an order making findings as to whether the evidence which was tested is authentic, has been contaminated, or such other findings in respect to the tested evidence as the circuit court determines to be appropriate.

(Vol. 3, R230).[3]

Concurrent with the order in Case No. SC03-931, this Court entered an order in Case No. 03-1153, an appeal from denial of post conviction relief pursuant to Rule 3.851, Florida Rule of Criminal Procedure. That order stated that:

> By separate order in *Swafford v. State*, No. SC03-931, we have directed that there be an evidentiary hearing in respect to evidence which the circuit court finds is capable of being tested for DNA, that reports be made in writing of the DNA test results pursuant to Florida Rule of Criminal Procedure 3.853(8), and that the circuit court enter an order making findings as to contamination, authenticity, and other findings which the circuit determines to be appropriate.

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(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

[2] Rule 3.853(c)(8), Florida Rules of Criminal Procedure provides:
(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

[3] Cites to the record on appeal will be by volume number followed by "R" and the page number of the cite.

(Vol. 3, R229).

At the June 11, 2004, evidentiary hearing, the State offered to stipulate to the authenticity of the evidence collected at the crime scene (Vol. 1, R48). In discussing "contamination," the State referred to contamination from the crime scene (Vol. 1, R49). The trial court referred to "contaminated" as something that was "so contaminated that it would be difficult or impossible to recover DNA." (Vol. 1, R50). Defense counsel then stated:

> But the State's response [to the DNA motion] was contamination; and indicated that a trail of the victim had been destroyed, and there were contamination issues as to the crime scene. So the State injected the contamination issue, and your Honor relied on that in the order denying the motion for DNA testing.
>
> So I think in that context it addresses the what [sic] the Supreme Court is addressing. It seems to me, given that contamination has been raised at this point in time by the State, the question is, what is the contamination that they're alleging and what's the basis for that?

(Vol. 1, R51). Mr. Nunnelley responded for the State:

> Well, your Honor, since I wrote the brief, maybe I need to respond to the issue of contamination.
>
> This is not what you would call a sterile crime scene by any stretch of the imagination. I mean, we're all aware from the testimony at trial that this area of the sugar mill ruins was, I guess, a party spot, for lack of a better word. In fact, still is.
> . . . .
> However, your Honor, the bottom line is, it was a

> dirty crime scene. It was not a sterile scene where law enforcement knew or had a pretty good idea that the items of evidence that they were collecting from around the victim were definitely connected to the crime itself.
>
> As you go further out, folks were connecting more artifacts, perhaps. But that's what we referred to and that's what we were talking about with contamination. And I think the response in this and the pleadings incorporate very clearly what we're talking about.

(Vol. 1, R52-53).

Defense counsel, Mr. McClain, then indicated he wanted to call an expert witness on "sort of the chain of custody, to show what the procedures were in terms of whether there were any contamination issue." (Vol. 1, R56). The defense expert, Keith Paul, was then released because the trial judge wanted to conduct the evidentiary hearing on what evidence could be tested (Vol. 1, R58). The trial judge advised Mr. Paul that since his expert testimony involved chain of custody, the parties had agreed as to the scope of the evidentiary hearing and Mr. Paul's testimony would not be needed (Vol. 1, R58). There was no proffer.

The State called Harry Hopkins, crime lab analyst supervisor for FDLE-Orlando, who was qualified as an expert in DNA analysis (Vol. 1, R62).

Mr. Hopkins explained the procedures conducted at FDLE when evidence on which DNA testing is requested is received (Vol. 1,

R64-65). Hopkins did not do the original testing in the Swafford case; however, he had reviewed the evidence which had been collected by Volusia County Sheriff's Office ("VCSO") at the time of the murder and which was located at the VCSO office (Vol. 1, R66). Hopkins attempted to locate all the items of evidence listed in Swafford's DNA motion (Vol. 1, R67). Hopkins identified the VCSO property receipt (Vol. 1, R68, 232-234, State Exhibit #1). Hopkins also reviewed the evidence admitted at trial which was located at the clerk's office (Vol. 1, R69).

Mr. Hopkins went through each item of evidence and advised the trial court which items would be appropriate for DNA testing (Vol. 1, R71-79). During this identification procedure, it was discovered that the victim's blood sample that the State believed had been destroyed had, instead, been admitted into evidence at the trial (Vol. 1, R72). The items identified for possible testing appeared to be the majority of the items in Swafford's DNA motion (Vol. 1, R79). There were several items Mr. Hopkins did not believe were suitable for DNA testing: a "paperback writing of victim" and a large paperback found in the area, an evidence receipt, and fibers (Vol. 1, R80). Additionally, removal of hairs from mounted slides is difficult because of the mounting medium and the 22 years in which the

slide had “set.” (Vol. 1, R80). FDLE had “zero success” in terms of trying to remove a hair that had been mounted any length of time (Vol. 1, R85).

Mr. Hopkins also addressed the issue whether FDLE could conduct mitochondrial[4] DNA testing (“mtDNA”) (Vol. 1, R83). There are laboratories that can conduct mtDNA testing; however, FDLE could only perform this type testing if the hair had “root material and clear material on the root into the hair.” (Vol. 1, R83).

On cross-examination, Mr. Hopkins discussed the screening process for DNA testing (Vol. 1, R87-88). In order to conduct Short Tandem Repeat (“STR”) DNA testing, a minimum of 50 nuclei is required (Vol. 1, R88). To test sperm, 100 nuclei are required because a sperm cell only contains “half the number of chromosomes as a regular nucleated cell.” (Vol. 1, R89). Part of the screening process for semen is to conduct a “presumptive” test. If that test is positive, “the confirmatory test for semen is the identification of sperm cells and reproductive cells.” (Vol. 1, R89). The process for removing DNA from sperm cells is different from that for blood or saliva (Vol. 1, R90). If there is a sexual assault there will be “contributions” from both the

[4] This word was mistakenly transcribed as “hypochondrial” testing.

victim and the assailant (Vol. 1, R90). The male contribution can be separated from the female contribution. If there are no sperm cells in the sample, the cells can "break open" at the same time as the female cells. As Mr. Hopkins explained it:

> And in that case we're going to end up with a mixture sample, where we may or may not be able to tell much about the male donor.

(Vol. 1, R91).

Defense counsel had Mr. Hopkins explain the procedure used to match up the evidence found at the scene with those received at FDLE (Vol. 1, R95). Hopkins also described the process of mounting evidence on slides (Vol. 1, R96-99). Defense counsel also discussed mtDNA testing with the expert (Vol. 1, R104).

After Mr. Hopkins' testimony, the State indicated there was a witness present to establish the chain of custody (Vol. 1, R107). The FDLE analyst who prepared the microscopic slides was also present and available to testify as to the conditions under which the evidence had been kept for 20 years (Vol. 1, R 113-114).

The parties then went through each item of evidence and defense counsel advised the judge whether he wanted the evidence tested or not (Vol. 1, R114-126).

Defense counsel told the judge that he had the handwritten notes of the examiner which provided the "best way of figuring

out what each slide comes from." (Vol. 1, R127). Mr. McClain then questioned whether it was necessary to put on the record the conditions under which the evidence had been kept (Vol. 1, R128). He then declined to present any evidence, noting "this is my first 3.853 evidentiary hearing. So I'm just coming up with ideas to try to—"(Vol. 1, R129). There was a discussion off the record and Mr. Nunnelley indicated to the court that Mr. Hopkins indicated there could be some degradation of the samples; however, it could not be undone (Vol. 1, R129-130).

Mr. McClain then requested mtDNA testing on hair samples that FDLE could not test (Vol. 1, R132). After discussion, it was decided the evidence would go to FDLE. Any samples to be sent to an independent lab would be sent by FDLE (Vol. 1, R135). Mr. Nunnelley then advised the court that the lab in Pennsylvania which Mr. McClain requested for MtDNA was an accredited lab and "So long as the State is not paying the bill for sending it to MitoTyping, we do not care if it gets done." (Vol. 1, R139). The parties then discussed Mr. McClain picking the hairs to be tested by MitoTyping (Vol. 1, R140).

The samples to be tested were transmitted to FDLE, and an October 28, 2004, report was filed in the court file on November 2, 2004 (Vol. 3, R260-261). The State also filed the October 28, 2004, report on December 2, 2004 (Vol. 3, R262-264). On February

24, 2005, the State filed a second report from FDLE dated February 21, 2005 (Vol. 3, R265-269).

On March 5, 2005, defense counsel filed a Motion to Permit Additional DNA Testing (Vol. 3, R285-416). The State filed a response on March 9, 2005, objecting to testing by a non-accredited laboratory in violation of Rule 3.853(c)(7), Fla.R.Crim.P. (Vol. 3, R273). The lab which Swafford requested, Forensic Science Associates, is not an accredited lab (Vol. 3, R273).

A hearing was held March 11, 2005 (Vol. 2, R145-175). In addition to the request for independent lab testing, Mr. McClain indicated that it was necessary for the State and defense to view the evidence and clarify for FDLE the items that required testing (Vol. 2, R150). Ms. Davis (State) and Mr. McClain had done this in another case in order to identify the hairs to be sent to MitoTyping (Vol. 2, R150-151). Ms. Davis asked the judge to enter an order allowing them to view the evidence at FDLE in order for Mr. McClain to select the hairs to send to MitoTyping (Vol. 2, R151). Mr. McClain indicated that this procedure was the "best way to proceed." (Vol. 2, R152). The court entered a detailed Order allowing the parties to view evidence at FDLE and outlining the procedures for sending the evidence to MitoTyping (Vol. 4, R417-419).

Insofar as additional DNA testing by Forensic Science Associates ("FSA"), the motion was denied (Vol. 2, R420). At the hearing on March 11, 2005, the State cited Rule 3.853(c)(7) which requires the lab which conducts DNA testing to be certified (Vol. 2, R 159). Defense counsel did not contest the fact that FSA was not certified (Vol. 2, R161). The State advised the court and defense counsel there was no objection to FDLE conducting further testing (Vol. 2, R162). The State also agreed with the procedure of visiting FDLE to select the items to be tested by MitoTyping and to be further tested by FDLE (Vol. 2, R170). The trial judge ruled that there was "no dispute that the California lab, Forensic Science Associates headed by Dr. Blake is not a certified or accredited by either one of those agencies" and further testing could not be conducted by FSA (Vol. 2, R169). Swafford moved for rehearing (Vol. 4, R422–516). The motion was denied (Vol. 4, R517). Swafford filed a renewed motion to permit additional DNA testing (Vol. 4, R523-528). The motion was denied (Vol. 4, R529).

In the meantime, Mr. McClain and Ms. Davis visited FDLE and filed a stipulated report of the exhibits Mr. McClain selected to be sent to MitoTyping Technologies for mtDNA testing (Vol. 4, R520-521). The parties also agreed to additional testing to be done by FDLE (Vol. 4, R521). At the June 27, 2005, status

conference, the parties were simply waiting for the results from additional testing at FDLE and the testing at MitoTyping (Vol. 2, R178).

On July 22, 2005, FDLE produced a supplemental report which was filed in court filed by the State (Vol. 4, R537-542). On July 20, 2005, MitoTyping Technologies prepared a report of the evidence tested at their facility. The report was filed by the State on July 26, 2005 (Vol. 4, R543-546).

On September 22, 2005, Swafford filed a motion to "re-release" one hair to MitoTyping because defense counsel had mistakenly told MitoTyping not to test the hair (Vol. 4, R547-549). The State did not object to this motion (Vol. 4, R548). On November 18, 2005, MitoTyping prepared a supplemental report replacing the July 20 report (Vol. 4, R561-566).

The last hearing was held January 6, 2006. The State asked the trial court to determine whether there had been compliance with the Florida Supreme Court order (Vol. 2, R205). Defense counsel stated that she had some confusion over FDLE's findings of a "mixture" on four hairs (Vol. 2, R207). Defense counsel's interpretation of this Court's order regarding "contamination" was:

> And that contamination was not just regarding the issue of perhaps a dirty crime scene, although that was certainly relevant, but also was there any contamination of the DNA evidence from the time of

> collection up till now, you know, in the storage of the sheriff's office of the clerk's office or where it was held.
>
> And so the findings of FDLE at this point that there is a mixture of unknown origin contributed possibly by some unknown source to me goes directly to the contamination issue.

(Vol. 2, R208). The State replied that its understanding of "contamination" meant contamination of the crime scene as in the *Hitchcock*[5] case (Vol. 2, R209). The State also argued that the trial court had complied with this Court's remand order, and substantive issues should be raised in a Rule 3.851 motion (Vol. 2, R218). However, insofar as the Rule 3.853 DNA testing, that had been accomplished. Mr. Nunnelley advised the judge that he was the attorney who used the word "contamination" in the prior proceeding because it was close in time to the *Hitchcock* decision (Vol. 2, R219). Mr. Nunnelley was not referring to "contamination" as the lab tampering with samples (Vol. 2, R219).

Public Records. On July 26, 2005, Swafford requested records from FDLE including: the original case file, electronic data for ABI 7000, all electronic data on STR testing, proficiency files for the FDLE analyst who conducted testing, color copies of all color electropherograms, complete copy of

[5] *Hitchcock v. State*, 866 So. 2d 23, 26 (Fla. 2004).

STR protocols, equipment maintenance logs, practice casework for the FDLE analyst, copies of all certifications held by FDLE, the personnel file of the FDLE analyst, and all property receipts reflecting chain of custody of all items tested by the FDLE analyst (Vol. 4, R550-554). At the October 6, 2005, status conference, the State indicated that FDLE was going to provide the records requested (Vol. 2, R194-195). FDLE filed a Notice of Compliance on November 28 2005 (Vol. 4, R559-560). Swafford then requested an *in camera* inspection of sealed records (Vol. 4, R569-571). At a hearing on January 6, 2006, the State filed a letter from counsel for FDLE stating that FDLE had complied with the records request (Vol. 4, R573). Attached to the letter was a summary of the exempt records, citing the specific statute number for each exemption (Vol. 4, R574-579). At the January 6, 2006, hearing the State also argued that the recent public records requests were beyond the scope of remand (Vol. 2, R212). The remand occurred in March 2004, and the public records request was September 28, 2005 (Vol. 2, R212). Notwithstanding, counsel for FDLE indicated there had been compliance and the only item that was redacted was the social security number of employees (Vol. 2, R213). The trial judge entered an order to view the sealed records *in camera* to verify the exemptions (Vol. 4, R585-586).

STATEMENT OF THE FACTS

The facts as found by this Court on direct appeal are:

The evidence showed that on the morning of Sunday, February 14, 1982, the victim was at work at the FINA gas station and store on the corner of U.S. Highway No. 1 and Granada Avenue in Ormond Beach, Florida. Two witnesses saw her there at 5:40 and 6:17 a.m. A third witness, who said he arrived at the station at around 6:20, found no attendant on duty although the store was open and the lights were on. At 6:27 a.m., the police were called, and an officer arrived at the station a few minutes later.

On February 15, 1982, the victim's body was found in a wooded area by a dirt road, about six miles from the FINA Station. She had been shot nine times, with two shots directly to the head. The cause of death was loss of blood from a shot to the chest. Based on trauma, lacerations, and seminal fluid in the victim's body, the medical examiner concluded that she had been sexually battered. Holes in the victim's clothing corresponding to the bullet wounds to her torso indicated that she was fully clothed when shot. The number of bullet wounds and the type of weapon used indicated that the killer had to stop and reload the gun at least once. Several bullets and fragments were recovered from the body.

Swafford and four companions drove from Nashville, Tennessee, to Daytona Beach, Florida, departing Nashville at about midnight on Friday, February 12 and arriving in Daytona Beach at about noon the next day. After setting up camp in a state park, Swafford and some others went out for the evening, arriving back at the campground at about midnight. Then, according to the testimony at trial, Swafford took the car and went out again, not to return until early Sunday morning.

State's witness Patricia Atwell, a dancer at a bar called the Shingle Shack, testified that Swafford was there with his friends on Saturday night, that they left at around midnight, and that Swafford returned alone at about 1:00 a.m. Sunday. When Atwell finished working at 3:00 a.m., she left the Shingle Shack with

Swafford. They spent the rest of the night together at the home of Swafford's friend. At about 6:00 a.m., he returned her to the Shingle Shack and left, driving north on U.S. 1, a course that would have taken him by the FINA station. In the light traffic conditions of early Sunday morning, the FINA station was about four minutes away from the Shingle Shack. According to Swafford's travelling companions, he returned to the campsite around daybreak. The court took judicial notice of the fact that sunrise took place on the date in question at 7:04 a.m.

On Sunday Swafford and his friends attended an auto race in Daytona Beach. That evening they went back to the Shingle Shack, where one of the party got into a dispute with some other people over money he had paid in the expectation of receiving some drugs. Swafford displayed a gun and got the money back. The police were called, and Swafford deposited the gun in a trash can in one of the restrooms. The police seized the gun, and ballistics tests performed later conclusively established that Swafford's gun was the gun used to kill the victim. The evidence also showed that Swafford had had the gun for some time. Although the gun was not tested until more than a year after the murder, after authorities received a tip concerning Swafford's possible involvement, evidence established the chain of police custody and the identification of the gun.

The state also presented evidence that Swafford made statements from which an inference of his guilt of the crimes charged could be drawn. Ernest Johnson told of an incident that took place about two months after this murder. After meeting Swafford at an auto race track, Johnson accompanied him to his brother's house. When leaving the brother's house, Swafford suggested to Johnson that they "go get some women" or made a statement to that effect. Johnson testified as follows concerning what happened then:

> Q. Okay. What happened then? What was said by the Defendant?
>
> A. He just asked me if I wanted to go get some girl and I said yeah.

Q. And then what took place?

A. We in -- he asked me if I wanted to take my truck and I said no, so we went in his car. All right. We went and got a six-pack of beer and started riding. And he said, do you want to get a girl, and I said yeah, where do you want to get one, or something like that. He said, I'll get one.

So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said -- he said, you won't have to worry about nothing the way I'm going to get her, or he put it in that way. And he said -- he said, we'll get one and we'll do anything we want to to her. And he said, you won't have to worry about it because we won't get caught.

So, I said, how are you going to do that. And he said, we'll do anything we want to and I'll shoot her.

So, he said if -- you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.

I said, man, you're crazy. He said, no, I'll shoot her in the head twice and I'll make damn good and sure that she's, you know, she's dead. He said, there won't be no witnesses.

So, I asked him, I said, man, don't -- you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.

Johnson then told the jury that he and Swafford went to a department store parking lot late at night, that Swafford selected a victim, told Johnson to drive the car, directed him to a position beside the targeted victim's car, and drew a gun. Johnson at that point refused to participate further and demanded to be

taken back to his truck.

Swafford v. State, 533 So. 2d 270, 271-273 (Fla. 1988).

SUMMARY OF ARGUMENT

Swafford argues that the circuit court did not comply with this Court's order on remand. This court directed the circuit court to:

> (1) Hold an evidentiary hearing to determine which pieces of evidence that appellant moved to have tested are capable of being tested for DNA
>
> (2) The evidence which the Court determines to be capable of being tested is to be tested pursuant to Florida Rule of Criminal Procedure 3.853(7).[6]
>
> (3) The results of the tests shall be provided in writing pursuant to rule 3.853(8).[7]
>
> (4) The circuit court shall then enter an order making findings as to whether the evidence which was tested is authentic, has been contaminated, or such other findings in respect to the tested evidence as the circuit court determines to be appropriate.

The circuit court conducted an evidentiary hearing on June 11, 2004, which complied with instruction (1). The evidence was tested and reports by FDLE and MitoTyping Technologies filed

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[6] Rule 3.853(c)(7), Florida Rules of Criminal Procedure provides:
(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

[7] Rule 3.853(c)(8), Florida Rules of Criminal Procedure provides:
(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

written reports, complying with instructions (2) and (3). The circuit court entered an order which complied with instruction (4). Swafford's arguments regarding further evidentiary hearing(s), additional testing, and public records are beyond the scope of remand and should be presented through a Rule 3.851 motion.

ARGUMENT

THE TRIAL COURT COMPLIED WITH THIS COURT'S INSTRUCTIONS ON REMAND

This Court remanded Case No. SC03-1153 to the circuit court with the following directions:

> (1) Hold an evidentiary hearing to determine which pieces of evidence that appellant moved to have tested are capable of being tested for DNA;
>
> (2) The evidence which the Court determines to be capable of being tested is to be tested pursuant to Florida Rule of Criminal Procedure 3.853(7);[8]
>
> (3) The results of the tests shall be provided in writing pursuant to rule 3.853(8);[9]
>
> (4) The circuit court shall then enter an order making findings as to whether the evidence which was tested is authentic, has been contaminated, or such other findings in respect to the tested evidence as the circuit court determines to be appropriate.

(Vol. 3, R230).

The circuit court complied with each of these directives.

Step 1: An evidentiary hearing was held June 11, 2004, to

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[8] Rule 3.853(c)(7), Florida Rules of Criminal Procedure provides:

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

[9] Rule 3.853(c)(8), Florida Rules of Criminal Procedure provides:

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

determine which pieces of evidence that appellant moved to have tested were capable of being tested for DNA. Step 2: The evidence that was capable of being tested was tested by FDLE or MitoTyping. In fact, defense counsel was on site at FDLE and selected the items he wanted sent to MitoTyping and the items he wanted tested by FDLE. Step 3: Written reports from FDLE and MitoTyping were filed with the court. Step 4: The circuit court entered an order making the appropriate findings. That order stated:

ORDER FOLLOWING REMAND ON DNA ISSUES

> THIS MATTER having been remanded to the Circuit Court by order of the Florida Supreme Court in Case No. SC03-931 dated March 26, 2004, and the Circuit Court having held an evidentiary hearing on June 11, 2004, and status conferences on March 11, 2005, June 27, 2005, October 6, 2005 and January 6, 2006, the Circuit Court, having reviewed the record and pleadings and being fully advised in the premises, it is therefore ordered:
>
> 1. This Court has complied with the directions on remand from the Florida Supreme Court as follows:
>
> > (A) An evidentiary hearing addressing the issues on remand from the Florida Supreme Court was held June 11, 2004. At that hearing, Harry Hopkins, crime lab supervisor for Florida Department of Law Enforcement (AFDLE@), advised the Court as to which pieces of evidence that Defendant moved to have tested were capable of being tested for DNA. At this hearing, this Court ordered numerous items be submitted to FDLE for DNA

testing, including evidence held by the Volusia County Sheriff=s Office (AVCSO@) and the Clerk=s Office for the Seventh Judicial Circuit (AClerk=s Office@).

(B) On October 28, 2004, FDLE submitted its written findings on the biological evidence submitted by the Clerk=s Office.

(C) On February 21, 2005, FDLE provided a written report of findings on the items held by VCSO.

(D) Defendant requested mitochondrial DNA testing. This Court entered an Order On March 15, 2005, allowing attorneys for both Defendant and the State to view the evidence listed in the FDLE report dated February 21, 2005. Defendant was ordered to designate any evidence he wished to have tested. Evidence susceptible of STR testing would remain at FDLE-Orlando, and FDLE was ordered to conduct STR testing on that evidence. Evidence which could not be STR tested and that defense counsel elected to have tested for mitochondrial DNA, would be sent to MitoTyping Technologies in State College, Pennsylvania.

(E) MitoTyping Technologies prepared a written report dated July 20, 2005.

(F) FDLE provided a supplemental written report on July 22, 2005.

(G) On September 25, 2005, Defendant moved to re-release one hair from evidence at VCSO and send it back to MitoTyping Technologies. That was accomplished, and MitoTyping Technologies sent a supplemental written report dated November 18, 2005, which replaced the original report dated July 20, 2005.

(I) In addition to the above testing and reporting, Defendant requested additional

> DNA testing by Forensic Science Associates, a private DNA lab in Richmond, California. That motion was denied by order dated March 15, 2005.
>
> 2. This Court finds that all requirements listed in the remand order from the Florida Supreme Court dated March 26, 2004, in Case No. 03-931, have been completed. This Court held an evidentiary hearing as directed. The evidence capable of being tested was tested pursuant to Florida Rule of Criminal Procedure 3.853(7). The results of all testing were provided in writing.
>
> 3. During remand, Defendant orally raised the subject of Acontamination@ or mixing of samples at the FDLE laboratory. This Court agrees with the arguments made by the State regarding the scope of remand. This Court has complied with the remand order from the Florida Supreme Court, and any issue that Swafford wishes to raise beyond that remand should be raised in an amended motion for post-conviction relief.
>
> 4. Defendant shall have sixty (60) days from the date of this order to amend the fourth motion for post-conviction relief as to issues related to DNA testing of evidence, as provided in the supreme court order dated March 24, 2004, in Case No. SC03-1153.

(Vol. 4, R587-90).

Swafford now argues the circuit court did not comply with this Court's order on remand. His complaints fall in three categories:

(1) <u>Evidentiary hearing</u>.

The trial court held an evidentiary, as directed by this Court, "to determine which pieces of evidence that appellant moved to have tested are capable of being tested for DNA." (Vol. 3, R230). Swafford now argues the circuit court did not comply

with this Court's order because it did not hold an evidentiary hearing on the significance of the DNA testing. This case was on remand for almost two years. During this time, Swafford filed motions which were outside the scope of remand. He requested additional testing, public records, and re-released evidence to MitoTyping which he had told MitoTyping not to test. The State and circuit court accommodated every request even though it was clearly outside the scope of remand. S*ee Duckett v. State*, 918 So. 2d 224, 239 (Fla. 2005). What Swafford fails to recognize is that Rule 3.853 is a discovery tool and Rule 3.851 is the basis to request relief and place before the judge any information discovered through the Rule 3.853 proceedings that might require an evidentiary hearing. *See Duckett,* 918 So. 2d at 239.

Swafford also takes issue with the State's understanding of this Court's use of the word "contamination." (Initial Brief at 29). This word first appeared in the State's response to the Motion for DNA Testing.[10]

> 5. The State submits that the scene where Rucker's body was found was at least as unsecure and subject to **contamination** as the one in the Amos Lee King case, wherein the Florida Supreme Court upheld a trial court

[10] By separate motion, the State has requested this court take judicial notice of the record on appeal in Case No. SC03-931, the case which this Court remanded for DNA testing and which was the predecessor of this appeal. Cites to that record will be "JN-R" for "judicially noticed record." Since there is only one volume in that record, there will be no cite to volume number.

> finding that there was no reasonable probability that DNA testing of a fragment of body hair recovered from the murder victim's nightgown would result in an acquittal or a life sentence for King. *King v. State,* 808 So. 2d 1237 (2002) at 1247. Swafford has asserted no basis for this Court to conclude that hairs found on Rucker's outer garments and on debris found near her body at this unsecure and littered scene on public land more than twenty four hours after her disappearance would be probative of Swafford's guilt or innocence in this case, or that DNA testing of these hairs would mitigate the sentence imposed. (Emphasis supplied).

(JN-R74).

The circuit court used "contaminate" in his original order on DNA testing in the same manner as the State, meaning contamination of the crime scene:

> (B) The results of DNA testing of the physical evidence would likely not be admissible at trial. Although the evidence was initially obtained by law enforcement during its investigation and has been in the custody of government agencies since that time, the risk of **contamination** is substantial. *Cf King v. State,* 808 So. 2d 1237 (Fla. 2002). The victim's body was not located until the following day.' It was in a wooded area, off of a dirt road. The area was frequented by all-terrain vehicles and was used for beer parties. For these reasons this Court finds that the proof is unreliable to establish that the evidence containing the DNA is authentic and would be admissible at a future hearing.
>
> Also unreliable are the vaginal and anal swabs. Not only have they been in the possession of the clerk as evidence for almost 20 years, there is no semen present in the samples collected. Rather, only acid phosphatase, a component of seminal fluid, is present. (Emphasis supplied).

(JN-R83). As indicated in Swafford's Initial Brief, the State's

understanding of the word “contamination” meant contamination of the crime scene, not contamination at the FDLE lab (Initial Brief at 29, Vol. 2, R209). The original cite in the State’s Response to DNA Testing was to “contamination” in the sense the crime scene was contaminated in *King v. State*, 808 So. 2d 1237, 1247 (Fla. 2002):

> 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).

Likewise, in *Hitchcock v. State*, 866 So. 2d 23, 26 (Fla. 2004), the crime scene had been compromised:

> In its response, the State argued that Hitchcock's motion failed to set out the evidentiary value of the evidence proposed to be tested and how such testing would exonerate or mitigate the sentence. The State specifically noted that James Hitchcock, Richard Hitchcock, and the victim all occupied the same household. The State asserted that "it is therefore

> likely that biological samples such as hair, sloughed off skin, small amounts of bodily fluids, eyelashes, and finger and toe nail clippings would constantly be inadvertently deposited by all three persons throughout the house and curtilage they shared."
>
> . . . .
>
> However, the motion fails to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate Defendant or mitigate his sentence. Defendant alleges that DNA testing "may show that Richard Hitchcock strangled the victim, that his hair was present at the crime scene, that his blood was present at the scene, or that there was other forensic evidence." (Defendant's motion, page 6, emphasis added.) Such a speculative claim cannot support the granting of postconviction DNA testing. Moreover, Defendant, his brother, and the victim occupied the same house, and all three would have deposited hair, skin, bodily fluid, eyelashes, and nail clippings throughout the house.

Mr. Nunnelley, also the attorney for the State in *Hitchcock*, advised the judge that "contamination" as used in the State's response in this case was used in the sense of contamination of the crime scene (Vol. 2, R219). Swafford was arguing that "contamination" meant contamination at the FDLE lab, i.e., a "mixture." (Vol. 2, R208). The State also argued that Swafford was mutating a Rule 3.853 motion into a Rule 3.851 motion and any issues beyond the remand should be raised in a Rule 3.851 motion (Vol. 2, R218). The trial court agreed with this argument which is supported by the record in Case No. 03-931, the case that was remanded to the trial court.

(2) <u>The trial court should have held an evidentiary hearing</u>

on issues revealed during the DNA testing. As argued by the State above and at the January 6, 2006, hearing and as held by the circuit court, these issues are beyond the scope of remand and should be the subject of a Rule 3.851 motion. Further, the aspersions cast upon FDLE are unfounded, and the citing of non-record, unpublished decisions never presented to the circuit court is inappropriate. (Initial Brief at 39). Not only is the information cited in the Initial Brief not in the record on appeal in this case, it is not identified as being from any case. (Initial Brief at 39-40).

(**3) Swafford is entitled to additional testing by a non-certified lab.** Swafford filed a Motion for Additional Testing by a non-certified lab after the first two rounds of FDLE testing[11] (Vol. 2, R285-416). On March 5, 2005, defense counsel filed a Motion to Permit Additional DNA Testing (Vol. 3, R285-416). The State filed a response on March 9, 2005, objecting to testing by a non-accredited laboratory in violation of Rule 3.853(c)(7), Fla.R.Crim.P. (Vol. 3, R273). The lab which Swafford requested, Forensic Science Associates, is not an accredited lab (Vol. 3, R273).

A hearing was held March 11, 2005 (Vol. 2, R145-175). The

[11] FDLE conducted three rounds of testing: November 2, 2004 report, February 21, 2005 report, and July 22, 2005 report.

State cited Rule 3.853(c)(7) which requires the lab which conducts DNA testing to be certified (Vol. 2, R 159). Defense counsel did not contest the fact that the requested lab was not certified (Vol. 2, R161). The State advised the court and defense counsel there was no objection to FDLE conducting further testing (Vol. 2, R162). The State also agreed with the procedure of visiting FDLE to select the items to be tested by MitoTyping and to be further tested by FDLE (Vol. 2, R170). The trial judge ruled that there was "no dispute that the California lab, Forensic Science Associates headed by Dr. Blake is not a certified or accredited by either one of those agencies" and further testing could not be conducted by FSA (Vol. 2, R169). Swafford moved for rehearing (Vol. 4, R422—516). The motion was denied (Vol. 4, R517). Swafford filed a renewed motion to permit additional DNA testing (Vol. 4, R523-528). The motion was denied (Vol. 4, R529).

Rule 3.853(c)(7), Florida Rules of Criminal Procedure provides:

> (7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such

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(Vol. 3, R 262-264, 265-269; Vol. 4, R537-542).

testing.

Swafford fails to explain why this rule does not apply to him or how the trial court erred by following this rule. Furthermore, in *King v. State*, 808 So. 2d 1237, 1247-1248 (Fla. 2002), this Court held:

> 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 every DNA test performed by FDLE for every 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.

Not only is there no statute or rule providing for re-testing, Swafford's request flies in the face of the exiting statute and rule because he had chosen a non-certified lab. Swafford once again makes spurious allegations that the FDLE test results are "highly suspect." (Initial Brief at 44). He also claims the "State has attempted to block Mr. Swafford's efforts to resolve the issues at every juncture." (Initial Brief at 44). This last statement is belied by this record because the State agreed to testing by MitoTyping, a certified lab. Swafford fails to recognize that the State, too, has an interest in preserving the evidence. Brenda Rucker was murdered 24 years ago, yet the State has managed to retain and preserve that evidence for those 24

years. Swafford fails to understand that the rules are designed to prevent against destruction of evidence.

Last, Swafford attempts to analogize the present situation to *Crawford v. Washington*, 541 U.S. 36 (2004). What he fails to recognize is that this Court specifically afforded him a remedy to challenge the test results through a Rule 3.851 motion. Case No. SC03-1153. In fact, this Court held that Swafford had sixty days from the date of the circuit court's order in respect to Rule 3.853 to file a Rule 3.851 motion. If the circuit court finds that motion legally sufficient and orders an evidentiary hearing, Swafford can cross-examine the FDLE expert, hire his own expert to examine the FDLE test results, and do everything that defendants always do at Rule 3.851 evidentiary hearings. To say that the rules or the courts or the State are precluding Swafford from presenting his issues is simply disingenuous when the circuit court bent over backwards to accommodate Swafford and this Court has supplied the procedure to raise those issues.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court, lift the stay on Swafford's filing an amended to the fourth motion for post conviction relief, and order the amended motion to be filed within sixty (60) days as provided in the March 26, 2004, order in Case No. SC03-1153.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Celeste Bacchi,** Asst. CCRC, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301 the on this _____ day May, 2006.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

BARBARA C. DAVIS
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