IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO6-242

ROY CLIFTON SWAFFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" – Record on appeal to this Court in the 1988 direct appeal;

"PC-R1. ___" – Record on appeal to this Court from the 1990 summary denial of post-conviction relief;

"PC-R2. ___" – Record on appeal to this Court from the 1994 appeal from the second summary denial of post-conviction relief;

"PC-R3. ___" – Record on appeal to this Court from the 1996 appeal from the third summary denial of post-conviction relief;

"PC-R4T. ___" – Transcript of evidentiary hearing conducted February 6-7, 1997;

"PC-R5. ___" – Record on appeal to this Court in the appeal from the denial of DNA testing;

"PC-R6. ___" – Record on appeal to this Court in the appeal from the denial of Rule 3.850 motion filed in 2003;

"PC-R7. ___" – Record on appeal in the current appeal on the circuit court's final order on remand, filed in 2006.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

This is a capital case pending in which this Court's mandate for DNA testing under Rule 3.853 has not been followed. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and issues raised here. Mr. Swafford, through counsel, respectfully urges the Court to permit oral argument.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 2002, this Court in a 4-3 decision narrowly denied Mr. Swafford a new trial based on Brady v. Maryland, 373 U.S. 83 (1963) violations. Four justices found Mr. Swafford's Brady claims to be procedurally barred because his state-provided collateral counsel failed to locate a witness who had not been previously disclosed to Mr. Swafford's trial counsel.[1]

Three members of this Court were so troubled by the majority's opinion that they joined in two lengthy dissenting opinions written by Justices Anstead and Quince. Justice Anstead wrote:

> This case represents one of those truly rare instances where this Court has summarily brushed aside on wholly speculative grounds **a colorable claim of actual innocence and a possible serious miscarriage of justice.** There has been absolutely no focus here on the reality of what actually happened. Tragically too, the claim arises out of a demonstrated Brady violation where the police and **prosecuting authorities failed to provide the defendant**, as they were constitutionally obligated to do, **with substantial evidence of another person's guilt for the crime for which the defendant has been sentenced to die.**

Swafford v. State, 828 So. 2d 966, 968 (Fla. 2002) [Anstead, J., dissenting] [emphasis added].[2]

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[1]This was a per curiam opinion joined by Chief Justice Wells, Justices Shaw and Harding. Justice Lewis concurred in result only.

[2]Justice Pariente concurred in Justice Anstead's dissenting

Justice Quince wrote separately:

> The highly circumstantial evidence produced at trial along with the evidence Swafford claimed in his first [post-conviction] motion was not disclosed by the State concerning other suspects and witnesses, when considered in conjunction with the Lestz affidavit, **would probably produce an acquittal at trial.**

Swafford v. State, 828 So. 2d at 985 (Quince, J., dissenting) [emphasis added].[3]

This was the backdrop on which Mr. Swafford's request for DNA testing was made. Despite the lower court and the State's attempt to foreclose DNA testing completely, this Court ordered DNA testing.

Thus, the lower court's sole responsibility on remand was to hold an evidentiary hearing to determine which evidence the lower court found to be capable of being tested for DNA, to have reports of the results of that testing generated, and for the lower court to make findings as to contamination, authenticity and other findings it deemed appropriate with regard to the DNA evidence. The lower court failed to follow this Court's mandate.

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opinion.

[3]Justice Anstead and Pariente concurred in Justice Quince's dissenting opinion.

The issue at Mr. Swafford's November, 1985 trial was whether he was the individual who had sexually assaulted and killed Brenda Rucker. The State never revealed that other suspects had been investigated, and it made no suggestion that there was more than one perpetrator.

The evidence against Mr. Swafford was circumstantial. No physical evidence linked Mr. Swafford to the crime other than a .38 caliber pistol found in a trash can at the Shingle Shack, a bar in Daytona Beach. Ballistic analysis showed that this was the murder weapon. However, the testimony linking Mr. Swafford to the .38 was circumstantial and contradictory.

Trial counsel focused on rebutting the State's theory that Mr. Swafford could only have committed these crimes in an hour to an hour and a half. This short time period, the defense argued, was insufficient to have kidnapped the victim, disrobed her, raped her both anally and vaginally, burned her twice with cigarettes, put her clothes back on and then shot her nine times. In fact, police questioned whether Ms. Rucker was even murdered at the scene where her body was found in that no spent bullets were found at that location.

In early October, 1990, police reports concerning law enforcement's 1982 investigation were disclosed for the first

time to collateral counsel. These reports named suspects, James Michael Walsh (Walsh), Walter Levi (Levi) and Michael Lestz (Lestz) as having been the subjects of the police investigation at the time of the crime. The reports implicated Walsh because he was seen one block away from the gas station where Ms. Rucker disappeared, fifteen minutes before she went missing. Walsh was not seen again for over four hours. When he reappeared, he was nervous and sweaty.

The reports also revealed that Walsh had homosexually assaulted Lestz and while doing so, burned him with cigarettes similar to Ms. Rucker's burns (PC-R3. 205). In July, 1982 when confronted with his failure to pass a polygraph test, Lestz denied involvement in the Rucker murder (PC-R4T. 538). He said that on the day of the murder, February 14, 1982, Walsh left Lestz at a laundromat a block away from the gas station where Ms. Rucker worked. Walsh left him at the laundromat at 6 a.m. and took Lestz's car to find some drugs. This was fifteen minutes before Ms. Rucker was kidnapped by a person whose face in a composite drawing "strongly resembled" Mr. Walsh (PC-R4T. 546).

Walsh did not return to the laundromat until after 10:30 a.m. He appeared "[p]retty nervous, sweaty. He was real

hyper." (PC-R4T. 65). He was anxious to dispose of several guns, specifically two .38 caliber pistols. On January 25, 1983, the date of this interview, police knew the murder weapon was a .38 caliber weapon. Lestz's statement was "very similar" to one that Levi had already given.[4] Yet, the investigation ended there because police "just didn't find [Lestz] credible." (PC-R41. 569). No further investigation of Walsh occurred.[5]

Even though physical evidence was found with Ms. Rucker's body, it produced no evidence linking Mr. Swafford to the crime using the technology available in the 1980s (PC-R5. 38, 63). This physical evidence included:

1. FDLE report - May 12, 1982 – 4 "light brown to blonde hairs typical of Caucasian pubic hair" were collected from a tissue near Ms. Rucker's body (PC-R5. 46). These hairs were suitable for comparison.

2. In the pubic hair sample collected from Ms. Rucker, FDLE found "numerous brown and dark brown hairs typical of Caucasian pubic hair [that were] suitable for use as a known hair

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[4]Levi told police on August 30, 1982 that at 6 a.m. on February 14, 1982, Lestz arrived at the motel room where Levi and Walsh had been staying. Walsh left with Lestz saying that the pair had "something to do." (PC-R4T. Def. Ex. 7). Levi said the pair did not return until between 11 a.m. and noon.

[5]In 1994, collateral counsel found Lestz, who reported that on the evening of February 14, 1982, he had taken Walsh to the Shingle Shack during the time period that Walsh was trying to get rid of a .38.

sample.” (PC-R5. 46).

3. As to a pubic hair combing, FDLE found “[n]umerous brown hairs typical of Caucasion pubic hair [that] were suitable for comparison to known hair samples.” (PC-R5. 46).

4. As to the questioned hairs collected from the pubic region, the report showed “[n]umerous brown hairs typical of Caucasian pubic hair are contained in this exhibit. These hairs are suitable for comparison purposes pending submission of known hair samples from subject.” (PC-R5. 47).

5. Three blonde hair fragments typical of Caucasian scalp hair were found in the victim’s blouse and sock that were suitable for comparison (PC-R5. 47).

6. Several hairs typical of Caucasian body hair, in addition to several animal hairs are contained in the debris from the victim’s shoes and socks. (PC-R5. 47).

An August 10, 1982 report described Mr. Walsh as 31 years old, 6'1" tall, 165 lbs., blonde hair, blue eyes with a ruddy complexion.

The Be On The Lookout bulletin (BOLO) issued on February 16, 1982 included a composite drawing of the suspect who was described as “late 20's to early 30's, 160-170 lbs., 5'10" to 6'0" tall, Brown hair with Redish tint, Light Brown eyes, Bushy eyebrows, A full Redish tint beard, neatly trimmed with a fair complexion.” (PC-R5. 53).

The BOLO and a copy of the composite drawing were found in Walsh's possession at the time of his arrest in Arkansas a month after the Rucker murder.

Mr. Swafford is listed in the criminal complaint on June 27, 1983 as 36 years old, 5'8", 140 lbs., with dark brown hair and brown eyes (PC-R5. 55).

Based on this information, this Court found that there were issues in dispute that could be resolved by DNA testing. See, Court's Order 3/26/04. Mr. Swafford repeatedly sought to prove that he is not the source of seminal fluid in the vaginal and anal swabs taken from Ms. Rucker's body, nor the source of the numerous hairs found on and near her body (and that Ms. Rucker is not the source of those hairs). Mr. Swafford sought through Fla. R. Crim. P. 3.853 to establish that he did not sexually assault and murder Ms. Rucker.

At first, the State argued that the victim's blood samples had been destroyed in 1986 (PC-R5. 76) and that therefore the vaginal and anal swabs could not be tested because there was no means of establishing a standard for Ms. Rucker.

After this Court issued its remand, the evidence reappeared. Once counsel established the existence of biological evidence to be reviewed, FDLE sent mixed signals on

what could be tested.

At first, FDLE said that there was nothing to test. FDLE intended to send the hair evidence to Mitotyping Technologies, which does mitochondrial DNA testing that is specific to hair and degraded samples.

The State and defense agreed and selected the samples to be tested. After the samples were selected, FDLE changed its position and said if a root existed, then it could be tested with nuclear STR testing (the only kind FDLE could do) for free, instead of paying the $2,500 per test that Mitotyping Technologies charged. The hair that had follicles intact was tested at FDLE first, while the rest was sent to Mitotyping Technologies.

FDLE's results were baffling. Mr. Swafford requested a hearing to deal with possible contamination and authenticity issues. He also requested his own expert to assist counsel in interpreting what FDLE had done. These requests were both denied by the lower court.

Mr. Swafford argued that:

> - FDLE's conclusion that there was a DNA mixture on one of the hair follicles was evidence of possible contamination in either the testing materials or procedures at FDLE (i.e. a hair follicle can only come from the person from whom the hair was collected).

- FDLE’s conclusion that there was no presence of acid phosphatase was contrary to the trial testimony that said there was. A hearing was needed on this issue.

- FDLE’s inconclusive results on fingernail scrapings and rape kit swabs collected from Ms. Rucker on which biological material was present indicated the need for further testing by an independent laboratory at Mr. Swafford’s expense.

These arguments fell on deaf ears.

Mr. Swafford was not afforded any opportunity to depose the FDLE technicians to learn what their conclusions meant, why there was a discrepancy between its acid phosphatase test results between the time of trial and today, or why they found a DNA mixture on a hair follicle when the follicle could only belong to one person. Nor was Mr. Swafford allowed to have his own expert review what FDLE had done or assist the defense in understanding the results.

No testimony of any laboratory personnel was taken, no reports were entered into evidence, and as a result, none of the DNA results, testing methods or procedures are in evidence. Nor has any of this evidence been subjected to the crucible of an adversarial testing.

The lower court erred in failing to follow this Court’s mandate to conduct an evidentiary hearing on the authenticity or contamination of the biological evidence and in failing to grant

additional DNA testing, pursuant to Fla. R. Crim. P. 3.853 (7), in order to get a conclusive result.

STATEMENT OF THE CASE

Mr. Swafford was charged with first-degree murder, sexual battery, and robbery. A jury found Mr. Swafford guilty of first-degree murder and sexual battery, but acquitted him of robbery. Mr. Swafford's conviction for sexual battery was predicated on evidence that acid phosphatase, an enzyme found in large quantities in seminal fluid, was present in rape kit swabs taken from the victim during her autopsy. The jury recommended death by a vote of 10 to 2 (R. 1661), and the court sentenced Mr. Swafford to death. This Court affirmed the convictions and death sentence. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

In 1990, Florida's governor signed a death warrant scheduling Mr. Swafford's execution for November 13, 1990. Mr. Swafford subsequently filed a motion under Fla. R. Crim. P. 3.850 in the lower court, which denied the motion without an evidentiary hearing. Mr. Swafford appealed to this Court and filed a petition for a writ of habeas corpus. This Court affirmed the denial of Rule 3.850 relief and denied the habeas corpus petition. See Swafford v. Dugger, 569 So. 2d 1264 (Fla.

1990).

Mr. Swafford then filed a petition for a writ of habeas corpus in the United States District Court, which denied relief. Mr. Swafford appealed to the United States Court of Appeal for the Eleventh Circuit. In November 1990, the Eleventh Circuit stayed Mr. Swafford's execution. Proceedings in that court were later held in abeyance while Mr. Swafford pursued other state remedies.

In 1991, Mr. Swafford filed a second petition for a writ of habeas corpus in this Court. Subsequently, this Court denied relief. Swafford v. Singletary, 584 So. 2d 5 (Fla. 1991).

In 1991, Mr. Swafford filed a second Rule 3.850 motion. The lower court denied the motion without an evidentiary hearing, and Mr. Swafford again appealed to this Court. While the appeal was pending, Mr. Swafford asked this Court to relinquish jurisdiction for an evidentiary hearing on the "Howard Pearl" issue regarding trial counsel's status as a deputy sheriff and on whether the lower court judge engaged in *ex parte* communications with the State in denying his Rule 3.850 motions. This Court granted the requested relinquishment.

After an evidentiary hearing on these two issues, the lower court denied relief. Mr. Swafford appealed. This Court

affirmed the denial of Rule 3.850 relief. Swafford v. State, 636 So. 2d 1309 (Fla. 1994).

In 1994, Mr. Swafford filed a third Rule 3.850 motion. The lower court denied the motion without an evidentiary hearing. Mr. Swafford appealed to this Court, which reversed and ordered an evidentiary hearing. Swafford v. State, 679 So. 2d 736 (Fla. 1996).

In 1997, the lower court held an evidentiary hearing and again denied relief. In 2002, this Court affirmed the denial of Rule 3.850 relief. Swafford v. State, 828 So. 2d 966 (Fla. 2002).

On October 9, 2002, Mr. Swafford filed a Motion for DNA Testing pursuant to Fla. R. Crim. P. 3.853, in which he requested testing of the available physical evidence with the new technological advances in forensic testing since 1986. He requested STR DNA testing of any serological material available and mitochondrial DNA testing of any hair evidence in existence.

In March, 2003, the State responded that the victim's blood samples drawn during her autopsy in 1986 had been destroyed (PC-R7. 76). As a result, the State argued that STR DNA testing of the vaginal swabs, which still existed, could not be done (PC-R7. 76). Because of the missing blood samples, the State argued

that there was no means of establishing a standard for the victim's DNA (PC-R7. 76). Without this standard, the State contended, there was no way of knowing what DNA was the victim's and what DNA belonged to someone else.

The State also argued that testing the hair evidence was unnecessary since Mr. Swafford's motion "offered nothing but speculation regarding an alternative source [for the DNA] let alone one that exculpates him." (PC-R7. 75). The lower court denied the DNA motion and Mr. Swafford appealed this denial to this Court on September 25, 2003.

On April 11, 2003, Mr. Swafford filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850/3.851 (PC-R6. 13). In this motion, Mr. Swafford raised a claim of newly-discovered evidence based upon recent technological improvements to DNA testing which would prove Mr. Swafford's innocence. Within this claim[6], Mr. Swafford alleged that the destruction of the blood sample was in bad faith and warranted relief under

[6]Alternatively, Mr. Swafford argued that in light of the new scientific developments in the field of DNA testing and analysis, the standard set forth in Youngblood for establishing a due process violation under both the Florida and/or United States Constitution should be lowered.

Arizona v. Youngblood, 488 U.S. 51 (1988).[7] (PC-R6. 20). Mr. Swafford specifically requested that an evidentiary hearing be conducted on his newly-discovered evidence claim (PC-R6. 25).

On April 29, 2003, the State argued that Mr. Swafford's 3.850 motion should be dismissed on the merits and as untimely filed (PC-R6. 39). On June 5, 2003, the lower court dismissed the 3.850 motion (PC-R6. 46).

On June 20, 2003, Mr. Swafford appealed the denial of his 3.850 motion to this Court. As a result, both the denial of the DNA motion and the Rule 3.850 motion were before this Court.

On March 26, 2004, this Court entered two orders in Mr. Swafford's appeals reversing the lower court (PC-R7. 229, 230). One order reversed the amended order denying DNA testing. The second order reversed the denial of Mr. Swafford's 3.850 motion. This Court granted Mr. Swafford "sixty (60) days from the date of the lower court's order in respect to Rule 3.853 to amend the fourth motion for post-conviction relief as to issues related to DNA testing of evidence."[8] (PC-R7. 230).

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[7]Also included in this motion was a claim that Florida's capital sentencing scheme was unconstitutional per Ring v. Arizona, 122 S. Ct. 2428 (2002).

[8]This Court did not decide Mr. Swafford's Ring claim in light of its reversal of this court's order denying his 3.850

After the remand, the State revealed on June 11, 2004 for the first time that the victim's blood sample had been found in the Volusia County Clerk's Office, though the sample had not been properly stored or maintained.[9] (PC-R7. 72).

The lower court ordered that biological evidence capable of STR DNA testing was to be tested by FDLE's Orlando laboratory. The lower court also ordered the hair evidence suitable for mitochondrial DNA testing was to be tested by Mitotyping Technologies in Pennsylvania[10] because FDLE was not capable of such testing.

Also at the June 11, 2004 evidentiary hearing, counsel for Mr. Swafford informed the trial judge that he was prepared to go forward on the issues of authenticity of the forensic evidence and the contamination problems pursuant to this Court's orders (PC-R7. 48, 51, 56). At the suggestion of the State, the trial judge refused to hear testimony on those matters. The trial judge ordered that issues of contamination and authenticity were

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motion.

[9]When FDLE conducted STR DNA testing on items capable of STR DNA testing, it identified the victim's DNA from the degraded blood sample.

[10]The parties agreed to rely upon the transcript of the proceedings rather than reduce the list of items to be tested to a formal written order.

to be “left for another day, as per the two opinions from the Supreme Court.” (PC-R7. 55).

On October 28, 2004, FDLE submitted its findings on the rape kit swabs (oral, anal, and vaginal) and projectiles collected from the victim’s body during the autopsy (PC-R7. 262-64). The liquid blood standard had “dried up,” and no stain card was able to be produced. The FDLE, however, was able to determine through STR testing that the DNA profile was “consistent with originating from a female individual.” (PC-R7. 263). FDLE did not specify in this report exactly what type of analysis it conducted on the oral, anal, and vaginal swabs obtained from the victim. Its only finding as to these items was that “[S]emen was not identified on the above Exhibits.” (PC-R7. 263).

On February 21, 2005, FDLE submitted its findings on the items held by Volusia County Sheriff’s Office (PC-R7. 265-69). Among FDLE’s findings were the following results:

a. *Right and Left Fingernail Scrapings from Brenda Rucker (the victim)* – FDLE was able to obtain a “limited DNA mixture” from this evidence.

b. *White Panties (of the victim)* – FDLE noted chemical indications for the presence of blood. Their analysis failed to give chemical indications for the presence of semen.

c. *White Towel With Flower Pattern*[11] – A hair collected from this towel was consistent with a male individual, but did *not* match Mr. Swafford's DNA profile.

d. *Debris* – Analysis of this exhibit (Q16) gave chemical indications for the presence of blood. No further testing appears to have been conducted.

e. *Various Slide-Mounted Hair Standards* – While several of these were deemed by FDLE to be suitable for STR testing, FDLE had not conducted DNA testing on those items. (Some of these hairs were later tested by FDLE, and those test results were set forth in their July 22, 2005 supplemental report(PC-R7. 537-42).

FDLE was unable to get a conclusive result on the rape kit vagina swabs or the fingernail scrapings of the victim.

Since FDLE could not get a result on many of the items, Mr. Swafford filed a Motion to Permit Additional DNA Testing on March 7, 2005 (PC-R7. 285-416). Mr. Swafford requested that the rape kit and fingernail scraping samples be sent to Forensic Science Associates, a forensic laboratory in Richmond, California that had previously been used by both the State and the defense in other cases, for additional DNA testing. The State objected on March 10, 2005 (PC-R7. 270-84).

The trial judge held a status hearing on March 11, 2005 and

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[11]This item was not specifically listed on the evidence property report produced by VCSO in preparation for the evidentiary hearing held June 11, 2004.

orally denied Mr. Swafford's request for additional DNA testing, finding that Forensic Science Associates is not "certified" as required by Fla. R. Crim. P. 3.853. (PC-R7. 420-21).

Mr. Swafford filed a Motion for Rehearing on March 29, 2005, which the court denied on April 4, 2005, and a renewed Motion for Additional DNA Testing in June of 2005, which was also denied (PC-R7. 422, 516, 523-28).

FDLE provided a supplemental written report dated July 22, 2005 on DNA testing results of hair evidence on "various mounted slides" it had not previously tested in the 1980's (PC-R7. 537-42). FDLE found a DNA profile foreign to Ms. Rucker on hairs that had previously been mounted on glass slides at the time of trial. The DNA profile was consistent with "originating from a male individual" and indicated the presence of a "mixture" but due to low levels of DNA the foreign DNA profile could not be conclusively resolved.

Mitotyping Technologies submitted a written report finding that the DNA results from the hair retrieved from the victim's panties did not belong to Mr. Swafford or the victim. A written report was filed on November 18, 2005 (PC-R7. 561-66).

After the submission of these reports to the court, a hearing was held January 6, 2006 to address the status of the

remand. At this hearing, the State maintained that the scope of the remand had been satisfied, and that the trial judge should enter a written order on the remand (PC-R7. 205-06).

The State assured the court that the term "contamination" meant contamination of the crime scene and that none of the FDLE reports had mentioned contamination as an issue. Therefore, the DNA testing results could not have been contaminated.

Counsel for Mr. Swafford objected to the State's interpretation of authenticity and contamination. She argued that the remand had not been fully addressed without an evidentiary hearing. She also notified the court the defense had yet to receive the raw data on the FDLE testing (PC-R7. 208-09) and that Mr. Swafford needed an expert to assist counsel in interpreting FDLE's results.

Moreover, defense counsel notified the court that Mr. Swafford had lost his lead attorney and that a new lead attorney had yet to be appointed. Celeste Bacchi, a second chair attorney on the case, asked that a hearing be set after a new lead attorney was appointed and the raw data had been received by CCRC-South (PC-R7. 208-209).

The court agreed with the State's assertion that there were no contamination issues and if there were, that they should be

addressed in a Rule 3.851 motion. The trial court entered an "Order Following Remand on DNA Issues" on January 25, 2006 (PC-R7. 587-90).

On February 7, 2006, Mr. Swafford filed his notice of appeal to this Court. Mr. Swafford also filed a Motion to Toll Time for amending the 3.850 motion with the lower court, which was denied on March 2, 2006. Mr. Swafford then filed a Motion to Toll Time with this Court, which was granted on March 27, 2006. In its order granting the Motion to Toll Time, this Court ordered expedited briefing on the appeal. This initial brief follows.

STATEMENT OF THE FACTS

On February 14, 1982, at approximately 6:15 a.m., Brenda Rucker was abducted from a Fina gas station in Ormond Beach, Florida (R. 728, 739-40, 1273). A composite drawing of the suspect was prepared (PC-R4 T. 547) and a BOLO and composite drawing were issued on February 16, 1982.

The suspect was described as being in his late 20's to early 30's, 160 to 170 lbs, 5'10" to 6'0" tall, brown hair with reddish tint, light brown eyes, bushy eyebrows, a full reddish tint beard neatly trimmed and having a fair complexion (PC-R5. 53).

On February 15, 1982, Ms. Rucker's body was discovered by sheriff's deputies in a wooded area about 6.5 miles from the gas station (R. 746, 748). Ms. Rucker had been sexually assaulted both anally and vaginally and had been shot 9 times (R. 768-69, 771). The bullets passed through her clothing, indicating that she was fully clothed at the time she was shot (R. 767). State witnesses opined that the fatal shot was "[b]ehind the victim's right ear" where "a faint imprint of the muzzle of a weapon" appeared (R. 765). Ms. Rucker had marks on her body consistent with cigarette burns.

Police collected the victim's blood samples, vaginal, oral and anal swabs. Swabs were also taken from back of her head, and behind her right ear (PC-R5. 42). This evidence was examined by FDLE. An April 19, 1982 FDLE report showed "[a] chemical test for acid phosphatase, a substance characteristically found in seminal fluid, was positive on Exhibit Q26 (the vaginal swabs) and on Exhibit 26D (the anal swabs). However, semen could not be conclusively identified as no spermatozoa were found." (PC-R5. 43).

Additional FDLE reports found biological material present on the following physical evidence:

a. portion of toilet tissue containing hairs;

b. pubic hair sample collected from Rucker;

c. scalp hair sample from Rucker;

d. pubic hair combings collected from Rucker;

e. hair sample collected from area of wound;

f. fingernail scrapings collected from Rucker;

g. questioned hairs collected from pubic region;

h. bag collected from Rucker's right hand;

i. bag collected from Rucker's left hand;

j. hair sample collected from area of wound;

k. blouse and one sock;

l. vest;

m. slacks;

n. panties (described as stained);

o. pair of shoes and one sock; and

p. blood sample and swabs.

(PC-R5. 45-46).

On May 12, 1982 the FDLE found a collection of "[f]our light brown to blonde hairs typical of Caucasian public hair" from the tissue found with Ms. Rucker's body (PC-R5. 46). Ms. Rucker's known pubic hair sample was described as "brown and dark brown" (PC-R5. 46). Ms. Rucker's scalp hair sample was described as "brown." (PC-R5. 46).

FDLE also examined the pubic hair combings collected from Ms. Rucker, and found "[n]umerous brown hairs typical of Caucasian pubic hair." (PC-R5. 46). As to the questioned hairs collected from the pubic region, the report indicated "[n]umerous brown hairs typical of Caucasian pubic hair are contained in this exhibit [and are] suitable for comparison purposes." (PC-R5. 47). As to the blouse and sock, the report noted the presence of "[t]hree **blonde** hair fragments typical of Caucasian scalp hair." (PC-R5. 47)[emphasis added].

Long before Mr. Swafford surfaced as a suspect, James Michael Walsh had been investigated as a suspect.[12] According to a March 17, 1982 supplemental police report, James Michael Walsh had been arrested in Arkansas (PC-R4T. Def. Exh. 2). In his possession at the time of his arrest was the BOLO and composite drawing for the Rucker homicide in Daytona Beach (PC-R4T. Def. Exh. 2). Arkansas authorities recognized Mr. Walsh's strong resemblance to the composite drawing.

As a result, the Arkansas authorities contacted the Volusia

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[12]An August 10, 1982 report by Volusia County Sheriff's Investigator Buscher described an interview of James Michael Walsh conducted by Special Agent Baker. Therein, it was reported that Agent Baker described Walsh "as being 6'1", 165 lbs., **blonde** hair, blue eyes with a ruddy complexion." The report showed his age to be 31.

County Sheriff's Office on March 17, 1982 (PC-R4T. 546). Volusia County law enforcement began investigating Mr. Walsh and corroborated that he resembled the BOLO (PC-R4T. 546). Law enforcement also determined that Mr. Walsh, along with his companions Michael Lestz and Walter Levi, had been in Daytona Beach on February 14, 1983.

At Mr. Swafford's trial, the State also relied heavily on a gun which had been seized at the Shingle Shack on February 14, 1982 as inculpatory evidence. The State argued that the gun had been in Mr. Swafford's possession on that date (R. 691-95, 1336). But the gun taken from a bouncer at the Shingle Shack was identified as coming from two different places by two different witnesses.

Justice Quince summarized Mr. Swafford's circumstantial case and Mr. Walsh's involvement in her 2002 dissent:

> From the time of his arrest, Swafford has maintained his innocence. During opening argument, the defense indicated the evidence would demonstrate that innocence; evidence that included a composite drawing which did not resemble Swafford; a description by witness Paul Seiler (Seiler) that was not a description of Swafford; a description of the last vehicle to leave the FINA station, the vehicle believe to be involved in the abduction of Rucker that was not the vehicle Swafford was in; and the fact that the gun from the Shingle Shack was given to the police by a bouncer. During Seiler's deposition, he was sure of the descriptions he had given to the police. He even indicated he had seen the person and the car a few

days later; he followed the car to the Hidden Hills neighborhood, recorded the tag number, and called the police with a further description and indicated he could positively identify the driver of the vehicle. However, at trial, Seiler's description of the individual was more tentative, and he could not remember how he arrived at the description he gave the police.

...at the first 3.850 proceeding it was revealed that prior to trial, Seiler was arrested and indicted on charges of sexual acts with children. Four months after he testified in the Swafford trial, Seiler pled guilty and did not receive any jail time. It was also learned that Seiler had been hypnotized by the police to clarify his memory. This information was not disclosed to defense counsel.

In closing argument, defense counsel pointed out the inconsistencies in the State's case, such as the fact that the bouncer indicated he retrieved the gun from the men's room and gave it to police, while a waitress from the Shingle Shack testified she escorted Swafford into the ladies' room, saw him put the gun in the trash in the ladies' room, and the police retrieved it from that location. Counsel also opined that Roger Harper (Harper), whom Swafford implicated in a robbery, implicated Swafford in the murder case to further his own chances of getting out of jail. Furthermore, counsel pointed out the fact that Harper was in touch with his family, the Johnsons, while he was in jail, and that one of the Johnsons testified at trial concerning an alleged conversation with Swafford about getting a girl and shooting her. Counsel also indicated that it was only after Harper cooperated with the police that they tested the gun retrieved from the Shingle Shack.

At the initial 3.850 hearing, information was revealed that Harper was granted early release in exchange for his testimony at the Swafford trial. He also received a $10,000 reward from the FINA Corporation for cooperating at trial. Harper blamed Swafford for the breakup of his marriage and was

instrumental in getting his family member from Tennessee to testify against Swafford.

Another Brady allegation in the first 3.850 motion was that the State violated Brady by withholding police investigative and other reports regarding Walsh, Levi and Lestz. These investigative materials revealed the following information which pointed to other persons as the likely perpetrators of the murder. Rucker was shot nine times with different bullets, one of which was homemade. The Lestz affidavit puts Walsh in possession of two .38 caliber weapons. There was also evidence that Walsh had various .38 bullets, and that his modus operandi was using various .38 caliber shells. Several types of .38 bullets were removed from Rucker's body during the autopsy. Walsh has a history of sexual conduct, and even burned Lestz with cigarettes during a homosexual encounter. Similar cigarette burns were found on the murder victim's body. Additionally, Walsh's wife had a car that was similar to the description given to police by Seiler.

When Walsh was interviewed by police, he became nervous when asked about Rucker. When he was arrested for a robbery, he had a composite BOLO of the Rucker murder suspect in his back pocket, and that composite resembled him. The arresting agency called the Volusia County police to give them this information. Also, there were statements made by Lestz concerning Walsh, including a statement that Walsh admitted committing three murders in Florida and that one of the three victims was a white female. Lestz placed Walsh in the vicinity of the murder at a laundromat one day before the murder. Additionally, Lestz told investigators that Walsh and Levi left the motel around 6 a.m. on the day of Rucker's murder. The Lestz affidavit also places Walsh in the Shingle Shack trying to dispose of two .38 caliber guns at or near the same time that police either were given or retrieved a gun from one of the restrooms at the Shingle Shack.

Swafford v. State, 828 So. 2d at 982-85 [Quince dissent].[13]

No scientific evidence linked Mr. Swafford to Ms. Rucker. No hair, fiber, fingerprints, blood, or any other forensic evidence linked Mr. Swafford to the crime. The only biological evidence relied upon by the State against Mr. Swafford was FDLE's finding that acid phosphatase was present on the rape kit swabs (PC-R7. 1017-19). The State relied on this finding as circumstantial evidence that Mr. Swafford had raped Ms. Rucker (R. 768-69; 1339).

In 2002, Mr. Swafford sought testing of the available biological evidence in this case based upon significant advances in DNA testing technology. In its response objecting to DNA testing, the State raised the issue of possible contamination of hair and serological evidence in this case and argued that these concerns were sufficient to warrant denial of Mr. Swafford's DNA motion (PC-R5. 75-76). The State also admitted that key pieces of evidence in this case – namely the victim's blood sample and hairs collected from her body – had been or were thought to be misplaced and/or destroyed (PC-R5. 75-76).

In its March 26, 2004 orders, this Court recognized that

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[13]Justice Quince opined that based on this information and a newly discovered affidavit from Mr. Lestz that Mr. Swafford was

questions regarding capability, authenticity, and contamination needed to be addressed and ordered an evidentiary hearing to resolve these issues (PC-R7. 229, 230).

The lower court's June 11, 2004 hearing, however, addressed only the items that were capable of being tested for DNA. No testimony was taken regarding contamination or authenticity of evidence. No determination was made by the lower court regarding those issues. Mr. Swafford objected to the lower court's failure to follow this Court's mandate, but his objections were overruled. As a result, the lower court's order on remand is devoid of any findings on authenticity or contamination of the biological evidence in this case.

STANDARD OF REVIEW

This is an appeal from the lower court's final order on remand regarding DNA issues. The lower court's order is reviewed *de novo.*

ARGUMENT I

MR. SWAFFORD WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FULL AND FAIR HEARING ON HIS DNA MOTION IN THAT THE LOWER COURT FAILED TO FOLLOW THIS COURT'S MANDATE IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

After the DNA testing reports from FDLE and Mitotyping had

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entitled to a new trial. Id.

been submitted to the trial court, Mr. Swafford requested an evidentiary hearing to address the issues of contamination and authenticity – issues which this Court ordered to be addressed in its remand. The State objected and argued:

> MS. DAVIS: The last thing is that 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 this Circuit Court deems to be appropriate.
>
> And it's the State's position that we have complied with every part of this remand, that Your Honor is able to enter an order now stating that these –- all these things have been done. Here's the hearing. Here's the orders from FDLE and Mitotyping. And that we now -– you now can enter that order and everything that this Court remanded for you to do has been finished.

(PC-R7. 205-06).

The defense objected, stating that the DNA mixture shows the need for a hearing on contamination and that the remand specifically called for an evidentiary hearing on the contamination issue (PC-R7. 207-09).

The State replied that contamination meant contamination of the crime scene, and that FDLE had not given any indication that any samples had been compromised (PC-R7. 209-210).[14] Ms. Davis

[14]The transcript in the record on appeal at PC-R7. 209 erroneously attributes the State's reply to Ms. Bacchi. This is

insisted that contamination meant by outside sources before the samples got to FDLE.

Defense counsel continued to object (PC-R7. 224).

Whereupon, Assistant Attorney General Kenneth Nunnelly argued that defense counsel's argument on contamination has "mutated" into a Rule 3.851 motion.

What we're hearing about now, the complaints about contamination, the complaints about what does this mixture mean, those are 3.851 issues. If they want to file a 3.851 motion based on this DNA testing that's been accomplished, then they can do that, I suppose, under the terms of the rules. (PC-R7. 218).

The lower court adopted the State's arguments:

> (I)(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 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 "contamination" or mixing of samples at the FDLE laboratory. This Court agrees with the arguments made by the State regarding the scope of the remand. This Court has complied with the remand order from the Florida Supreme Court, and any issue that Swafford

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in error. Ms. Bacchi did not make the statements, Ms. Davis did.

> wishes to raise beyond that remand should be raised in an amended motion for post-conviction relief.

(PC-R7. 589).

To the extent that the lower court failed to fulfill the dictates of this Court's remand, Mr. Swafford was prejudiced, and an evidentiary hearing is warranted.

A. The lower court failed to fulfill this Court's mandate

From the time of his arrest in 1985, Mr. Swafford has maintained his innocence. His case was circumstantial, and there was substantial evidence to indicate that another individual, James Michael Walsh, actually committed the crime, but this information was withheld from trial counsel. See, e.g., Swafford v. State, 828 So. 2d 966 (Fla. 2002) (denying relief on defendant's claim under Brady v. Maryland, 373 U.S. 83 (1963) on procedural bar grounds).

In post-conviction, Mr. Swafford sought DNA testing to definitively prove that he was not the perpetrator of the rape and murder of Ms. Rucker. The lower court denied his request, which was reversed by this Court on March 26, 2004. The scope of this Court's mandate was clear:

> The amended order is reversed, and this case remanded to the circuit court with directions that the circuit court hold an evidentiary hearing to determine which pieces of evidence that appellant moved to have tested are capable of being tested for DNA. 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). The results of the tests shall be provided in writing pursuant to rule 3.853(8). **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 findings in respect to the tested evidence as the circuit court determines to be appropriate.**

See, Court's Order, March 26, 2004 [emphasis added].

In accordance with this Court's order, a hearing was held to determine which pieces of evidence were available for testing but the court, at the State's urging, deferred an evidentiary hearing on authenticity and contamination issues to "another day."

Under Rule 3.853, only FDLE was to conduct nuclear STR DNA testing on serological and biological evidence that could be tested with this method. After failing to obtain a result, the hair evidence was submitted to Mitotyping Technologies for testing because FDLE does not have the capability to conduct mitochondrial DNA testing on hair evidence.

The results of the DNA testing by FDLE were inconclusive and internally contradictory and illogical. FDLE identified male DNA on a hair found on a white towel with a flower pattern which did **not** match Mr. Swafford. On the right and left fingernail scrapings of the victim, FDLE extracted a "limited

DNA mixture" but obtained no "interpretable" results. A DNA mixture indicates either that more than one DNA profile exists in that scraping or that the laboratory has contamination issues in its testing procedures.

More puzzling was FDLE's discovery of a DNA "mixture" on hair evidence that had been mounted on glass slides since the 1980s. FDLE was only able to test those hair strands that contained a follicle with cells containing a nucleus. Logically, a hair follicle can only come from the person from whom the hair was extracted. A hair follicle cannot originate from two persons.

There are only a limited number of logical explanations for this phenomenon. Either some other substance was present on the hair follicle which was not a cell from the follicle, or there was some other cell matter in the mounting solution on the glass slide prepared in the 1980s. Otherwise, there would be no "mixture" of DNA profiles on a single hair follicle. This means that either some other cellular matter was on the hair originally before it was mounted or the mounting solution used by FDLE in the 1980s was contaminated with other cell matter. It could have a been a dirty glass slide or slide cover. It could have been other objects touching the hair before it was

mounted, but these issues cannot be resolved without an evidentiary hearing at which testimony is taken from laboratory technicians from today and those present in the 1980s. The issue cannot be laid to rest until this occurs, which was this Court's purpose in issuing the mandate in the first place.

Equally disturbing are the results of the acid phosphatase test. At the time of trial in 1985, FDLE tested vaginal and anal swabs of the victim and got a positive result for acid phosphatase, a substance characteristically found in seminal fluid. Semen could not be conclusively identified because no spermatozoa were found. The State argued that this circumstantial evidence corroborated that Mr. Swafford had sexually assaulted and murdered the victim (R. 1339).

However, FDLE's recent testing indicates the opposite – that no acid phosphatase was found and no semen was identified. This evidence would have been invaluable at the time of trial in that it directly rebutted the State's case and did not show that Mr. Swafford sexually assaulted or murdered the victim. Or, it shows that the FDLE laboratory erred in its analysis of the sample or in its testing method in 1982 or in 2004-5.

These are the most definitive test results FDLE could give the lower court after having tested the evidence once at the

time of trial and again in 2004 and 2005. It is clear that FDLE's test results were not instructive to the lower court in any manner, particularly when no hearing as to the possibility of contamination in the laboratory has been held.

Moreover, Mitotyping's test results show that a hair found in Ms. Rucker's panties did **not** belong either to Ms. Rucker or Mr. Swafford.

Thus, the contradictory results by FDLE and Mitotyping's conclusive results show that Mr. Swafford was **not** a contributor to the DNA samples. FDLE's testing has been thrown into doubt. Either FDLE's testing was contaminated or the samples are truly from someone else – perhaps James Michael Walsh.[15]

In the only definitive results that FDLE was able to give, it found that Mr. Swafford was not eliminated as a contributor to the DNA samples. Thus, of the definitive forensic results of Mitotyping and FDLE, Mr. Swafford is not implicated in this crime.

Yet, none of this evidence has been presented in court, admitted into evidence or subjected to examination by counsel.

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[15]There is no indication in the record that FDLE attempted to run its new DNA profiles through its DNA database or attempted to compare the results to any other person except Mr. Swafford.

Mr. Swafford also repeatedly requested an opportunity to have his own DNA expert, Dr. Blake of Forensic Science Associates, test the available remaining biological evidence on which FDLE could not get a conclusive result. Under Fla. R. Crim. P. 3.853, this contingency was anticipated:

> 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 National Forensic Science Training Center when requested by a movant who can bear the cost of such testing.

Fla. R. Crim. P. 3.853(7). But these requests were denied by the lower court.

FDLE's inconclusive and contradictory results support the grant of an evidentiary hearing to determine whether contamination has played a role in the findings of DNA "mixtures" in the biological evidence. Likewise, additional DNA testing, funded by Mr. Swafford, is a logical choice to finally resolve whether Mr. Swafford is the actual perpetrator of this crime or whether it is someone else. The contradictory results themselves call into question the validity of Mr. Swafford's conviction and sentence. Mr. Swafford's case was highly circumstantial even without the wrong determination on the acid phosphatase test, the finding of foreign DNA in the victim's panties and the other inconclusive DNA results.

Moreover, these DNA results cannot be considered in a vacuum and must be considered cumulatively with the multiple errors that have been presented to this Court in prior proceedings. See, Gunsby v. State, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitley, 514 U.S. 419, 434 (1995) [reasonable probability standard requires court to analyze evidence jury did not hear collectively, not item by item].

For example, in a previous Rule 3.850/3.851 motion Mr. Swafford alleged Brady[16] violations for information withheld by the State concerning the investigation of suspect Walsh and other state witnesses. FDLE's contradictory DNA results seem to substantiate Mr. Swafford's claims that someone else committed the murder of Ms. Rucker. Without further testing to get a definitive result, no court could not make that determination.

Clearly, some DNA material foreign to Mr. Swafford and the victim was present, but because the State urged the trial court to stop its inquiry on this issue, the matter went no further (PC-R7. 208-09).

Mr. Swafford suggests that the State's oral representations that there are no contamination issues are no more reliable now then they were when the State said the samples were destroyed.

Yet, the lower court adopted wholesale the State's oral assurance that no contamination issues exist in this case, despite a disturbing history of contamination in the FDLE crime labs.

The presence of DNA mixture is a prime indicator that contamination may be an issue. Early on, the State voiced its concerns that contamination would render any DNA results moot and argued that DNA testing was not necessary. Now, the State has changed course and argued that because FDLE could get **some** result, no matter what it is, that contamination is no longer an issue.

In FDLE's reports, it concludes that in several instances a DNA mixture of the profiles of two different people exists, but it cannot draw any conclusive results as to who these two people are. Instead, it makes "assumptions" and opines that Mr. Swafford "cannot be excluded" as a possible contributor to these mixtures. It is clear that FDLE has been able to obtain an acceptable DNA profile of the victim's blood and Mr. Swafford's blood at all 13 loci, which is the standard for an acceptable "match." That means the examiner could not get a "match" at 13 loci on these questioned samples, that the DNA profile of

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[16]Brady v. Maryland, 373 U.S. 83 (1963).

someone else is present in the samples tested by FDLE, or that contamination by another biological sample is present.

Moreover, contamination is not an anomaly at FDLE. At an evidentiary hearing, Mr. Swafford would argue that in August, 2005, evidence was presented that showed that FDLE has had recent problems with contamination of DNA samples. In Michael Mordenti v. State, Hillsborough County Case No. 90-3870, it was discovered that samples in that case had been contaminated to such a degree that no result could be obtained. Additionally, on December 13, 2005, it was reported that the FDLE crime lab was investigating how DNA from an unknown female suspect wound up on both Florida and Arizona cases where the DNA had no connection to the suspects or the crimes.

Susan Livingston, director for FDLE crime lab in Tallahassee, was quoted as stating that “it is a profile we can’t attribute to someone in a case or someone in a lab...it certainly raises the question of what our two states have in common.” A Tucson, Arizona crime lab contacted FDLE which maintains a national database of unknown DNA profiles. The database confirmed that the same DNA had been found in police laboratories in Florida. Florida officials would not say how many cases were involved. Both accounts of contamination

coincide with the same type of contamination that was discovered in the Mordenti case in August, 2005.

This means that possible contamination needs to be eliminated in this case in order to rely on any results that FDLE may render. This Court recognized this fact when it remanded the case for further proceedings. Failure to address these issues prejudices Mr. Swafford and limits his ability to prove his innocence.

The lower court erred in failing to follow this Court's mandate on remand. In carrying out an appellate mandate, the trial court's role is purely ministerial. Rodriguez v. State, citing Straley v. Frank, 650 So. 2d 628 (Fla. 2nd DCA 1994). It cannot "deviate from the terms of an appellate mandate." Mendelson v. Mendelson, 341 So. 2d 811, 813-14 (Fla. 2nd DCA 1977). The trial court is without jurisdiction to evade the mandate. Downs v. Crosby, 29 Fla. L. Weekly D 1901 (Fla. 2nd DCA August 13, 2004); citing Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp., 328 So. 2d 825, 827 (Fla. 1975).

Here, the lower court did not follow the mandate of this Court's remand. It was without jurisdiction to deviate from the court's order. Because the lower court failed to follow the mandate of this Court, Mr. Swafford is unable to definitively

prove his innocence.

When this Court ordered the remand, Mr. Swafford argued that the State obviously believed at the time of the submissions of the biological evidence to FDLE in 1985 that it could identify the perpetrator of this crime. It is now known that foreign DNA exists from a hair found in the victim's panties, that unknown DNA mixtures exist, and that the acid phophatase test on which the jury based its decision in 1985 was very likely error. "[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2nd DCA 2002).

If the lower court would follow the mandate of this Court and allow further testing to produce a conclusive result, DNA testing could still resolve the issue of the identity the perpetrator of the Rucker homicide.

B. The scope of Fla. R. Crim. P. 3.853 includes resolving evidentiary issues.

In arguing against further proceedings pursuant to this Court's remand, Assistant Attorney General Kenneth Nunnelly argued that Mr. Swafford was attempting to "mutate" his Rule 3.853 motion into a Rule 3.851 post-conviction proceeding by

requesting an evidentiary hearing and his own expert to assist in his defense (PC-R7. 218).

> What we're hearing about now, the complaints about contamination, the complaints about what does this mixture mean, those are 3.851 issues. If they want to file a 3.851 motion based on this DNA testing that's been accomplished, then they can do that, I suppose, under the terms of the rules...
>
> Rule 3.853 does not provide a vehicle for the Defendant to gain substantive relief from his conviction. It is merely and simply the way that DNA testing is done.

(PC-R7. 218).

The defense objected to this characterization of the rule (PC-R7. 224), but the lower court agreed with the State and denied Mr. Swafford's requests. The lower court erred.

"[T]he purpose of the section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2nd DCA 2002), quoting In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring).

Conversely, Fla. R. Crim. P. 3.851 is a post-conviction

vehicle for a criminal defendant to appeal issues of ineffective assistance of counsel, newly-discovered evidence claims, Brady issues and constitutional issues as delineated in the rule. There is no discovery in Rule 3.851 nor is there a substantive or procedural right to DNA testing. That is why the legislature passed Fla. Stat. 925.11, and this Court promulgated Rule 3.853 as a new rule of criminal procedure to deal with the advancing technology of new forensic testing methods. Had DNA testing proceedings been covered by Rule 3.851, there would have been no need for this Court and the legislature to formulate new rules.

Moreover, DNA issues and resolving them with evidentiary proceedings are inherent in the rule. As it stands now, none of Mr. Swafford's DNA evidence or testing results are in evidence. They have not been examined through an adversarial process and due process demands. There is no other procedural vehicle in place to resolve these issues except Rule 3.853 and Fla. Stat, sec. 925.11.

DNA issues must be addressed in Rule 3.853 where the substantive right to DNA testing was created and the parameters of its usage and results are to be entered into evidence and tested. If the State's argument is carried to its logical conclusion, then Mr. Swafford would have a right to DNA testing

under Rule 3.853, but once the results are obtained, he has no vehicle under which to enter the results and conclusions into evidence or subject the results to adversarial testing. This is not due process. The State and lower court's interpretation of Rule 3.853 is incorrect.

C. Mr. Swafford is entitled to his own expert and further DNA testing by an independent laboratory.

Concomitant with the substantive right to DNA testing, Fla. R. Crim. P. 3.853 (7) does not preclude a defense expert of the movant's choosing to assist him in interpreting FDLE's results. The State argued and the lower court found that Mr. Swafford was not entitled to have an expert of his own choosing or any additional DNA testing by an independent laboratory. Despite the fact that FDLE's results were highly suspect, the lower court refused Mr. Swafford's requests even though Rule 3.853 specifically allows further DNA testing if the movant can bear the cost and show good cause.

Good cause has been established here in that FDLE's results are contradictory and inconclusive. Further testing could definitively result in Mr. Swafford being able to prove his innocence. The State has attempted to block Mr. Swafford's efforts to resolve the issues at every juncture. The State repeatedly elevates the procedural rules to a literal reading of

the rule that this Court never intended. The State's argument essentially is that Rule 3.853 precludes a defense expert.

The State ignores that due process is the key element in Rule 3.853. Where the State of Florida extends a right or a liberty interest, the right or liberty interest may only be extinguished in a manner that comports with due process. See, Evitts v. Lucey, 469 U.S. 387 (1985) [state must operate whatever programs it does establish subject to protections of Due Process Clause]. To grant a substantive right and then not allow the defense an opportunity to fully exercise the right is a due process violation contrary to the eighth and fourteenth amendments. Cf. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) [due process protection applies to right to seek clemency].

"[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2nd DCA 2002), quoting In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring).

Moreover, no effective examination of FDLE's results can be accomplished without Mr. Swafford having the ability to get assistance from his own expert and request his own testing if he has shown good cause.

If the State's logic is followed, the worst case scenario would be that FDLE could botch a testing procedure, come up with an unreliable result and write a report where it neither recognizes nor acknowledges the unreliability of its result, and a defendant would have no way of challenging it. That scenario is exactly what Mr. Swafford faces.

This unconstitutional result is analogous to the State's attempt to present testimonial evidence from an unavailable witness in the form of a taped or written statement. In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court has condemned this practice finding that a criminal defendant must have the opportunity to cross examine his accusers:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection's to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."
>
> ...Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence but it is a procedural rather

> than substantive guarantee. **It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.** The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there can be little dissent), but about how reliability can best be determined. Cf. *3 Blackstone, Commentaries*, at 373 ("This open examination of witnesses...is much more conducive to the clearing up of truth"); *M. Hale, History and Analysis of the Common Law of England* 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Crawford v. Washington, 541 U.S. at 61-62[emphasis added].

In cases where a defendant seeks to raise mental retardation as a bar to execution, competency or present mental health mitigators during penalty phase, he is entitled to an effective mental health expert in which to do so. See, Fla. R. Crim. P. 3.203, Ake v.Oklahoma, 105 S. Ct. 1087 (1985). If due process requires that the defense have an expert of its own choosing in these instances, then it is inherent in Rule 3.853 that Mr. Swafford be entitled to his own expert to assist him in understanding and challenging evidence in his DNA proceeding.

The lower court's order and rulings are in error. Mr. Swafford is entitled to an expert of his own choosing and further DNA testing to prove his innocence. As three justices of this Court have found, there is a "reasonable probability" that Mr. Swafford would have been acquitted if the DNA evidence,

and the Brady information were presented to his jury. See, Swafford v. State, 828 So. 2d 966 (Fla. 2002); Cf. Kyles v. Whitley, 514 U.S. at 436 (1995). If this evidence is analyzed "collectively and not item by item," Mr. Swafford is entitled to relief.

CONCLUSION

For the foregoing reasons, this Court should vacate the lower court's order denying Mr. Swafford's request for further DNA testing and allow him to obtain a definitive result, and order the lower court to conduct an evidentiary hearing on the issues of authenticity and contamination of the DNA evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail delivery to , Barbara Davis and Ken Nunnelly, Assistant Attorneys General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on May 4, 2006.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Rule 9.210(a) (2), Fla. R. App. P.

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