IN THE SUPREME COURT OF FLORIDA

ROY CLIFTON SWAFFORD,

Appellant,

v. **Case No. SC10-1772**

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

Barbara C. Davis
Assistant Attorney General
Florida Bar No. 0410519
444 Seabreeze Blvd., 5th Floor
Telephone: (386) 238-4990
Facsimile: (386) 226-0457

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This appeal is from denial of Swafford's fourth postconviction motion. Prior decisions of this Court include:

Direct appeal: *Swafford v. State*, 533 So. 2d 270 (Fla. 1988);

First postconviction appeal and first habeas petition: *Swafford v. State*, 569 So. 2d 1265 (Fla. 1990);

Second habeas petition: *Swafford v. State*, 584 So. 2d 5 (Fla. 1991);

Second postconviction appeal: *Swafford v. State*, 636 So. 2d 1309 (Fla. 1994);

Third postconviction appeal: *Swafford v. State*, 828 So. 2d 966 (Fla. 2002);

First DNA motion appeal: *Swafford v. State*, 871 So. 2d 874 (Fla. 2004);

Second DNA motion appeal: *Swafford v. State*, 946 So. 2d 1060 (Fla. 2006).

Cites to the records are:

Direct appeal: "DAR";

First postconviction appeal: "1st PCR";

Second postconviction appeal: "2nd PCR";

Third postconviction appeal: "3rd PCR";

First DNA motion appeal: "1st DNA"

Second DNA motion appeal: "2nd DNA";

Record in the present case: "V" followed by volume number, followed by "R" and the page number for the cite.

Several record excerpts are attached as appendices for this Court's convenience.

INTRODUCTION

In response to Swafford's argumentative and misleading "Introduction" the State replies, with record cites, as follows:

> - The white flowered towel was not found near the victim. It was found in James Walsh's van when he was investigated. (V9, R1527, 1564, 1566);
>
> -Walsh was cleared by the sheriff's investigation. Swafford's Exhibit #2 shows that the items seized from his van were not tied to Rucker; i.e., the blue rag, white towel and all other evidence seized from Walsh's van (V9, R1564-1566; V10 R1764);
>
> -The gun was conclusively linked to Swafford: it was stolen in Nashville (where Swafford lived) a few months before the murder (DAR1026, 1028, 1158-59), his friends saw him with it months before the murder (DAR811), Swafford pulled the gun outside the Shingle Shack the night of the murder when an attempted drug deal went bad (DAR807, 859), Swafford was nervous and deposited the gun in the Shingle Shack bathroom (DAR1044-45, 1156), Swafford had also been at the Shingle Shack the night before the murder (DAR854), after a tip that Swafford killed Rucker, the gun was test fired and matched the bullets found in Rucker (DAR794, 1127, 1142), Swafford told his friends he was mad the police seized his gun (DAR 814, 848);
>
> - Marianne Hildreth, FDLE hair analyst in 1982, found one hair in the victim's panties: an animal hair. (V9, R1526; V10, R1772; V11, 1845). In 2005, analyst Shawn Johnson pulled one more possible hair from the panties. (V10, R1770). This second hair is the one sent to MitoTyping. Neither Johnson nor MitoTyping identified the hair as a "pubic" hair. (V11, R1868).
>
> - Animal hair was also found in the victim's sock and shoes in 1982. (V11, R1845).

- Animal hair was found in the 1971 Chevy which Swafford was driving the night of the murder. (V9 R1530, 1546);

-Hairs submitted from the 1971 Chevy were different from both Rucker and Swafford. (V11, R1983). Swafford and four other men had driven from Nashville to Daytona Beach for the races. (DAR796);

-The testimony from both Dr. Botting and Keith Paul regarding acid phosphatase being "positive proof" of, or "absolutely establishes" a male organ were phrases used by ***defense counsel on cross-examination*** to elicit responses from the witnesses. (V12, R2157; V11, R1993);

-Keith Paul's direct examination testimony was that because there were no sperm cells on the vaginal and anal swabs, he "could not conclusively say that these items contained semen." (V11, R1991);

-The theory of defense was that Swafford did not have time to abduct the victim, travel 6.5 miles, disrobe and have vaginal and anal intercourse with the victim, dress her, then shoot her 9 times and return to the campsite by sunrise (3rd PCR231-235, Appendix 4 attached); vaginal and anal intercourse increased the time necessary for the assault;

- The jury knew Roger Harper had been in prison and was on work release when he testified. (DAR 793-94);

-Inconsistencies between Seiler's identification and Swafford were brought out at trial. (DAR 1267-69, 1271, 1280);

-The trial judge did conduct a cumulative-evidence analysis. The theory that Walsh is a suspect is now discredited as is Swafford's theory of defense. Rather than exonerating Swafford, the cumulative analysis now balances even further in favor of the State. *See Johnston v. State*, 27 So. 3d 11, 20 (Fla. 2010); *Green v. State* 975 So. 2d 1090, 1101 (Fla. 2008) *; Wright v.* State 995 So. 2d 324, 327-328(Fla. 2008).

STATEMENT OF THE CASE AND FACTS

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. On direct appeal, this Court summarized the facts as follows:

> 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 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, 271-173 (Fla. 1988).

The postconviction litigation process was outlined in this Court's decision in *Swafford v. State*, 946 So. 2d 1060 (Fla. 2006):

> The facts of this case are set out fully in our opinion affirming the convictions and death sentence on direct appeal. *Swafford v. State*, 533 So. 2d 270, 271 (Fla. 1988). We have since affirmed the denial of Swafford's three postconviction motions and have denied various petitions for writs of habeas corpus. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002); *Swafford v. State*, 636 So. 2d 1309 (Fla. 1994); *Swafford v. Singletary*, 584 So. 2d 5 (Fla.1991); *Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990).
>
> Swafford filed a fourth motion for postconviction relief, and he filed a motion for DNA testing pursuant to Florida Rule of Criminal Procedure 3.203 on October 9, 2002. The circuit court denied the motion for DNA testing and dismissed the motion for postconviction relief. Swafford appealed the two orders separately in Case Nos. SC03-931 and SC03-1153. On March 26, 2004, we remanded the DNA testing case to the circuit court for further proceedings, see *Swafford v. State*, 871 So. 2d 874 (Fla. 2004) (No. SC03-931) (table report of unpublished order), in an order stating:
>
> > Appellant Roy Clifton Swafford appeals an amended order denying his motion for DNA testing under Florida Rule of Criminal Procedure 3.853. We have jurisdiction. See Art. V, § 3(b)(1), Fla. Const.
> >
> > The amended order is reversed, and this case is 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[c](7). The results of the tests shall be provided in writing pursuant to rule 3.853[c](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 other findings in respect to the tested evidence as the circuit court determines to be appropriate.

We reversed the order dismissing the motion for postconviction relief, remanding for further proceedings following the trial court's ruling on the motion for DNA testing. *See Swafford v. State*, 871 So. 2d 874 (Fla.2004) (No. SC03-1153) (table). Swafford now appeals to this Court, arguing that the circuit court erred in the proceedings below. We find that the circuit court has complied with our order. The circuit court held an evidentiary hearing on June 11, 2004. At that hearing, the parties determined which pieces of evidence were to be DNA tested. That evidence was tested by the Florida Department of Law Enforcement (FDLE) and MitoTyping Technologies, LLC, as reflected in various reports filed by those laboratories from November 2, 2004, through November 18, 2005.

Following that testing, the circuit court entered an order which stated that it had complied with the directions from this Court on remand. *Swafford v. State*, No. 83-3425-BB (Fla. 7th Cir. Ct. order filed Jan. 25, 2006). We affirm the circuit court's order, including its denial of Swafford's motions for an additional evidentiary hearing under rule 3.853 and his motion seeking further DNA testing by a laboratory not certified as required by rule 3.853(c)(7). This denial is without prejudice to Swafford presenting DNA issues, including any issues concerning possible contamination of DNA samples, in further proceedings under rule 3.851. Swafford is granted sixty days from the date this opinion is final to amend his rule 3.851 motion to present any DNA issues.

Swafford v. State, 946 So. 2d 1060, 1061(Fla. 2006).

Swafford filed two amended motions to vacate. (V7, R1099-1185, R1196-1226). The motions raised the following issues:

> (1) Newly-discovered evidence: hair on white towel, no acid phosphatase in vaginal and anal swabs, hair in victim's underwear; failure of trial court to conduct hearing as to authenticity and contamination; testing by independent lab;
>
> (2) Rule 3.853, Fla. R. Crim. P. is unconstitutional because it denies the defendant access to the expert of his choice.

The State filed a response. (V8, R1227-1275). At the Case Management Conference on February 28, 2008, Swafford filed a motion to amend. (V2, R195). The trial judge allowed amendment with Claim Four. (V2, R199; V9, R1418-1424). The trial judge ordered an evidentiary hearing on one subpart of Claim One and summarily denied the other claims. (V2, R228; V8, R1301; V9, R1419). Claim Four was also summarily denied after it was filed. (V9, R1418-24).

The evidentiary hearing was held March 2 and 5, 2010. (V3, R296-483; V4, R484-597). The defense called three witnesses: Charles Alan Keel, Shawn Johnson, and Roy Swafford, the defendant. The State called one witness: Keith Paul.

The trial judge denied relief on August 13, 2010. (V 14, R2442-2446).

Evidentiary hearing testimony.

Charles Alan Keel, forensic serologist, specializes in the examination and identification of human body fluids. (V3, R316). Keel earned a Bachelor of Science

degree in Zoology as well as earning credits in human physiology, molecular biology, and DNA biochemistry. (V3, R316, 323, 334). He worked in various crime laboratories prior to his current employment at Forensic Science Associates. (V3, R317-18). Forensic Science Associates is not accredited by the American Society of Crime Laboratory Directors. ("ASCLD").[1] (V3, R321). Keel was not aware that Forensic Science Associates did not meet the requirements of Florida Rules of Criminal Procedure 3.853(c)(7). (V3, R327). Keel had not seen or performed any DNA analysis on the evidence in this case. (V3, R328, 336, 398).

Keel reviewed a vast amount of documentation which included crime scene documents, autopsy report, depositions, bench notes and reports written by Florida Department of Law Enforcement personnel. Keel also reviewed the trial testimony of the medical examiner, Dr. Botting, and FDLE analyst, Keith Paul. (V3, R336, 337-340, 342).

Keel said acid phosphatase testing is useful in the forensic context because "there's such an abundance of it in semen that we can use it to help locate stains or evidentiary stains that may be of interest in investigating a particular crime or case." (V3, R347). Semen contains high concentrations of acid phosphatase and it is also present in vaginal fluids. (V3, R348). Keel said acid phosphatase is a "presumptive

[1] *See Florida Rules of Criminal Procedure* 3.853 (c) (7).

test." Therefore, the presence of acid phosphatase is not "proof positive" that semen is present. (V3, R349). Both males and females can produce either a low or high range of acid phosphatase. (V3, R350). Acid phosphatase testing is a widely-used presumptive test when examining stains for semen. (V3, R404).

Keel said when a suspected stain is tested and the result is positive for acid phosphatase, "it could be coming from some other source than semen." (V3, R351). Then, a "quantitative" acid phosphatase test should be conducted. (V3, R351). The results should be compared to the known endogenous levels of acid phosphatase in semen to determine whether or not the acid phosphatase came from semen. (V3, R351-52). A spectrophotometer is required to perform a quantitative test[2] which takes approximately 20 minutes. Every lab should have a spectrophotometer. (V3, R352).[3]

Keel said acid phosphatase is an exceedingly stable enzyme which means the enzyme's activity lasts for decades. It remains a stable enzyme **as long as it is not subjected to extreme moisture or heat.** (V3, R353, 392).

Keel said the primary method for testing and identifying semen in 1982 was the

[2] At various points throughout the testimony, the court reporter typed "test" as "assay." (V3, R352, line 9; 355, line7; 358, line 6, 8; 365, line25; 366, line 18; 367, line 8; 369, line 18; 431, line14).

[3] Analyst Shawn Johnson said FDLE does not have a spectrophotometer in its lab. (V3, R456).

microscopical observation of sperm in the semen sample. (V3, R354). If there was an absence of sperm, a "P-30 Test," an immunological test, was performed. P-30 is a protein produced by the prostate and is a positive indicator for the presence of sperm. (V3, R355, 356).

Keel explained the method in examining and evaluating sexual assault evidence as follows: "Take half of a vaginal swab ... and collect the components that contain the acid phosphatase enzyme and the genetic traits that we could use at that time to try to discriminate potential sources of evidence." Then, "collect the cellular portion separately ... and look at the cellular portion for semen, for sperm. And if you found sperm, then you do a quantitative acid phosphatase test on the soluble component." (V3, R365). Keel said this test could be followed by the ABO or ABH blood group test followed by a P-30 test, all from the same sample. This order of testing would eliminate the need for sampling the specimen multiple times. (V3, R366).

Keel was aware that the victim was a non-secretor. She did not contribute to any blood group substance through her body fluids. Therefore, any fluids recovered from her body came from someone else. (V3, R368, 369). The FDLE analyst did not perform a quantitative acid phosphatase test on the sample collected from the victim. There was no proof of any sperm, either.[4] (V3, R369). However, the semen could have

[4] Keel said there is an average of three hundred million sperm in an average ejaculate.

come from a non-secreting donor. (V3, R370).

Keel said two swabs were obtained from each of the victim's orifices. The vaginal swabs were placed into plastic tubes while they were still wet. This would have prevented the swabs from drying when placed in a refrigerated setting, causing bacterial proliferation and degradation. (V3, R371, 400). Keel said the FDLE analyst notated that the vaginal swabs were damp with a strong odor as the victim's body had already started to decompose. (V3, R372, 373, 386, 399-400). The swabs were tested about a month after the samples were collected. (V3, R410).

Keel was aware the victim's rectal swabs were dry. They contained a lot of blood and bacteria, but no sperm. (V3, R375). In Keel's opinion, there was "no proof whatsoever that there had been sexual contact at the vagina or the rectum through the acid phosphatase test that Mr. Paul had done." (V3, R378-79). In Keel's opinion, there was no evidence that "a male organ was present, either at the anal or the vaginal area of the victim." (V3, R388). In Keel's opinion, the presence of acid phosphatase could have been derived from bacterial activity or the victim-produced acid phosphatase. (V3, R401).

(V3, R374). However, a semen source can be aspermic, (contains no sperm) or the male could have had a vasectomy. (V3, R374). He believed Swafford fathered a son. (V3, R376). Keel did not know if FDLE analyst Keith Paul had prior information or evidence that Swafford may have had a low sperm count or vasectomy. (V3, R383, 404). Paul testified that he had no idea if Swafford's had a vasectomy. (V4, R556).

Shawn Johnson, FDLE crime lab and DNA analyst, testified that typically, rape or sexual assault kits are refrigerated. (V3, R423). Johnson had heard of the "Florence test for choline" but had never run the test. (V3, R430). FDLE did not use that test because the reagent for acid phosphatase is easier to work with and more readily used. Therefore, FDLE laboratories have chosen to use the latter. (V3, R430).

In 2004, Johnson re-tested the anal and vaginal swabs taken from Brenda Rucker in 1982. (V3, R430, 432). Johnson did not review the test results from 1982. (V3, R442). He issued a report dated October 28, 2004. (V3, R433, Defense Exhibit #8).

When Johnson received the two anal swabs, there were yellow and dark brown and had already been cut. (V3, R436). They had been encased in plastic, which is bad for moisture. If the swabs were wet going in, then bacteria is going to grow and "break down any enzymatic activity that the AP may have." (V3, R437). If it is left long enough, it will break down the DNA to the point where no profile could be obtained. (V3, R437). Johnson did not make a note that the swabs were wet when he extracted them, so they must have been normal. (V3, R437).

Johnson performed a "spot test" for acid phosphatase ("AP") and both swabs were negative. (V3, R438). He then performed a microscopic sperm search. He found no sperm but noted "E cells and debris." (V3, R439). Debris is "pieces of cells that are broken up. There's a lot of bacteria and fecal matter, so it could be the bacteria." (V3,

R439). FDLE does not conduct tests on debris unless semen with sperm is present: the epithelial cell fraction is examined to confirm the swabs came from that victim. (V3, R440). As to whether sperm cells would survive longer than epithelial cells if there was degradation, Johnson noted that, although sperm cells are more hardy than epithelials, every individual's biochemistry in the vaginal area is different, and there are no "real set guidelines," no "black and white." (V3, R442).

When Johnson did review Keith Paul's 1982 report and learned Paul obtained a positive AP result, "it did not surprise me." The swabs were originally in bad condition when Paul received them.[5] So Johnson was not surprised that Paul got a positive result and he got a negative result. (V3, R443). The test for AP is a screening test.

The two vaginal swabs were also sealed in a plastic vial and were yellow. They had already been cut when Johnson received them. (V3, R446). There was no acid phosphatase, no sperm, and no epithelial cells found on the vaginal swabs. (V3, R447, 450). The fact the swabs tested negative for AP did not surprise Johnson because:

> [t]here's no certainly in biological chemistry as far as through the time. Depending on the storage conditions, there's so many variables. But in a typical – typically I would expect not to get anything.

[5] Brenda Rucker was abducted between 6:18 and 6:20 a.m. on February 14, 1982. Her body was found in the woods behind what is called Old Sugar Mill Run, the afternoon of February 15, 1982. (DAR746).

Q. So based on the way the swabs had been stored previously?

A. Correct.

(V3, R448). The way results are "read" also makes a difference. Johnson had "no idea how he [Paul] characterizes his positives." (V3, R448). There was a lot of small debris on the vaginal swabs – bacteria and cellular fragments – but no epithelial cells. Johnson would normally expect to find epithelial cells on a vaginal swab. (V3, R450). It is more likely to find epithelial cells on a vaginal swab than on an anal swab. (V3, R451).

If swabs are 100% dry, they can be stored at room temperature for a long period of time. (V3, R452-53). FDLE does not use a spectrophotometer. (V3, R456).

Johnson has not been trained in ABO testing and stated that it is an outdated test and FDLE had stopped using it before he was hired. He was not aware that the victim was a non-secretor. (V3, R459). That knowledge would not have made a difference because the test is not performed any more at FDLE. (V3, R459). Whether a person is a secretor is not relevant to present DNA analysis. (V3, R461). Johnson was not familiar with ABO test methods, so could not testify regarding protocols. (V3, R462).

Swafford testified that he has never had a vasectomy and was never diagnosed as aspermic or had a low sperm count. (V3, R475) He testified that he fathered a son who was born on August 10, 1981 (six months before Brenda Rucker was murdered).

(V3, R476).

Keith Paul, currently a Special Agent with the FBI, was the FDLE serology analyst who tested the swabs in 1982. (V4, R489, 491, 493). He tested two vaginal swabs, and two anal swabs for acid phosphatase, performed a choline test, and conducted a microscopic test for sperm cells. (V4, R491). Those tests were the tests performed by FDLE when Paul worked there. (V4, R491). Paul reported his results in accordance with FDLE protocol at the time. (V4, R491-92).

Acid phosphatase ("AP") testing is a presumptive test, not a confirmatory test. (V4, R508, 542). When Paul worked at FDLE, the agency required a certain quantitative level to get a positive test. (V4, R494, 517-18). Paul got a positive test for AP when he tested the anal and vaginal swabs. (V4, R499). Keith received a positive result for AP on the vaginal and anal swabs, but negative on the oral swab he tested. (V4, R499). Paul did not find sperm, or sperm cells. Therefore, he could not conclusively say the AP result indicated semen. (V4, R502). Paul noted the fact that a positive AP test is not conclusive proof of the presence of semen. (V4, R503). **He also testified at Swafford's trial that he could not conclusively say it was semen. (V4, R502, 503). Paul did not indicate at trial or try to say that a male organ had contact with the victim's anus or vagina. (V4, R546, 548, 552).**[6] Paul said acid

[6] The trial record shows that any testimony regarding acid phosphatase being "positive

phosphatase can be found in vaginal fluid and in other natural sources but in lower levels than found in the male prostate. (V4, R503-04). The test Paul conducted for AP is a screening or "presumptive" test, not a confirmatory test. (V4, R508). It was defense counsel who pressed Paul to testify that the presence of AP meant a male organ had come in contact with the victim. (V4, R508-09). Paul's lab report from 1982 stated that "semen could not be conclusively identified as no spermatozoa were found." (V4, R510-511; State Exhibit 5).

Paul was not trained to do quantitative AP testing. (V4, R518). He did qualitative AP testing. (V4, R517). Testing was "very crude in those days." (V4, R521).

Paul recalled that the vaginal swabs were damp and his notes showed "strong odor." (V4, R524). There was slight putrefaction in the blood sample to the extent it blew the top off the test tube. (V4, R524). In following proper protocol for testing for AP, Paul allowed the samples to "cook" for 10 to 15 seconds before concluding the test was positive by the reaction he observed. (V4, R526, 527). He did not notate how long

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proof" that a male organ came in contact with the victim was elicited ***on cross-examination by defense counsel.*** Defense counsel later used this testimony to expand the time required for the perpetrator to disrobe both the victim and himself in order to have union between the male organ and the female sex organs. Because the time frame between the victim's abduction and Swafford's return to the campsite was short, the expanded time frame required for sexual activity was critical to Swafford's defense that he could not be the perpetrator.

the test took to get a reaction. (V4, R527, 536-37). Paul did not note whether he consumed the entire sample on the swabs. He doubted that he did. He did note that the swabs were damp when he opened the vials. (V4, V530). The swabs were taken 2-3 weeks before Paul tested them. (V4, R531). Storing the swabs in plastic test tubes was not ideal. (V4, R531).

SUMMARY OF ARGUMENTS

Claim 1. The trial judge held an evidentiary hearing regarding the acid phosphatase ("AP") tests. The 1982 AP test was positive, the 2004 AP test was negative. Because an evidentiary hearing was held, this Court's duty is to review the record in the light most favorable to the prevailing theory. It was the State's position below that the AP test could have been conducted at any time since 1982 and was not newly discovered evidence. This is Swafford's fourth postconviction motion, and the AP testing issue is time barred and not newly discovered. The reason for different AP test results in 1982 and 2004 could be degradation of the sample due to either a wet sample being saved, the passage of time, or both. Swafford should be precluded from raising an issue which he created by delaying 20 years before seeking AP testing.

If the evidence is newly discovered, it is not material. It was trial counsel, not the prosecutor, who pressed the medical examiner and FDLE serologist to testify that the presence of AP was positive proof of a male organ being in contact with the victim anally and vaginally. The theory of defense was that Swafford did not have time to abduct, disrobe, sexually batter anally and vaginally, dress, then shoot the victim nine (9) times.

All other postconviction claims were summarily denied, including whether 2004 test results on a white towel and hair in the victim's panties were newly discovered

evidence. Although DNA testing on the items is "new" evidence, the fact that Swafford's hair was not found on the victim is not newly discovered. The hair found on the panties 2004 could have been discovered at any point in the postconviction process. All hair recovered from the victim and crime scene was analyzed in 1982. The 1982 FDLE analyst's results showed that Swafford's hair was not on the victim, but that animal hair was in the victim's panties, sock and shoes ***and*** was recovered from the car Swafford drove. This Court's *de novo* review will demonstrate that the hair evidence is not newly discovered and that this "new" evidence is inculpatory, not exculpatory. Trial counsel knew in 1982 that Swafford's hair was not on Rucker, but he did not call the hair analyst as a witness, nor did he argue the lack of hair evidence.

Swafford relies heavily on the dissent from *Swafford v. State*, 828 So.2d 966 (Fla. 2002), in which three members of this Court believed that James Walsh was a viable suspect. In his brief, Swafford claims that the lack of his biological material on a white towel "found near the victim" exonerates him. The 1982 hair shows that the white towel was obtained from Walsh's van. Thus, according to Swafford's theory of exoneration, Walsh is now exonerated. Likewise, the animal hairs in both the victim's panties and in Swafford's abduction vehicle are inculpatory. That the additional hair found on the panties in 2004 does not match Swafford is insignificant because there were 5 men travelling in the car in which the victim was abducted.

Swafford's claim that "other" DNA results exonerate him is also misplaced. Many of the results are inconclusive or cannot exclude Swafford as a contributor. In any case, trial counsel knew the 1982 hair test results did not implicate Swafford but did not present that testimony.

The trial judge considered all new evidence and conducted a cumulative evidence analysis. The trial judge properly found that the outcome of the trial or sentence would not change. The new evidence is not exonerating: it is inculpatory. The negative AP test result, whether from degradation of the sample or otherwise contradicts the theory of defense. If Swafford merely sodomized the victim anally without penile contact in two areas, he did have sufficient time to commit these crimes. Walsh is now exonerated as a suspect. Animal hairs from Swafford's car are consistent with animal hairs in the victim's panties, sock and shoes. When postconviction evidence favors the State, that evidence is weighed in the cumulative evidence analysis.

Claim 2. The issue regarding testing by an unaccredited lab was resolved by this Court in *Swafford v. State*, 946 So. 2d 1060 (Fla. 2006). Not only is *Swafford, supra* the law of the case, but also this issue is procedurally barred. Additionally, Swafford's argument that he has a Due Process right to testing by a lab of his choosing has no merit.

Claim 3. Whether the lower court complied with this Court's order is procedurally barred. *Swafford v. State*, 946 So. 2d 1060 (Fla. 2006), is law of the case and specifically held that the trial judge complied with this Court's order.

ARGUMENTS

CLAIM I

THE TRIAL JUDGE PROPERLY FOUND THAT NEWLY-PRODUCED EVIDENCE WOULD NOT PRODUCE AN ACQUITTAL AT THE GUILT PHASE OR RESULT IN A LIFE SENTENCE

There are two parts to this issue: (1) the acid phosphatase test on which the trial judge held an evidentiary hearing; and (2) "other" test results on which there was no evidentiary hearing.

Standard of Review. The standard of review for claims on which an evidentiary hearing was held is: "when the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory." *Swafford v. State*, 828 So. 2d 966, 977 (Fla. 2002). Under that standard, this Court will not alter a trial court's factual findings if the record contains competent, substantial evidence to support those findings. As long as the trial court's findings are supported by competent, substantial evidence, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial

court." *Jones v. State*, 591 So. 2d 911, 915, 916 (Fla. 1991).

For claims in a successive postconviction motion which are summarily denied:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002).

Ventura v. State, 2 So. 3d 194, 197-198 (Fla. 2009).

The standard for newly-discovered evidence requires that, first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). In determining whether the evidence requires a new trial, the circuit court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence

which was introduced at the trial." *Heath v. State*, 3 So. 3d 1017, 1024 (Fla. 2009) (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991). Once it is determined that the newly discovered evidence would be admissible, "an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence." *Jones II*, 709 So. 2d at 521. "The trial court should also determine whether the evidence is cumulative to other evidence in the case" and consider "the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." *Id.; see also Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008). If postconviction evidence is favorable to the State, that evidence is considered in the cumulative analysis. *Johnston v. State*, 27 So. 3d 11, 20 (Fla. 2010); *Green v. State*, 975 So. 2d 1090, 1101 (Fla. 2008); *Wright v. State*, 995 So. 2d 324, 327-328(Fla. 2008).

Lower Court Order. The issues raised in this appeal were raised in Claim 1 in the motion to vacate. The trial judge denied relief:

> On the morning hours of February 14, 1982, the female victim, Brenda Rucker, was kidnapped from the gas station she worked at and ultimately her body was discovered several miles away shot nine times.
>
> On August 9, 1983, the Volusia County Grand Jury returned a three count Indictment against the Defendant.
>
> Count one was a charge of first degree premeditated murder. Count two was a charge of sexual battery. Count three was a charge of robbery with

a firearm.

The matter proceeded to jury trial before Circuit Judge Kim C. Hammond and on November 6, 1985, the jury returned its verdict finding the Defendant, Roy Clifton Swafford, guilty as charged to count one, first degree murder; guilty as charged to count two of sexual battery with great bodily harm; and not guilty as to count three which was armed robbery with a firearm.

The matter proceeded to a penalty phase and on November 12, 1985, the jury recommended death by a vote of ten to two.

On November 12, 1985, Judge Hammond imposed a sentence of death as to count one. The matter was affirmed on direct appeal to the Florida Supreme Court on September 29, 1988.

During the course of the post-conviction relief proceedings, Judge Hammond was recused and the matter was re-assigned to this Court.

The Defendant filed his Amended Fourth Motion for Post Conviction Relief on February 20, 2007. The amendment filed on that date raised two issues. First, there was newly discovered evidence regarding the DNA testimony presented during the jury trial. Second, was the argument that Fla. R. of Crim. Proc. 3.853 is unconstitutional on its face and as applied to the Defendant.

In addition, there appears to be a claim still holding over from the earlier post-conviction relief motions regarding the argument by the defense that Florida's capital sentencing scheme is unconstitutional pursuant to the United States Supreme Court decision of *Ring v. Arizona*, 122 S. Ct. 2428(U.S. 2002). Also to be addressed would be the cumulative effect argument of all the issues raised in the three previous post conviction relief motions and amendments.

A two day evidentiary hearing was held on the DNA issue on March 2 and March 3, 2009, before this Court. Testifying for the defense was its DNA expert from California, Alan Keel, and Shawn Johnson, from the

Florida Department of Law Enforcement, who in 2004 had done some re-testing of the original DNA evidence collected in this case.

Testifying for the state was Special Agent Keith Paul, who was with the FBI at the time of this evidentiary hearing and was with the Florida Department of Law Enforcement originally and testified on behalf of the state regarding DNA testing at the original jury trial back in 1985.

At the jury trial in 1985 Keith Paul testifying for the state told the jury while running chemical tests for semen or seminal fluid that he received a positive test for acid phosphatase (hereafter referred to as APT), which he told the jury was commonly found in seminal fluid. He later told the jury that a positive test would be a very strong indication that semen was present. (Trial transcript pages 1017-1020).

Also at the jury trial in 1985 the Medical Examiner, Dr. Arthur Botting, told the jury that based on the positive APT that it established there was seminal fluid, though he further told the jury that the test did not find any actual sperm cells. (Trial transcript 779-780).

At the jury trial in 1985 the state prosecutor in his closing argument briefly told the jury there was evidence of semen. (Trial transcript page 1339).

At this DNA evidentiary hearing, the defense witness, Shawn Johnson, testified that approximately twenty (20) years later in 2004, while with the Florida Department of Law Enforcement he re-tested the vaginal and anal swabs that had been preserved and the APT was negative indicating the lack of seminal fluid.

The other defense witness at this hearing, Alan Keel, testified that with a negative APT, then that would indicate the lack of seminal fluid and the state witnesses at the jury trial in 1985 should have conducted further tests to confirm or refute the presence of seminal fluid.

The standard for newly discovered evidence requires first, that the asserted facts must have been unknown by the trial court, by the parties,

or by the attorneys, at the time of trial, and it must appear that the Defendant or his trial counsel could not have known then by the use of due diligence, and, if so, secondly, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v State*, 709 So. 2d 512 (Fla. 1998).

This Court finds that the defense has met the first prong of the standard for newly discovered evidence and finds that the negative APT results from the re-testing of the swabs in 2004 qualifies as such.

But as to the second prong of the newly discovered evidence standard this Court finds that the defense has failed to show that the newly discovered evidence would probably produce an acquittal on retrial or if there was a conviction again that the newly discovered evidence would probably result in a sentence of life rather than death.

At the jury trial in 1985, the state produced an extremely strong circumstantial evidence case against the Defendant, even if the jury was not told of the presence of semen.

At the jury trial the state produced evidence as to date, time, and place, that the Defendant had the opportunity to commit the kidnapping and murder of the victim.

The state also showed that within a few hours after the kidnapping and murder of the victim the Defendant had in his possession the firearm that fired the nine bullets killing the victim.

The state further produced evidence at the trial that approximately two months after the murder the Defendant confided in a friend a situation how they could kidnap, rape, and murder a female by shooting her. The Defendant further told his friend words to the effect that such a murder bothers you for a while, but you get used to it. These words would infer that he committed such a murder in the past.

Also at the jury trial there was evidence presented to the jury that there were physical injuries suffered by the victim which was

consistent with sexual assault.

As to a sentence of death rather than life, Judge Hammond found that five aggravators applied and that there was only one mitigator.

Judge Hammond found that the murder was heinous, atrocious, and cruel; he found that the murder was cold, calculated, and premeditated; he found the murder was committed to avoid arrest; he found the Defendant had a prior conviction of a felony of violence which was a conviction for burglary with assault with a fact situation where the Defendant had shot a person in the face and hip with a .38 caliber revolver during the burglary with an assault; finally, Judge Hammond found the murder was committed while the Defendant was engaged in a sexual assault of the victim.

The only mitigator Judge Hammond found that had been established was that in the past the Defendant was an Eagle Scout.

Based on the strong circumstantial evidence case against the Defendant at the guilt phase and the findings of five aggravators and a minimal mitigator **even if testimony of semen being present is taken out of the equation that would still have left testimony that there was physical injuries to the victim consistent with sexual assault.**

Again, this Court finds that the newly discovered evidence would not have probably produced an acquittal at the guilt phase nor would it have probably resulted in the recommendation of life or a life sentence.

As to the second claim in the Defendant's Amended Fourth Motion for Post-Conviction Relief, this Court finds that Fla. R. Crim. Pro. 3.853 is constitutional both facially and as applied to this Defendant and that claim is also rejected.

As to the remaining claim of the Defendant, that Florida's capital sentencing scheme is unconstitutional per *Ring v. Arizona*, this Court rejects that argument and finds that Florida's capital sentencing scheme is constitutional.

> Finally, as to the cumulative effect argument, this Court finds that all of the issues argued in previous motions and the most current motions do not create a cumulative effect and would not have affected the outcome of the trial both at the guilt phase and the penalty phase and that argument is rejected.
>
> Accordingly, based on the foregoing, it is:
> ORDERED AND ADJUDGED that all the claims raised in the Defendant's Fourth Motion for Post Conviction Relief and Amended Fourth Motion for Post Conviction Relief are DENIED.
>
> Further, it is, ORDERED AND ADJUDGED that the Defendant's claim that Florida's death sentencing scheme is unconstitutional and the claim of cumulative effect are also DENIED. (emphasis supplied)

(V14, R2442-2445).

Whether the 2004 test results are newly discovered evidence. The State does not agree, and argued in the lower court (V4, R576-79), that the testimony at the evidentiary hearing established that the acid phosphatase evidence is not "newly-discovered" since that test has existed since 1982 and a re-test on the rape kit could have been conducted at any point in the prior three postconviction proceedings. Likewise, included in Swafford's Exhibit #2 were hair comparisons from 1982 which excluded Swafford. (V11, R1843-45, 1854-55). The additional hair that was discovered in 2004 on the victim's panties could have been found at any point since 1982 had collateral counsel requested re-examination for hair comparison. This is Swafford's fourth postconviction motion and the "new" test results are time barred.

The "new" evidence does not meet the first requirement of *Jones v. State*, 709 So. 2d 512 (1998), because there was no due diligence in performing an acid phosphatase test or re-examining the panties. *Cf. Hitchcock v. State*, 991 So. 2d 337, 349 (Fla. 2008) (evidence does not qualify as newly discovered because it could have been discovered by use of diligence). Collateral counsel was aware of this issue as far back as 1990 when the first postconviction motion was filed and alleged trial counsel was ineffective for failing to conduct an independent medical exam on the rape. (1stPCR120). The issue was also raised in the second postconviction motion. (2ndPCR68).

Arguments raised. Swafford claims the trial judge erred by:

(1) failing to consider all "exculpatory" DNA results (Initial Brief at 34, 35, 38);

(2) misinterpreting the second prong of the newly-discovered evidence standard(Initial Brief at 34);

(3) failing to reconcile how Judge Hammond could find statutory aggravator of during-a-sexual-battery (Initial Brief at 35);

(4) citing to facts from direct appeal that have been "discredited" (Initial Brief at 36);

(5) using the wrong standard to assess "prejudice" (Initial Brief at 36); [7]

(6) ignoring evidence from prior evidentiary hearings (Initial Brief at 37);

(7) failing to make fact findings or credibility findings (Initial Brief at 38, 41); and

[7] The State assumes this is the same issue as "the second prong" mentioned in (2).

(8) failing to cumulatively consider evidence from prior evidentiary hearings and evidence presented at trial (Initial Brief at 44).

(1) Trial judge failed to consider all "exculpatory" DNA results (Initial Brief at 34, 35, 38). Swafford claims the trial judge failed to rule on the white towel, hair in the underwear debris and "other inclusive testing." To the extent "other" testing is not specifically argued on appeal, the issue is abandoned and waived. *See Simmons v. State*, 934 So. 2d 1100, 1111 n.12 (Fla. 2006) *citing Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997)*; Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). The State will address the two items which are specifically alleged: the white towel and hair on the panties. The trial judge denied an evidentiary hearing on these claims finding "the State's argument more persuasive." Review of this finding is *de novo*.

White towel. At the Case Management Conference on February 28, 2008, the results of recent DNA testing were discussed. (V2, R210-218). The State argued that, even if the test results were accurate, Swafford could not meet the second prong of *Jones v. State*, 709 So. 2d 512 (1998), to show that the items were relevant or how the outcome would change. Swafford failed to establish any significance to the white towel. In fact, collateral counsel admitted "we don't know exactly where that white towel was found." (V2, R223). Swafford now claims at page 35 that the towel was "near that victim." The white flowered towel was found in **James Walsh's van** when

he was investigated. (V9, R1527, 1564, 1566). Walsh was cleared by the sheriff's investigation. Swafford argues that because the white towel does not have his hair, he is exonerated. Ironically, we now know that the towel was seized from Walsh's van, does not contain the victim's biological material, and exonerates Walsh. Swafford relies extensively on this Court's dissent in *Swafford v. State*, 828 So. 2d 966 (Fla. 2002) which discussed whether Walsh was the true perpetrator. However, as Swafford argues, lack of Rucker's biological material on the white towel exonerates the source of the towel. That is Walsh. In fact, none of the items seized from Walsh's van were tied to Rucker. (V9, R1564-1566; V10 R1764). Thus, reliance on this Court's dissenting opinion is unavailing given the new evidence and the new evidence of testing on the white towel exonerates Walsh.

Hair on panties. Marianne Hildreth, FDLE hair analyst in 1982, found one hair in the victim's panties: an animal hair. (V9, R1526; V10, R1772; V11, 1845). Animal hair was also found in the victim's sock and shoes in 1982. (V11, R1845). Animal hair was found in the 1971 Chevy which Swafford was driving the night of the murder. (V9 R1530, 1546). In 2004, analyst Shawn Johnson pulled one more possible hair from the panties. (V10, R1770). It was this second hair that was sent to MitoTyping. Neither Johnson nor MitoTyping identified the hair as a "pubic" hair as Swafford says in his Initial Brief at 29. (V11, R1868).

The "new" test result (V1, R634) which shows a hair pulled in 2004 from the victim's underwear does not belong to either the defendant or the victim proves nothing. Because there was animal hair in the victim's panties, sock and shoes, it is probable that Swafford sodomized the victim in the 1971 Chevy. The fact that Swafford's hair was not found on Rucker is not surprising. Five men travelled in that vehicle from Tennessee. The men had been at the car races and camping. *State v. Swafford*, 533 So. 2d 270, 272 (Fla. 1988) (DAR 796, 875). Unquestionably, there would be other hairs besides Swafford's in the car. In fact, other hairs were obtained from the 1971 Chevy and submitted to FDLE. None of these hairs matched Rucker or Swafford and trial counsel knew this but did not use that evidence at trial. (V11, R1983).

Trial counsel deposed the hair analyst, Marianne Hildreth, before trial. (V11, R1969-1985). Trial counsel was aware Swafford was not a match to any hairs found on Rucker. (V11, R1977-78, 1984). Trial counsel did not call Hildreth or use the hair evidence. The logical inference is that, on balance, the animal hair in both the victim's panties and the abduction vehicle outweighed any significance of Swafford's hair not being on Rucker, given the location and victim's extended presence at the crime scene. *Cf. Sears v. Upton*, 130 S.Ct. 3259, 3266-3267 (2010) (holding that *Strickland* requires a court to "speculate as to the effect of the new evidence-regardless of how much or

how little mitigation evidence was presented during the initial penalty phase.")

If Swafford sodomized the victim at the crime scene and not in the car, there is ample opportunity for a foreign hair to become lodged on the panties. The victim was left face down on the ground in a remote wood area for 32 hours. She had a hole in her underwear from one of the gunshot wounds. (V12, R2143).[8] *Cf. Overton v. State*, 976 So. 2d 536, 568 (Fla. 2007) (evidence that the hairs came from someone other than Overton or the victims would fail to prove or disprove any theory in this case because it is impossible to establish when or how the hairs may have become attached to the tape); *King v. State*, 808 So. 2d 1237 (Fla. 2002) (upholding the trial court's finding that the defendant could not meet the requisite showing that DNA testing of hair would give rise to a reasonable probability that he would be acquitted or receive a reduced sentence because it was impossible to determine when, where, or how hair transferred to the victim's nightgown); see also *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004) (affirming the trial court's denial of the motion for DNA testing of hairs where the defendant, victim, and person that the defendant alleged was the perpetrator all lived in the same home; hairs from all three would have been deposited throughout the home;

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8 The area was a dump site. Beer bottles, cigarette butts, and paper bags were found at the crime scene. The crime scene photos from trial show a littered site in the woods. (DAR1627, 1629; State Trial Exhibits #10, 11). The victim was abducted sometime between 6:18 and 6:20 a.m. on February 14 and the police locate her body at 2:38 p.m. on February 15. *Swafford v. State*, 533 So. 2d 270, 272 (Fla. 1988); (DAR 746).

and proof that the hair was not the defendant's would not establish that the defendant was not at the crime scene or did not commit the murder); *Tompkins v. State*, 872 So. 2d 230 (Fla. 2003) (affirming the trial court's denial of the motion for DNA testing of hairs because the hairs were unreliably contaminated due to the location of the victim's remains in a shallow grave).

Summary denial. Swafford claims the trial judge did not consider Claims 2 and 3. Those claims were denied at the Case Management Conference. (V2, 192-240; V8, R1302). There was no issue of material fact to be determined, and summary denial was appropriate. *See Overton v. State*, 976 So. 2d 536, 564 (Fla. 2007).

Materiality. As the trial judge held, the "new" test results did not establish that, had this evidence been available and admissible, they would probably produce an acquittal or life sentence on retrial. In fact, they proved just the opposite: that the white towel belonged to Walsh, that animal hairs in the victim's panties is consistent with animal hairs in the car Swafford drove, and that the absence of AP could mean that Swafford anally sodomized the victim anally and did not have penile contact with both vagina and anus. Thus, the timeline is shortened and he was perfectly capable of completely all activities.

Last, the State notes that, regarding the "other" items tested, the State did not admit any of the items into evidence. This necessarily negates the relevance of the test

results since the results would have to disprove guilt, not merely contradict the State's evidence. All that the "other" 2004 test results show is that after 20 years, results are either inconclusive or Swafford could not be excluded as a contributor.

Swafford next argues that the new evidence negates the sexual battery conviction; however, there was other evidence of sexual battery: the medical examiner testimony the victim's "rectum had multiple superficial lacerations and the skin around the anus was covered with blood," that it was "very probable" she had been sexually molested; (V12, R2146), blood in her underwear (V1, R634); and Swafford's statements to Ernest Johnson that they could get a girl, do anything they want to her, shoot her in the head twice, not get caught, and that it bothers you for a while but you "get used to it." *See Swafford v. State*, 533 So. 2d 270, 272, 273 (Fla. 1988).

Even if the sexual battery conviction were stricken, it would not change the outcome. Swafford was convicted of first-degree murder.[9] Striking the sexual battery conviction would not affect the first-degree murder conviction which was premeditated: only a felony-murder conviction would be affected. Moreover, the State could pursue the kidnap charge as an underlying felony for both felony murder and the

[9] Swafford was charged with first-degree premeditated murder. (DAR1509). The State argued premeditated murder. (DAR1332). The verdict was first-degree murder. (DAR1425). This Court affirmed the cold, calculated and premeditated aggravating circumstance. *Swafford v. State*, 533 So. 2d 270, 272 (Fla. 1988).

aggravating circumstance of during-a-felony. Last, elimination of the sexual battery aggravator would be harmless, given the five (5) aggravating which include HAC and CCP, two of the weightiest aggravators, and the prior violent felony of burglary with assault during which he shot the victim in the face and hip. (DAR1617).

(2) Trial judge misinterpreted the second prong of the newly-discovered evidence standard (Initial Brief at 34). Swafford argues that the trial judge should have considered the "other" test results in (1) above, together with the AP test result. The lower court order specifically states:

> Finally, as to the cumulative effect argument, this Court finds that all of the issues argued in previous motions and the most current motions do not create a cumulative effect and would not have affected the outcome of the trial both at the guilt phase and the penalty phase and that argument is rejected.

(V14, R2445).

As discussed above, there is nothing in the "other" test results that is exculpatory. The theory of defense was that Swafford did not have time to commit anal and vaginal sexual assaults and had no motivation to commit the assault. The 2004-2005 test results are negative for AP, which would have gutted the theory of defense.

Contrary to Swafford's assertion at page 39 that it was the prosecutor who pressed the medical examiner to state that AP "absolutely establishes the presence of a male organ", **it was defense counsel who asked these questions.** (V12, R2157-58).

The entire case hinged on the timeline. Brenda Rucker was abducted between 6:18 and 6:20 a.m. Swafford was back at the campsite at 7:04 a.m. The FINA station where Rucker worked was 6 miles from Sugar Mill Ruins where her body was found. *Swafford v. State*, 533 So. 2d 270, 272 (Fla. 1988). The defense argument was that Swafford could not be the perpetrator because there was no time to drive the 6 miles, remove Rucker's clothing, rape her anally and vaginally, put her clothes back on, shoot her, reload and shoot her some more, then get back to the campsite by 7:04 a.m.

During direct examination of the medical examiner, the only testimony was that the analysis of the anal and vaginal swabs showed AP, a "constituent of seminal fluid." (V12, R2147). On cross-examination, defense counsel made a point of saying that the victim had to have been disrobed in order to be violated. (V12, R2151). ***Defense counsel*** then proceeded:

> Q. Now, if I may ask, sir, the presence of prostatic acid phosphatase both in the anus and in the vaginal area orifice, there is no other way that that can get in there, is there?
>
> A. No, sir.
>
> Q. It absolutely establishes the presence of a male organ –
>
> A. Yes, sir.
>
> Q. –in that area?
>
> A. Yes, sir.

Q. So it's –

A. Not only the male organ there, but seminal fluid being ejaculated into the orifices.

Q. That would have to have been?

A. Yes, sir, because the acid phosphatase is a component of seminal fluid.

(V12, R2157-58).

Likewise, during the testimony of Keith Paul, the FDLE serology analyst, the prosecutor questioned about the tests run. Mr. Paul testified that he received a positive test for AP, a negative test for choline, and a negative finding for sperm cells. (V11, R1989-90). **Mr. Paul stated "and in the absence of sperm cells, I could not conclusively say that that – that these items contained semen."** (V11, R1991). Mr. Paul got the same results on the both the anal and vaginal swabs. (V11, R1992). ***On cross-examination by defense counsel*** Mr. Paul was asked regarding the AP test:

Q. As an expert, can you say whether or not that's proof positive of the presence at that area of the male sex organ?

A. I'm not sure I understand your question.

Q. Well, I mean, where you find acid phosphatase, isn't – isn't that, or is it not positive proof that there has been a male organ at that place where it's found?

A. The particular test that I use, yes. Acid phosphatase is found in a

variety of substances and is found in vaginal fluid, but in the male prostate, its – it's like four hundred times the concentration found anywhere else in nature.

Q. Yes, sir. Now, essentially, what you're saying is that there had to have been a male organ at the – where these swabs were taken from?

A. Well, not necessarily the male organ there. I mean, you could have sexual contact at one point, have some type of drainage or transfer. It just depends on where the swabs were taken and the situation.

Q. I see. But – well, given a vaginal area and an anal area and its presence in both, there would have to have been a male organ at one of the other, is that correct?

A. Correct.

Q. All right, sir. Now, as I understand it, you found it present at both areas – of the swabs from both areas.

A. The swabs were represented as coming from those areas, and they were positive for the vaginal and anal swabs.

Q. All right, sir. And, sir, you did – did you find blood in the area represented by the anal swab?

A. That's correct.

(V11, R1993-94). In closing argument, defense counsel used the occurrence of a sexual encounter to his advantage. He argued Swafford was not the perpetrator because Swafford had no motivation to want or need sex: he had spent the evening in an "adult relationship" with Sunshine Atwell, the dancer from the Shingle Shack. (DAR1365-66, Appendix 1 attached). Further, Swafford could not be the perpetrator because of the

short period of time. Defense counsel argued that the medical examiner's testimony established the victim was dressed when she was killed and "at least a substantial part of her clothes" had to be removed in order to be sexually violated. (DAR1366, Appendix 1). Counsel argued that:

> So now we have sort of a three-part situation in which the young woman has got to be taken and violated, but she has to be undressed first, partially at least, and then that happens, and then she has to be robed again or dressed, and then she has to be shot nine times, which she was, and then she had to be taken up to Sugar Mill. This has got to happen between the hours of 6:18 . . .The Johnsons say that he was back there at daybreak . . So that means this had to be done at approximately – in approximately twelve minutes.

(DAR1357-58). Counsel reiterated that this was not the "act of a man who had spent two and a half hours in a mature relationship with Patricia Atwell." (DAR1368, Appendix 1). In comparison, the prosecutor's closing argument did not focus on the AP test, but merely mentioned that the victim was raped anally and there was evidence of a component of semen. (DAR1339, Appendix 2 attached). In rebuttal closing argument, the prosecutor referred to only anal abuse. (DAR 1386, Appendix 2). There was no further mention of AP or semen.

As collateral counsel alleged in his second postconviction motion, the theory of defense was that Swafford simply did not have time to commit the criminal acts. (2nd

PCR80-81). In fact, trial counsel testified at a 1997 postconviction hearing[10] that the defense strategy was about timelines and:

> We had an alibi witness up until six o'clock that morning. And the alibi for the preceding three hours was a very vigorous session with a very effective woman. And that plus leaving her place, going up to the Fina station and kidnapping Brenda Rucker and then taking her out in the area of Tomoka State Park and raping her, then reclothing her and shooting her nine times with three different kinds of ammunition didn't sound very credible to me.

(3rdPCR234, Appendix 4 attached). Further, the fact that Swafford was back to the campsite within a short period of time afforded a small window of opportunity. (3rd PCR234-35, Appendix 4).

The trial judge did consider the evidence cumulatively, specifically stated that in his order, and that finding is supported by competent substantial evidence.

(3) Failing to reconcile how Judge Hammond could find statutory aggravator of during-a-sexual-battery (Initial Brief at 35). Swafford argues that the lower court judge did not "reconcile" how the trial judge (Judge Hammond was the trial judge; Judge Hutcheson the postconviction judge) could find the during-a-felony aggravating circumstance. The jury convicted Swafford of sexual battery. Even if

[10] Although claims of ineffective assistance of counsel had been raised in the first and second postconviction motions, the hearing at which trial counsel Ray Cass testified was about other suspects. This Court ordered a hearing in *Swafford v. State*, 679 So. 2d 736 (Fla. 1996). The trial theory of defense was explored by collateral counsel to establish the relevance of other suspects.

there was no AP (the State does not concede the negative result indicate anything other than the degradation from the passage of time), there was ample evidence of sexual battery. As this Court held in *Johnston v. State*, the fact that 2009 test results showed no blood on an item does not mean there was never any blood on the item, as 1984 test results showed. *Johnston v. State*, 27 So. 3d 11, 20 (Fla. 2010). Even if the during-a-sexual-battery aggravator were stricken, Swafford kidnapped Brenda Rucker, and kidnapping is an enumerated felony for the during-a-felony aggravating circumstance. §921.141(5)(d), Fla.Stat.(1981). Although kidnap was not charged in the indictment, the facts at trial established this aggravator beyond a reasonable doubt. The State is not required to charge the felony during the guilt phase in order to argue the murder was committed during the commission of a felony. *Turner v. State*, 530 So. 2d 45, 50 (Fla. 1987); (Section 921.141(5)(d), Florida Statutes, does not require that a defendant be charged or convicted of the enumerated felonies, it requires only that the aggravating circumstances be proven beyond a reasonable doubt). *Preston v. State*, 607 So. 2d 404, 407-408 (Fla. 1992). In fact, this Court noted in its opinion in the third postconviction appeal that the victim's being abducted also supported HAC and committed-during-felony. *Swafford v. State*, 828 So. 2d 966, 970 n.2 (Fla. 2002).

(4) The trial judge cited to facts from direct appeal that have been "discredited;" (5) used the wrong standard to assess "prejudice" (Initial Brief at

36); and <u>(6) ignoring evidence from prior evidentiary hearings</u> (Initial Brief at 37). Swafford claims that the trial judge's recitation of the facts of the case in the order is not accurate because those facts, which are taken directly from this Court's opinion in *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), have been "discredited." Although not specifically listed, it appears the facts that have been "discredited" include:

- Dr. Botting and Keith Paul's testimony (Brief at 39);[11]

- Roger Harper was paid a reward (Brief at 41);

- Paul Seiler's identification did not match Swafford (Brief at 42);

-evidence that James Walsh was a "more likely suspect" (Brief at 44).

- evidence at trial which this Court has already affirmed as admissible; i.e., statements of Roger Harper and Ernest Johnson, ownership of the gun (Initial Brief at 44).

As to the trial testimony, defense counsel elicited the testimony now criticized. Keith Paul was clear that he could not conclusively identify semen because there were no sperm cells. Further, the difference in test results could very well be due to the passage of time. Swafford acknowledges that the samples 'had not been properly

[11] The State notes again that the testimony about "proof positive" of a male organ and "absolutely establishes the presence of a male organ" are phrases used by defense counsel to elicit answers from the two witnesses and ***not,*** as Swafford alleges, questions by the prosecutor.

stored or maintained." *Initial Brief*, at 8. The evidence was located at the Volusia County Sheriff's Office in the evidence vault. (V1, R29). The original swabs were not stored properly in 1982 and Keith Paul noted they had been placed in plastic vials wet. Even the defense expert, Mr. Keel, agreed that bacteria or decomposition could negate the AP test. (V3, R371, 400, 401). The trial judge discussed the conditions in which the evidence was stored. (V1, R90-91). Storage conditions were never established. Insofar as "discrediting" their testimony helps Swafford: it does not, as previously discussed, because it would obliterate the defense of time and motivation for sex. Swafford recognized this theory at page 44 of his brief which states: "This compressed time period gave little time to commit the crime." Further, there was ample evidence of anal assault without the AP which was not a conclusive result for semen and the jury knew that.

The reward to Roger Harper was raised in the first postconviction motion and the trial judge held:

> Roger Harper's seeking of a reward from FINA was not connected with the state. There is no allegation the state had knowledge of such, and this information was equally accessible to the defense. *Roberts v. State*, 15 F.L.W. S450 (Fla. Sept. 6, 1990). The court finds there is no possibility this affected the outcome. *Duest, supra.*

(1st PCR437, Appendix 3 attached.) This Court affirmed the trial court. *Swafford v. State*, 569 So. 2d 1264, 1267 (Fla. 1990). Additionally, the owner of PetCon – the

organization that rewarded Harper – testified at trial and was subject to cross-examination. (DAR727-737).

Paul Seiler's was a *defense* witness at trial. He was specifically called to testify that his description of the man he saw leaving the FINA store the morning of February 15, 1982, did not match Swafford. (DAR1267-69). The jury was aware Seiler had given a description that did not match Swafford, and that was argued in closing. (DAR1369). Defense counsel attempted to present the BOLO based on Seiler's description which did not match Swafford. The BOLO was excluded, and this Court upheld the exclusion. *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988).

This Court has already ruled on the *Brady* issue regarding James Walsh. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002). The weight of any James Walsh involvement has now been diminished by the test results – available since 1982 – that show no hair from Walsh's van match the victim. The white flowered towel Swafford claims was found near the victim and does not contain his hair was actually found in James Walsh's van when he was investigated. (V9, R1527, 1564, 1566). Not only was Walsh was cleared by the sheriff's investigation in 1982, Swafford's Exhibit #2 establishes that the items seized from his van were not tied to Rucker; i.e., the blue rag, white towel and all other evidence seized from Walsh's van (V9, R1564-1566; V10 R1764).

Not only is there no new evidence to factor into a cumulative evidence analysis, but the new evidence is actually detrimental to the defense. If, as the evidence might show, Swafford merely sodomized Ms. Rucker anally, that shortens the time frame required and makes this crime one of violence rather than sexual desire: disproving the theories of defense advanced at trial.

The trial judge conducted a proper cumulative analysis, and his ruling is supported by competent substantial evidence.

Swafford also argues the trial judge used the wrong standard to "assess prejudice." (Brief at 36). This appears to be the same argument presented as the cumulative-evidence assessment.

(7) The trial judge failed to make fact findings or credibility findings (Initial Brief at 38, 41). The trial judge made the following fact findings:

> At the jury trial in 1985 Keith Paul testifying for the state told the jury while running chemical tests for semen or seminal fluid that he received a positive test for acid phosphatase (hereafter referred to as APT), which he told the jury was commonly found in seminal fluid. He later told the jury that a positive test would be a very strong indication that semen was present. (Trial transcript pages 1017-1020).
>
> Also at the jury trial in 1985 the Medical Examiner, Dr. Arthur Botting, told the jury that based on the positive APT that it established there was seminal fluid, though he further told the jury that the test did not find any actual sperm cells. (Trial transcript 779-780).
>
> At the jury trial in 1985 the state prosecutor in his closing argument

briefly told the jury there was evidence of semen. (Trial transcript page 1339).

At this DNA evidentiary hearing, the defense witness, Shawn Johnson, testified that approximately twenty (20) years later in 2004, while with the Florida Department of Law Enforcement he re-tested the vaginal and anal swabs that had been preserved and the APT was negative indicating the lack of seminal fluid.

The other defense witness at this hearing, Alan Keel, testified that with a negative APT, then that would indicate the lack of seminal fluid and the state witnesses at the jury trial in 1985 should have conducted further tests to confirm or refute the presence of seminal fluid.

The standard for newly discovered evidence requires first, that the asserted facts must have been unknown by the trial court, by the parties, or by the attorneys, at the time of trial, and it must appear that the Defendant or his trial counsel could not have known then by the use of due diligence, and, if so, secondly, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v State*, 709 So. 2d 512 (Fla. 1998).

This Court finds that the defense has met the first prong of the standard for newly discovered evidence and finds that the negative APT results from the re-testing of the swabs in 2004 qualifies as such.

But as to the second prong of the newly discovered evidence standard this Court finds that the defense has failed to show that the newly discovered evidence would probably produce an acquittal on retrial or if there was a conviction again that the newly discovered evidence would probably result in a sentence of life rather than death.

At the jury trial in 1985, the state produced an extremely strong circumstantial evidence case against the Defendant, even if the jury was not told of the presence of semen.

At the jury trial the state produced evidence as to date, time, and place,

that the Defendant had the opportunity to commit the kidnapping and murder of the victim.

The state also showed that within a few hours after the kidnapping and murder of the victim the Defendant had in his possession the firearm that fired the nine bullets killing the victim.

The state further produced evidence at the trial that approximately two months after the murder the Defendant confided in a friend a situation how they could kidnap, rape, and murder a female by shooting her. The Defendant further told his friend words to the effect that such a murder bothers you for a while, but you get used to it. These words would infer that he committed such a murder in the past.

Also at the jury trial there was evidence presented to the jury that there were physical injuries suffered by the victim which was consistent with sexual assault.

As to a sentence of death rather than life, Judge Hammond found that five aggravators applied and that there was only one mitigator.

Judge Hammond found that the murder was heinous, atrocious, and cruel; he found that the murder was cold, calculated, and premeditated; he found the murder was committed to avoid arrest; he found the Defendant had a prior conviction of a felony of violence which was a conviction for burglary with assault with a fact situation where the Defendant had shot a person in the face and hip with a .38 caliber revolver during the burglary with an assault; finally, Judge Hammond found the murder was committed while the Defendant was engaged in a sexual assault of the victim.

The only mitigator Judge Hammond found that had been established was that in the past the Defendant was an Eagle Scout.

Based on the strong circumstantial evidence case against the Defendant at the guilt phase and the findings of five aggravators and a minimal mitigator **even if testimony of semen being present is taken out of the**

> **equation that would still have left testimony that there was physical injuries to the victim consistent with sexual assault.**
>
> Again, this Court finds that the newly discovered evidence would not have probably produced an acquittal at the guilt phase nor would it have probably resulted in the recommendation of life or a life sentence.

(V14, R1443-45). Swafford's argument has no merit.

(8) Trial judge failed to cumulatively consider evidence from prior evidentiary hearings and evidence presented at trial (Initial Brief at 44, 49-53). This argument repeats prior arguments as to the guilt phase; however, it also addresses the penalty phase. Swafford claims the lack of AP, considered together with mitigation which was not presented, requires a life sentence. As previously discussed, even if the sexual battery conviction were stricken, the during-a-felony aggravator would still stand. As to the mitigation recited by Swafford on pages 49-53, that evidence was all alleged in the first postconviction motion in Claim 4 alleging ineffective assistance at the penalty phase. (1st PCR131-143). The issue was raised as Claim 3k on appeal. This Court found no merit to the claims of ineffective assistance at the guilt and penalty phase and specifically held that:

> Regarding the evidence Swafford now advances, the court stated that Swafford's father would not testify at trial and that his mother could not and that the now-advanced information would not have changed the result. We agree that Swafford's claims fail to meet the prejudice test of Strickland and hold that the court did not err in refusing to hold an evidentiary hearing on claims 3 and 4. *Accord Roberts; Correll*.

Swafford v. State/Dugger, 569 So. 2d 1264, 1268 (Fla. 1990). The issue was also raised in the second postconviction motion as Claim 6 (2nd PCR91-114). It was Claim 7 on appeal. This court affirmed the lower court finding of procedural bar. *Swafford v. State*, 636 So. 2d 1309, 1311 (Fla. 1994).

The trial court properly considered the "new" evidence, conducted a cumulative evidence analysis, and his findings are supported by competent substantial evidence. *See Preston v. State/McDonough*, 970 So. 2d 789, 801 (Fla. 2007) (postconviction DNA testing showed pubic hair on victim's belt did not belong to defendant); *Hildwin v. State*, 951 So. 2d 784, 789 (Fla. 2006) (newly discovered DNA evidence which refuted trial serology evidence that Hildwin's bodily fluids were on the victim's panties would not produce acquittal on retrial).

In the present case, Swafford was known to be in the area at the time the victim was abducted. When he dropped off Patricia Atwell at 6:00 a.m., he headed north. The route between where Swafford left Atwell and the campsite took him right past the FINA station where the victim worked. The victim was found in a remote wooded area near the park where Swafford and his friends were camping. The friends had been at the Shingle Shack the evening before the murder and returned there the night of the murder. One of the men had an altercation outside, and Swafford pulled a gun. When informed the police were on their way, Swafford ditched the gun in the Shingle Shack

bathroom. The gun was stolen from Nashville where Swafford lives and his friends placed the gun on him before the trip to Daytona. Subsequently, one of the friends that came to Daytona tipped off the police that the gun belonged to Swafford. When the gun was test fired, it matched the bullets that killed the victim. Swafford made statements to Ernest Johnson that he could just pick up a girl, do what he wanted to her, shoot her twice in the head, and not get caught. He also said it bothers a person for awhile, but "you get used to it." Further, there was testimony that Swafford attempted to escape and told a reporter "We're murderers" in reference to himself and his co-escapee. (DAR1228). Nothing in the present appeal denigrates the sufficiency of the evidence against Swafford. The evidence has only gotten stronger and any doubts this Court may have had about Walsh have now been dispelled.

As to the death sentence, the trial judge found, and this Court affirmed, five (5) aggravating circumstances including HAC, CCP and prior violent felony. Nothing in this appeal calls any one of those aggravators into question. When this Court considers the weight of the aggravating circumstances, it has consistently recognized that "CCP and HAC are two of the weightiest aggravators in Florida's statutory sentencing scheme." *Bradley v. State*, 33 So. 3d 664, 680 (Fla. 2010) (*quoting Morton v. State*, 995 So. 2d 233, 243 (Fla. 2008)). Necessarily then, when these two aggravators are present, the mitigating circumstances must be of considerable weight to overcome

them. *Abdool v. State*, 53 So. 3d 208, 224 (Fla. 2010). Similarly, the prior violent felony aggravator is regarded as one of the weightiest aggravators. *See Jones v. State*, 998 So. 2d 573 (Fla. 2008).

The trial judge properly held that nothing presented in the fourth postconviction motion would change the outcome of either the guilt or penalty phase.

CLAIM II

THE ISSUE REGARDING TESTING BY AN UNCERTIFIED LABORATORY IS PROCEDURALLY BARRED AND HAS NO MERIT.

Swafford re-argues the certified-lab argument he presented in a prior appeal and this Court rejected. This issue is procedurally barred and has no merit. Swafford had requested testing by an independent lab, the trial judge denied that testing because the lab was not certified as required by Rule 3.853, Fla.R.Crim.P, and Swafford appealed. This Court held:

> We affirm the circuit court's order, including its denial of Swafford's motions for an additional evidentiary hearing under rule 3.853 **and his motion seeking further DNA testing by a laboratory not certified as required by rule 3.853(c)(7).**

Swafford v. State, 946 So. 2d 1060, 1061 (Fla. 2006). This Court's decision in *Swafford, supra*, is law of the case.

This Court has consistently ruled held that DNA testing must be conducted by a certified lab as required by Florida law. *See Wright v. State,* 995 So. 2d 324, 328 (Fla.

2008).

Swafford's reliance on *District Attorney's Office for the 3rd Judicial District v. Osborne*, ___U.S.___, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009) and *Skinner v. Switzer*, ___U.S. ___, 131 S.Ct. 1289 (2011), is misplaced. The Court in *Osborne* held that a defendant has no constitutional right to obtain postconviction access to the State's evidence for DNA testing. Osbourne claimed the Due Process Clause and other constitutional provisions gave him a constitutional right to access the DNA evidence for testing. The Court noted that: "A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Osbourne*, 129 S.Ct. at 2320. Thus, States have more flexibility in framing postconviction procedures. *Id*. The Court acknowledged the adequacy of postconviction procedures in Alaska (the procedures Osborne challenged) which provides for release of evidence upon a showing it is newly available, has been diligently pursued, and is sufficiently material. Id. Alaska did not have a specific rule for postconviction DNA testing; however, the Court relied on postconviction discovery rules in finding adequate guidelines. Florida does have a specific rule for postconviction DNA testing, and that rule fits squarely within the parameters outlined as adequate by the Court.

In *Skinner*, the Court merely held that Section 1983, U.S. Code, was the proper vehicle for raising constitutionality of a Texas postconviction DNA statute. The Court

noted that in Osborne, they left unresolved the question of the proper vehicle for raising the issue, and concluded that Section 1983 was the proper vehicle. Like *Osbourne, Skinner* did not hold that a defendant has a due process right to postconviction DNA testing. Rather, it held that if a defendant challenges the constitutionality of state action, it may be brought in a §1983 (civil rights) action. The Court specifically limited the decision to the procedural issue. *Skinner*, 131 S.Ct. at 1300.

This Court has previously denied claims that Florida's Rule 3.853, Fla.R.Crim.P. is unconstitutional and denies access to evidence. *Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005); *Cole v. State*, 895 So. 2d 398, 403 (Fla. 2004). *Osborne* has confirmed those holdings and *Skinner* is nothing more than a federal jurisdictional issue.

CLAIM III

THE TRIAL COURT DID NOT ERR IN LIMITING THE SCOPE OF THE EVIDENTIARY HEARING TO LEGALLY SUFFICIENT ISSUES.

Swafford claims the lower court failed to comply with this Court's remand order dated March 26, 2004. (Initial Brief at 77-78). This issue is procedurally barred and has no merit. This Court held in *Swafford v. State*, 946 So. 2d 1060, 1061 (Fla. 2006), that the trial judge had complied with the March 25, 2004, order. A review of the record in the prior appeal, Case No. SC05-242, shows that the trial court did address

the "contamination" issue in its order (pages 587-90, record on appeal, Case No. SC05-242) and the "contamination" issue was briefed and before this Court in 2005-2006. This Court's decision in *Swafford, supra*, is law of the case.

As to Swafford's claim that an evidentiary hearing was required on the hairs in the white towel and underwear, this argument repeats the arguments in Claim 1, and the State relies on the response therein.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Florida Bar #410519
444 Seabreeze Blvd., 5th Floor
Daytona Beach FL 32118
(386)238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Terri Lynn Backhus, Special Assistant CCRC-South, 101

NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this ___ day of May, 2011.

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

_____
BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL