IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO5-242

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 circuit court's denial of Rule 3.850 and 3.853 motions, filed in 2006.

"PC-R8. " – Record on appeal in the current appeal on the circuit court's order of August 12, 2010.

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. The resolution of the issues in this action will determine whether Mr. Swafford lives or dies. A full opportunity to air the issues through oral argument is more than appropriate in this case, given the seriousness of the claims involved including Mr. Swafford's actual innocence. Therefore, Mr. Swafford, through counsel, respectfully urges the Court to permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

Introduction

> 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][1]

For nearly 30 years, Mr. Swafford has steadfastly maintained his innocence of the Brenda Rucker murder. The State presented an entirely circumstantial case. No physical evidence linked Mr. Swafford to the crime. Hearsay testimony of a convicted felon in jail on pending charges and contradictory testimony about a .38 pistol that may have fired the nine different bullets found in the victim was the only circumstantial evidence against Mr. Swafford. But the alleged murder weapon that was not tested until one year after the crime, could not be conclusively linked to Mr. Swafford. An eyewitness's composite sketch did not resemble Mr. Swafford, but did strongly resemble another suspect.

In 2002, Mr. Swafford was narrowly denied a new trial based on *Brady v. Maryland*, 373 U.S. 83 (1963) violations by a 4-3 decision of this Court. Four

[1]Justice Pariente concurred in Justice Anstead's dissenting opinion.

justices found Mr. Swafford's *Brady* claims to be procedurally barred because his state-provided collateral counsel failed to locate a suspect withheld by the State and previously disclosed to Mr. Swafford's trial counsel.[2] Three members of this Court were so disturbed by the majority's opinion, they authored two lengthy dissenting opinions. The trial court has been reversed and the DNA issue remanded by this Court twice. This was the backdrop upon which Mr. Swafford has fought for proper DNA testing.

After filing a Rule 3.853 DNA motion, a hearing was held to determine which pieces of evidence were available for testing but the trial court, at the State's urging, deferred an evidentiary hearing on authenticity and contamination issues to "another day." Mr. Swafford has never gotten "another day" on the contamination issue.

Under Rule 3.853, only Florida Department of Law Enforcement (FDLE) was authorized to conduct nuclear STR DNA testing on serological and biological evidence. After failing to obtain a result, the hair evidence was submitted to Mitotyping Technologies for testing because FDLE did not have the capability to conduct mitochondrial DNA testing on hair evidence.

The results of the DNA testing by FDLE showed:

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

--male DNA on a hair found on a white towel with a flower pattern near the victim did **not** match Mr. Swafford;

--Fingernail scrapings of the victim yielded 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);

--FDLE discovered 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. Mr. Swafford argued that a hair follicle can logically only come from the person from whom the hair was extracted. It cannot originate from two persons. Though Mr. Swafford argued that some other cellular matter contaminated the hair originally before it was mounted or in the mounting solution used by FDLE in the 1980s, he was denied an evidentiary hearing on this issue.

-- FDLE's testing indicated that no acid phosphatase was found and no semen was identified on vaginal and anal swabs from the victim.

Because FDLE did not have the ability to do mitochondrial DNA testing, it sent the hair samples to Mitotyping Technologies. Mitotyping's test results showed that:

-- a hair found in the victim's panties did **not** belong to the victim or Mr. Swafford.

The conclusive results by FDLE and Mitotyping show that Mr. Swafford was **not** a contributor to the DNA samples. Had Mr. Swafford defense counsel had this information, he could have argued that Mr. Swafford was not implicated in this crime. None of this information was known to Mr. Swafford's jury.

Despite evidence of innocence, the trial court rejected this exonerating

evidence and discounted the weight of the DNA results that showed Mr. Swafford is innocent.

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 the mistaken belief 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)(Barkett dissenting).

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)(Pariente, Quince, Anstead dissenting).

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. The State claimed Ms. Rucker's blood samples had been destroyed making DNA testing impossible (PC-R7. 76). The lower court denied the DNA motion and Mr. Swafford appealed this denial to this Court on September 25, 2003. Mr. Swafford filed a motion for post-conviction relief arguing that recent technological advancements in DNA testing amounted to newly-discovered which would prove his innocence. (PC-R6. 13). Within this claim[3], Mr. Swafford alleged that the destruction of the blood sample was in bad faith and warranted relief under *Arizona v. Youngblood*, 488

[3]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.

U.S. 51 (1988).[4] (PC-R6. 20). Mr. Swafford specifically requested that an evidentiary hearing be conducted on his newly discovered evidence claim (PC-R6. 25).

The State urged that Mr. Swafford's 3.850 motion 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). 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."[5] (PC-R7. 230).

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,

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[4]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).

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

though the sample had not been properly stored or maintained.[6] (PC-R7. 72). The lower court ordered that biological evidence capable of STR DNA testing be tested by FDLE's Orlando laboratory. The lower court also ordered the hair evidence suitable for mitochondrial DNA testing to be tested by Mitotyping Technologies in Pennsylvania[7] because FDLE was incapable 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 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

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

[7]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.

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*[8] – 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

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

> 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). A status hearing was held on March 11, 2005 and the court 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).

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 on November 18, 2005 finding that the DNA results from the hair retrieved from the victim's panties did not belong to Mr. Swafford or the victim. (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. 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 court concluded 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 appeal of this order, this Court affirmed the circuit court's order denying Mr. Swafford relief on the basis of Fla. R. Crim. P. 3.853. However, this Court held that the "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 v. State,* 946 So. 2d 1060, 1061 (Fla. 2006). Mr. Swafford was afforded 60 days in which to file and amended rule 3.851 motion.

Mr. Swafford filed an amended 3.851 seeking an evidentiary hearing on the DNA that exonerated him as well as the issues regarding authenticity and contamination of the biological samples. He also argued that his constitutional

rights were violated by not being able to have the DNA evidence independently tested by his forensic DNA expert. The circuit court summarily denied all claims for relief with the narrow exception of the issue regarding acid phosphatase. The court held a limited evidentiary hearing on March 2 and March 5, 2009 on the fact that FDLE now determined there was no acid phosphatase present on the swabs taken from the victim. On August 12, 2010, the court entered an order denying Mr. Swafford all relief and this appeal 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 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 nine 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). No spent bullet casings were found at the scene. 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's autopsy revealed "two marks on the body of the victim possibly caused by the application of a lighted cigarette." (PC-R3.204).

Police collected the victim's blood samples, vaginal, oral and anal swabs. Swabs also were 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.[9] 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 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. The State concealed all of the information about Walsh, Lestz and Levi from Mr. Swafford until his lawyers discovered it in April, 1994. *See*

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[9]An August 10, 1982 report by Volusia County Sheriff's Investigator Buscher described an interview of James Michael Walsh conducted by Special Agent Baker. 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.

Swafford v. State, 828 So. 2d 966 (Fla. 2002).

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.
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> ...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.
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> 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 dissenting].[10]

As Justice Quince acknowledged, no scientific evidence linked Mr.

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[10]Justice Quince opined that based on this information and a newly discovered affidavit from Mr. Lestz that Mr. Swafford was entitled to a new trial. *Id.*

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

The 2009 Evidentiary Hearing

Mr. Swafford filed an amended motion pursuant to Rule 3.851 regarding issues that came to light after the DNA testing was completed. In that motion, Mr.

Swafford agued that his conviction and death sentence were in violation of the constitution because the court never made any determinations as to the authenticity of the forensic evidence that can establish his innocence. (PC-R8 1196-1226). He also argued that Florida Rule of Criminal Procedure 3.853 was unconstitutional on its face and as it was applied because it prevented him access for forensic DNA testing of the biological evidence that FDLE claims was inconclusive. The trial court refused to hear any issues relating to DNA that exonerated Mr. Swafford or any issues regarding the authenticity or contamination of the forensic evidence.

At the State's urging, the trial court held an evidentiary hearing limited to one paragraph of the DNA claim regarding the lack of acid phosphatase found in subsequent forensic testing of the vaginal swabs. No other evidentiary development was allowed on contamination of the DNA mixtures or on the DNA evidence that was exculpatory. Mr. Swafford objected to the limitations on the hearing.

At the evidentiary hearing, defense DNA expert Allan Keel, from Forensic Science Associates, testified that the majority of the testing he performs is on behalf of the prosecution and he had only testified for the defense approximately three times. (PC-R8 334). The court precluded him from conducting any independent tests or examinations of the evidence and was forced to rely on the reports from FDLE lab analyst Shawn Johnson and Special FBI Agent Keith Paul

along with trial testimony and depositions regarding the acid phophotase testing.

Mr. Keel explained that acid phosphatase is a naturally occurring substance in the human body. It is present in males and females, and it can be produced by bacteria as well. (PC-R8. 348) Acid phosphatase is useful forensically because it exists in very high concentrations in male semen, but is not unique or restricted to semen. (PC-R8. 347-348) Thus, when acid phosphatase is found in a suspected rape victim the standard protocol is to do further testing for semen and sperm cells. (PC-R8. 349). The screening nature of the acid phosphatase test is never proof positive of the presence of semen. (PC-R8. 349) This is because the test for acid phosphatase does not discriminate between whether it comes from semen, bacteria, or naturally occurring in the female body. (PC-R8. 350-351) He testified that acid phosphatase is a robust compound that does not degrade easily. (PC-R8. 353). According to standard forensic protocol, if acid phosphatase is present, one should take the next step and conduct a P-30 test to determine if sperm is present. (PC-R8 355)

In Mr. Swafford's case, Mr. Keel testified that the test for acid phosphatase was a "screening test" and that it did not, in and of itself, indicate the presence of semen or sperm. One must conduct confirmatory tests to conclude if semen or sperm was present. Mr. Keel found it compelling that no sperm was found in the original testing in Mr. Swafford's case. There are approximately 300 million

sperm in the average ejaculate. (PC-R8. 374). He stated that one should find sperm if semen is present unless the person was aspermic (non-sperm producing) or the person had a vasectomy. (PC-R8. 374).

Mr. Swafford testified that he has never had a vasectomy and was never diagnosed as aspermic. To prove that point, he testified that he had fathered a son who was born on August 10, 1981. (PC-R8. 466-467) Mr. Swafford is not, by definition, aspermic.

Mr. Keel also was troubled that the original test given by the State's experts found acid phosphatase, but no choline. (PC-R8. 372) This is because one of the samples was stored wet, and acid phosphatase could come from bacterial growth based on the improper storage, thus a negative choline test should have indicated the lack of semen. (PC-R8. 372-373).

Also problematic was the fact that there was a naturally occurring level of acid phosphatase in the female body including in the rectum. (PC-R8. 375). He noted that there was no sperm detected and sperm is the most sensitive indicator of semen. (PC-R8. 375). According to Mr. Keel, the lack of sperm and the naturally occurring nature of acid phosphatase should have made the original analyst "question whether or not your acid phosphatase result is attributable to semen or it's attributed to a non-semen source." (PC-R8. 376)

He also indicated that the trial testimony of medical examiner Dr. Botting

was incorrect. Dr. Botting testified at trial that the presence of acid phosphatase definitively meant semen was ejaculated into the victim. (PC-R8. 378). Mr. Keel testified that such a conclusion was "completely untrue." (PC-R8. 378). This is because, as he reiterated, acid phosphatase could come from non-semen sources so there is no proof whatsoever that there had been sexual contact with the victim. (PC-R8. 378). Dr. Botting also testified at trial that acid phosphatase indicated that a male sexual organ was near the victim. Again, Mr. Keel emphasized that Dr. Botting's testimony in that regard was not true. (PC-R8. 379). According to Mr. Keel, Dr. Botting's testimony could only be justified "if he were ignorant of the non-seminal sources of acid phosphatase activity, and given the fact that he was a multi-certified forensic pathologies, had extensive training as a forensic pathologist, you would certainly expect that that would be part of his scientific background." (PC-R8. 379).

With regard to the trial testimony of Special FBI Agent Keith Paul, the original FDLE serology analyst, Mr. Keel testified that it was common practice to conduct ABO blood typing if one thought there was semen present. (PC-R8. 383). Paul's proclamation that testing for ABO types is a gray area was disputed by Mr. Keel, who stated that "if I believed there was enough acid phosphatase activity there to indicate the presence of semen, I certainly would have attempted to develop ABO test results from that evidence, as best I could." (PC-R8. 385).

ABO testing should have been done, in Mr. Keel's opinion because it was known that the Ms. Rucker was a non-secreter and did not transmit her blood type through her cells. Thus, if a blood type was obtained from a sample it would have had to come from someone other than Ms. Rucker. (PC-R8 387). Like Dr. Botting's testimony, Paul's testimony that the acid phosphatase meant a male sexual organ was present at the victim's vagina or anus was "not true." (PC-R8. 388).

Regarding the subsequent testing in 2004 by FDLE analyst Shawn Johnson, Mr. Keel noted that there was an indication of epithelial cells in his testing but no indication of acid phosphatase. (PC-R8. 391-392). Mr. Keel stated that the mere passage of time could not account for the lack of acid phosphatase in 2004 unless the sample was exposed to extreme heat for a long period of time. (PC-R8. 392). The only explanation for the finding of acid phosphatase in 1985 and the lack of it in 2004 is that one of the tests is wrong. (PC-R8. 393).

In post-conviction, the State retained Dr. Robert P. Spalding of Spalding Forensics, LLP. to review the evidence and Mr. Keel's report. Mr. Keel reviewed Dr. Spalding's report and his deposition. (PC-R8. 396). The State's own expert agreed with Mr. Keels's conclusions. (PC-R8. 396). The last line of Dr. Spalding's report states that "he can't make an argument against the points that [Mr. Keel] make[s] in [his] report." (PC-R8. 396). Unsurprisingly, the State never called Dr. Spalding to testify at the evidentiary hearing.

Shawn Johnson, the FDLE technician who performed acid phosphatase and other testing in 2004, testified that, contrary to the State's testimony at the trial, he found no evidence of acid phosphatase. He agreed with Mr. Keel that a screening test for acid phosphatase cannot conclusively establish the presence of semen. (PC-R8. 426). He indicated that if he would have gotten a positive acid phosphatase test and a negative sperm test, as Paul did originally, he would have done a P-30 test for semen. (PC-R8. 426). He testified that a positive acid phosphatase test along with a negative sperm test would require a positive P-30 test to conclude semen was present. (PC-R8. 428). Paul never did a P-30 test at the time of trial.

Mr. Johnson tested the same swabs that Paul tested previously and all swabs tested negative for acid phosphatase. (PC-R8. 438). Mr. Johnson did not find any evidence of semen or sperm on the swabs and given the results of his testing he "would be reporting that no semen was found." (PC-R8 429; 438).

Mr. Johnson indicated that he found epithelial cells intact on the swabs that probably came from the victim. (PC-R8 441). He opined that had the swabs not been properly stored and had degraded, the epithelial cells would not have survived. (PC-R8. 441). He would not expect epithelial cells to survive, but sperm cells to be degraded because sperm cells are hardier than epithelial cells. (PC-R8. 441). Mr. Johnson's findings agreed with Mr. Keel's conclusions.

Contrary to the trial testimony that declared the acid phosphatase test definitive proof of the presence of semen, Mr. Johnson testified that the test is merely a screening test and that he conducts additional tests regardless of the results. (PC-R8. 444). He also testified that acid phosphatase is a stable enzyme and is known to last 20 to 30 years. (PC-R8. 449).

The State presented witness Keith Paul, the original technician who tested the swabs at the time of trial. At the time of his original testing he had become a Special Agent with the FBI, a position he held at the time of the evidentiary hearing. He testified that when he tested the anal and vaginal swabs he got a positive test for acid phosphatase. (PC-R8. 499). He recalled testifying at trial that a positive acid phosphatase test gives "a strong indication that semen was present." (PC-R8. 504). He agreed that since the victim was a non-secreter a blood type would have come from semen. (PC-R8. 521-522). However, Paul claimed that he would have to have a positive sperm cell in order to do ABO blood typing. (PC-R8. 522).

Paul's handling of the specimens was also problematic. He testified that the vaginal swabs were damp and he tested them without first allowing them to dry. (PC-R8. 524; 531-532). He also testified that proper protocol for testing for acid phosphatase was to allow the substance to "cook" for 10 to 15 seconds. (PC-R8. 526) However, he had no recollection of how long he allowed these samples to

"cook" before concluding the test was positive by the reaction observed. (PC-R. 526). Nor did he make any notes of how long the test took to get a reaction. (PC-R8. 527).

Paul nonetheless concluded without any documentation or corroboration that based on the time of the reaction, he could conclude that the acid phosphatase came from semen as opposed to another source. (PC-R8. 534; 536). No testing was ever done to determine the amount of acid phosphatase present, if any. (PC-R8. 537) Nor was a control test done to determine the amount of naturally occurring acid phosphatase on the swabs. (PC-R8 538).

During the original trial, Paul testified that the presence of acid phosphatase meant that a male sex organ was present near where the swabs were taken. Specifically, when asked if acid phosphatase was positive proof there had be a male organ at the place where it was found, he answered "yes." (PC-R8. 544).

During the evidentiary hearing, Special Agent Paul claimed he was confused by the question of whether his prior statement to Mr. Swafford's jury was false. (PC-R8. 544). Eventually, he conceded that his trial testimony about acid phosphatase was not accurate. (PC-R8. 551). He also admitted that his trial testimony that he was not able to get an ABO blood type from the swabs was inaccurate. (PC-R8. 553). In reality, he never even attempted to do an ABO type test. (PC-R8. 553). The State presented no other evidence to rebut Mr. Keel or

Mr. Johnson's conclusions.

Despite the lack of evidence, the trial court entered an order denying relief. In its order the court repeatedly and mistakenly referred to DNA testing as having been done at the trial and that DNA testimony was presented to the jury, when it had not. The court acknowledged that Special Agent Paul gave the jury inaccurate information that the presence of acid phosphatase was a strong indication of the presence of semen. The court also acknowledged that Dr. Botting also gave the jury inaccurate information when he testified to the jury that a positive acid phosphatase test "established there was seminal fluid. . . ."

Without making any credibility findings or acknowledging that both the defense and State's experts agreed, the trial court concluded that while the lack of acid phosphatase found in 2004 was newly discovered evidence, it did not entitle Mr. Swafford to relief because it would not have produced an acquittal on retrial or would not have resulted in a life recommendation.

The court concluded that the cumulative effect of all the errors would not have affected the outcome of the trial or the penalty phase. No records were attached to the judge's order to support his findings. And there was no indication in the order what errors the court was relying on to draw that conclusion.

SUMMARY OF ARGUMENT

I. In its order denying relief, the trial court only addressed the results of

the acid phosphotase test. It did not mention the fact that DNA evidence from a hair found in the victim's panties did not match the victim or Mr. Swafford. The order does not mention the hair evidence from a towel found near the victim that did not match the victim or Mr. Swafford. In fact, it does not mention any of the other test results done by FDLE and argued by Mr. Swafford.

The order fails to make any findings of fact or credibility determinations regarding the uncontested evidence that there was no acid phosphatase in the victim at the time of trial, or the fact that the State's experts testified under oath that there was acid phophotase and that proved Mr. Swafford sexually assaulted and killed Ms. Rucker. The trial court completely failed to consider cumulative effect of the false acid phosphatase testimony to the jury; and that DNA testing showed a pubic hair in the victim's panties that did not belong to the victim or Mr. Swafford.

Further, the trial court's order also fails to address the cumulative effect of the withheld *Brady* evidence. Withheld reports showed that James Michael Walsh, a suspect who matched the composite drawing made by eyewitnesses, was seen 15 minutes before the crime a block away from the gas station where the victim worked. Walsh had a penchant for burning his victims with cigarettes during sex. Ms. Rucker had cigarette burns on her body. Walsh discarded a .38 pistol at the Shack where the murder weapon was found. Walsh was arrested with a copy of

the BOLO and composite drawing from the Rucker case in his pants pocket at the time of his arrest on other charges in Arkansas one month after the Rucker murder.

The failure of the trial court to follow this Court's order and the lack of substantial and competent evidence to support its denial of a new trial warrants *de novo* review because Mr. Swafford has proved that newly discovered evidence puts his case in such a different light as to undermine confidence in the outcome at his trial.

II. Contrary to this Court's order, the trial court failed to hold any evidentiary hearing on issues pertaining to contamination and authenticity of the DNA testing done by FDLE or give Mr. Swafford the opportunity to prove his actual innocence based on the other newly discovered DNA evidence that exonerates him.

III. The trial court abused its discretion in failing to allow Mr. Swafford to select a DNA defense expert of his own choosing to conduct DNA testing on biological material on which FDLE could not get conclusive results. The lower court violated Mr. Swafford's due process and equal protection rights under the Florida and United States Constitutions by denying his ability to confront and challenge the State's inconclusive and faulty DNA results**.**

ARGUMENT I

MR. SWAFFORD HAS PROVED THAT NEWLY DISCOVERED DNA EVIDENCEAND PRIOR *BRADY* VIOLATIONS UNDERMINE CONFIDENCE IN THE OUTCOME OF HIS TRIAL BECAUSE THE LOWER COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN VIOLATION OF THIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Before reviewing the DNA results in this appeal, Justice Quince wrote:

> 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).[11]

Even without the newly discovered evidence presented during the current DNA litigation, three justices of this Court have found that the previous *Brady* violations would "probably produce an acquittal at trial." The DNA testing further supports their concerns that Mr. Swafford did not receive a fair trial in 1985.

Mr. Swafford has proved that, in addition to the egregious *Brady* violations, false evidence was presented to the jury by the State's forensic expert and medical examiner which was proved through DNA results. See, *Giglio v. United States*,

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

405 U.S. 150 (1972). The trial judge, Michael Hutcheson, did not preside over the original trial which was conducted by Judge Kim Hammond. Therefore, Judge Hutcheson did not observe the jury's demeanor or the credibility of the State's witnesses. *Swafford v. State*, 533 So. 270 (Fla. 1988)(Barkett dissenting).

The trial court's order fails entirely to make findings consistent with the evidence that was presented at the evidentiary hearing or accurately cite any record support that rebuts Mr. Swafford's claims. Contrary to *Porter v. McCollum*, the lower court "failed to engage" with what was happening at Mr. Swafford's trial in drawing the conclusion that the new exculpatory and exonerating evidence would not have made a difference to even one juror. *Porter v. McCollum*, 130 S. Ct. 947 (2009).

A. The Law and Standard of Review

Newly discovered evidence may be grounds for relief where the facts on which the claim is predicated were unknown to the trial court, the moving party, or counsel at the time of trial, and could not have been ascertained by the party or his or her counsel in the exercise of due diligence. *Gonzalez v. State*, 990 So. 2d 1017 (Fla. 2008); *Preston v. State*, 970 So. 2d 789 (Fla. 2007); *Kearse v. State*, 969 So. 2d 976 (Fla. 2007); *Correll v. State*, 698 So. 2d 522 (Fla. 1997).

For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that would probably produce an acquittal on

retrial, a less severe sentence, or result in a life sentence rather than the death penalty. *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), *cert denied*, 128 S. Ct. 2486 (U.S. 2008); *Williamson v. State*, 961 So. 2d 229 (Fla. 2007); *Van Poyck v. State*, 961 So. 2d 220 (Fla. 2007).

Newly discovered evidence supports a grant of postconviction relief if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; if defendant is seeking to vacate a sentence, the newly discovered evidence must be such that it would probably yield a less severe sentence. *Johnston v. State*, 27 So. 3d 11 (Fla. 2010). The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard (which is identical to the prejudice prong of the *Strickland* standard and that of newly discovered evidence in *Jones*), the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld (or newly discovered) information could have lead the jury to a different result. See *Kyles v. Whitley*, 514 U.S. 419, 449 n. 19 (1995),(whether the judge believed a witness is not controlling, it is the jury's appraisal of credibility that is important). This Court has already recognized the weaknesses in Mr. Swafford's case.

B. The trial court's order is contrary to the law and unsupported by competent evidence.

The trial court correctly found "that [Mr. Swafford's] defense has met the first prong of the newly discovered evidence standard and finds that the negative APT (acid phosphotase test) results from the re-testing of swabs in 2004 qualifies as such." (PC-R8. 2444). But, the court failed to consider any of the other exculpatory DNA results obtained in 3.853/3.851 proceedings on which it summarily denied a hearing. Nor did it make any findings at all about that evidence. See *Moss v. State*, 860 So. 2d 1007 (Fla. 5th DCA 2003)(where postconviction motion based on newly discovered evidence is summarily denied, defendant's factual allegations must be accepted as true to the extent that they are not refuted by the record); *Rutherford v State*, 940 So. 2d 1112 (Fla. 2006)(where claim summarily denied, court required to accept that defendant could not have known about evidence at time of trial by use of due diligence) .

The trial court misinterpreted the second prong of the newly discovered evidence standard by analyzing it exclusively on the negative APT test. The court failed to conduct the proper analysis in assessing the probability of an acquittal at retrial or that evidence showing Mr. Swafford did not sexually assault the victim would not have led the jury to impose a less severe sentence or something less than a death. Even though the court recited a cursory interpretation of the trial evidence, it did not meaningfully or honestly review the trial and postconviction record. See, *Porter, supra*.

For example, the court does not reconcile how trial judge Hammond could have found as a statutory aggravating factor that Mr. Swafford sexually assaulted and murdered the victim when DNA results show that there was no acid phosphotase in the victim's body and that hair found in the victim's panties did not belong to Mr. Swafford.

No competent or substantial evidence supported the trial court's conclusions on the second prong of the newly discovered evidence test, nor did it support the summary denial of the other DNA results. See *Spencer v. State*, 842 So. 2d 52 at 12 (Fla. 2003)(To support a summary denial, the court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion."); *McClain v. State*, 629 So. 2d 320 (Fla. 1st DCA 1993)(we consider the state's admitted inability to refute allegations without recourse to matters outside the record, warrants reversal of that portion of the order which denied the claims).

No records were attached to the court's order nor did it address the other DNA testing results that were exculpatory and exonerating (i.e. hair in the victim's panties and a towel near that victim that did not match Mr. Swafford or the victim, or the inclusive results on the rest of the testing). *Gaskin v. State*, 737 So. 2d 509, 517 (Fla. 1999)("under Rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the

defendant is not entitled to relief.).

Contrary to this Court's previous assessment of the highly circumstantial evidence in this case, the trial judge found that the "state produced an extremely strong circumstantial evidence case against the Defendant, even if the jury was not told of the presence of semen." (PC-R8. 2444). The court then cited to facts from the original appeal as if those facts have not since been thoroughly discredited. The court used the wrong standard to assess prejudice. The court viewed the evidence from the perspective of the strength of the evidence that remained after the offending acid phosphotase testimony was excised, instead of viewing what competent defense counsel could have done with the newly discovered evidence and *Brady* evidence from previous postconviction proceedings. The strength of the remaining evidence is not the proper standard. "The trial court is required to "consider all newly discovered evidence which would be admissible at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at trial." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). In addition, the court must evaluate all the admissible newly discovered evidence at this hearing in conjunction with evidence adduced at prior evidentiary hearings and compare it with evidence introduced at trial. *Id*. at 522; citing *Swafford v. State*, 679 So. 2d at 739; *Gunsby v. State*, 670 So. 2d 920 (Fla. 1996); cf. *Kyles v. Whitley*, 514 U.S. at 441. The trial court ignored all of the evidence from prior

evidentiary hearings and the DNA evidence he summarily denied and analyzed only the prejudice of the faulty acid phophotase testimony alone versus the trial evidence. This was error.

Moreover, the lower court's ruling is entitled to no deference when the analysis is legally and factually flawed and is not supported by competent and substantial evidence. Cf. *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003)(no deference when state court findings are contrary to the record).

On ineffective assistance of counsel claims, "when reviewing a trial court's ruling after an evidentiary hearing, this Court gives deference to the extent that the findings are supported by competent and substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of law and fact. See *Arbelaez v. State*, 898 So. 2d 25, 32 (Fla. 2005); *Morris v. State*, 931 So. 2d 821, 828 (Fla. 2006). A trial court's denial of a newly discovered evidence claim is a similar standard of review.

In reviewing a trial court's application of the relevant law to a rule 3.850 motion following an evidentiary hearing, this Court will defer to the lower court's rulings if supported by competent substantial evidence. *Jones v. State*, 709 So. 2d 512, 532 (Fla. 1998); quoting *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)(court will not substitute its judgment for that of trial court on questions of fact or credibility of witnesses as well as weight given to the evidence by the trial

court). The trial court, however, made no fact findings or credibility findings to be given any deference on the acid phophotase issue, which was the only issue on which the court granted an evidentiary hearing. As to the rest of the DNA issues that were summarily denied, the trial court made no findings at all. This Court must review the court's ruling *de novo* without deference to its conclusory order.

C. The facts at trial

At trial, the State solely relied on the testimony of Special FBI Agent Keith Paul and Medical Examiner Botting to prove that Mr. Swafford committed the sexual assault and murder of the victim. Paul told the jury that he was a "special agent with the Federal Bureau of Investigation" assigned to white collar crime to investigate violations of federal law and has previously worked as a serologist for FDLE in 1984 (R. 1014). He told Mr. Swafford's jury that he could not find sperm cells on the swabs he tested but he did find acid phosphotase.

> Prosecutor: what would that indicate to you, based on your examination?
>
> Paul: Based on my examination and the sensitivity of the test I use, it's a very strong indication that semen is present. In the field today, there is some problem because there are so many people that have vasectomies or just have no sperm counts, so it's kind of a gray area as to whether you should do a typing or not. (R. 1019).

This testimony was used to support the aggravating factor of during the course of a sexual assault.

Medical examiner Botting went further and told the jury that the presence of

acid phosphatase definitively meant semen was ejaculated into the victim regardless of the absence of sperm. (PC-R8. 378):

> Prosecutor: Now, if I may ask sir, the presence of prostatic (from the male prostate) acid phosphotase both in the anus and in the vaginal area orifice, there is no other way that that can get in there, is there?
>
> Botting: No, sir.
>
> Q. It absolutely establishes the presence of a male organ—
>
> Botting: yes, sir.
>
> Q. In that area—
>
> Botting: Yes, sir.
>
> Q. So it's –
>
> Botting: Not only the male organ there, but seminal fluid being ejaculated into the orifices.
>
> Q. That would have to have been?
>
> Botting: Yes, sir, because the acid phosphotase is a component of seminal fluid.
>
> Q. Of seminal fluid?
>
> Botting: Yes, sir.
>
> Q. Was there any sperm found?
>
> Botting: No, sir. (R. 779-780).

We now know through defense expert Keel, FDLE analyst Johnson, and State's expert Spalding that such a conclusion was "completely untrue." (PC-R8.

378). There was no proof whatsoever that there had been sexual contact with the victim by Mr. Swafford. (PC-R8. 378).

Mr. Keel emphasized that Dr. Botting's conclusion was not true. (PC-R8. 379). Special Agent Paul reluctantly conceded under oath that his testimony as a State expert at trial was "inaccurate."

During guilt phase closing argument, the prosecutor argued that Mr. Swafford raped the victim and the proof was supported by Dr. Botting's testimony (R. 1339). He embellished from there:

> Prosecutor White: …How long does it take for a person with a gun to the head of a female to order her to take off her pants and to anally abuse her and for her to put her pants back on and to be shot in a desolate area? Who knows? That is something for you the jury to decide when you're deliberating…
>
> Let me suggest something else to you, and I think it's a well recognized fact today when we've got the signs that we have, rape is not a crime of passion, rape is a crime of violence. I think everyone will tell you that. It's not done for sexual gratification, it's done for violence, not a relationship to satisfy your sexual appetite. If it was, would you anally rape a woman? Why in the world would anybody anally rape a woman for sexual gratification? (R. 1386-87).

In penalty phase, the prosecutor argued again that Mr. Swafford raped the victim:

> Mr. White: the crime, the third one, the crime for which the Defendant is to be sentenced was committed while he was engaging in the commission of the crime of sexual battery. Was Brenda Rucker sexually battered by this Defendant in the course of her murder? I think you've already decided that, and I think your verdict reflected that. But, that is an aggravating factor for you to consider (R. 1467).

The jury did not know that the State's experts testified falsely and that there was no acid phosphotase on the vaginal and anal swabs. The jury did not know that neither Dr. Botting, Special Agent Paul nor the prosecutor could say that "Brenda Rucker [was] sexually battered by this Defendant in the course of her murder." (R. 1467).

The trial court's order does not take issue with these conclusions or make any credibility assessments of the witnesses who testified at the evidentiary hearing. The trial court acknowledged this evidence was newly discovered, arguably a sign that the court found this testimony to be credible, but the order is silent on the issue.

The trial court's assessment of the rest of the trial court record is not a model of clarity either. The order reiterates the Judge Hammond's sentencing order at trial and states without analysis that State's case was an "extremely strong circumstantial evidence case." (PC-R8. 2444). Yet, the only evidence remotely connecting Mr. Swafford to the crime has been thoroughly discredited by evidence discovered in previous postconviction proceedings.

Roger Harper, whose hearsay statements implicated Mr. Swafford was paid $5,000 reward for his testimony. He was promised and received early release from prison in exchange for his testimony. He threatened prosecutors in letters if he did not get what he wanted (an early release from prison), he would tell the other

Tennessee people not to come down and testify at trial. Eyewitness Seiler's composite drawing and descriptions did not match Mr. Swafford. He was hypnotized to enhance his recall of details. A description of the vehicle leaving the FINA station was not the vehicle Mr. Swafford was in. The gun from the Shingle Shack was turned over to police by a bouncer and his story of how he retrieved the gun differed from other witnesses who said it was dumped by a man in jeans and a black t-shirt when Mr. Swafford wore a leather jacket that night. The jury could use any of this information to assess the credibility of the State's witnesses. Nor could it weigh the possibility that James Walsh's habits of burning his sexual assault victims with cigarettes; re-packing his own bullets; proximity to the crime scene and disposing of two .38 pistols at the Shingle Shack on the night of the crime fit the composite description of the killer much better than Mr. Swafford.

The addition of newly discovered DNA results that show a hair in the victim's panties did not belong to Mr. Swafford, and a hair on a towel near the body did not match Mr. Swafford, and that there was no acid phosphatase in the vaginal and anal swabs would have led to an acquittal. At least, the jury could have considered a lesser sentence, or perhaps, a lesser included crime. Without any of this new evidence, two jurors voted for life even when the only mitigating evidence presented was that Mr. Swafford was an Eagle Scout. *Swafford v. State*, 533 So. 2d 270 (Fla. 1988). On direct appeal, Justice Barkett dissented and Justice

Ehrlich concurred that the admission of Tennessee witness Johnson's hearsay statement about collateral matters was substantially prejudicial because the statements had no relevance except to establish criminal propensity and character. *Id* at 278-279.

Despite this perfect storm of errors, the trial court "discounted to irrelevance" the effects of the newly discovered evidence, expert testimony and inflammatory closing arguments on Mr. Swafford's jury. See *Porter v. McCollum*, 130 S. Ct. 947 (2009). The court also failed to consider the cumulative effect of this evidence with the DNA evidence it did not grant a hearing on and on the *Brady* violations presented in the prior 3.851 motion. See, *Gunsby v. Florida*, 670 So. 2d 920 (Fla. 1996); *Kyles v. Whitley*, 514 U.S. 419 (1995).

D. The proper cumulative analysis of the newly discovered evidence, in conjunction with *Brady* evidence and ineffective assistance of counsel evidence from prior evidentiary hearings weakens the case against Mr. Swafford to the extent that there is a reasonable doubt as to his culpability.

The issue at Mr. Swafford's trial was whether he alone was the individual who sexually assaulted and killed Ms. Rucker. The State made no suggestion that there was more than one perpetrator. By showing that he was not the source of the seminal fluid found 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, Mr. Swafford has shown that someone else sexually assaulted and murdered Ms. Rucker. Had this

evidence been presented to his jury, in addition to the *Brady* evidence showing that James Walsh was a more likely suspect, Mr. Swafford would have been acquitted.

In making a determination of whether newly discovered evidence revealed in DNA testing warrants a new trial, this Court is required to cumulatively consider the DNA evidence in conjunction with evidence presented at all prior evidentiary hearings and evidence presented at trial. *See, e.g.*, *Hildwin v. State*, 954 So.2d 784, 790 (Fla. 2006). An examination of the exculpatory DNA evidence, combined with evidence presented at prior evidentiary hearings and at trial, supports Mr. Swafford's claim that he would likely be acquitted upon retrial or receive a life sentence.

What the jury knew prior to the new facts discovered in postconviction is reflected in this Court's initial review of this case on direct appeal. Hearsay statements from Roger Harper and Ernest Johnson were entered into evidence as similar fact evidence and admissions of guilt, but the statements neither admitted killing Ms. Rucker nor were similar to the facts of the Rucker case.

Mr. Swafford was with Patricia Atwell, a dancer from the Shingle Shack until 6 a.m. on the morning of the crime and other friends said Mr. Swafford returned to the campsite at daybreak. This compressed time period gave little time to commit the crime.

Later that evening, Mr. Swafford was back at the Shingle Shack got in a dispute over money and purportedly displayed a gun. The police were called and then contradictory testimony was given by a bouncer and a waitress as to where a gun was retrieved. A year later, the police tested the gun that was purportedly taken from the incident and found it could have fired some of the bullet fragments in the victim. Though the victim was shot nine times, not all of the bullet fragments were of the same caliber and some were hand loaded. No spent bullets were found at the scene.

Dr. Botting and Special FBI Agent Paul testified the presence of acid phosphatase supported a conclusion that the victim had been sexually assaulted despite the absence of sperm. The facts of the sexual assault were used to support the during the course of a felony (sexual assault) aggravator and "heinous, atrocious and cruel" aggravator. See, *Swafford v. State*, 533 So.2d at 277 (…the shooting-abduction, fear, mental anguish, and sexual abuse—the killing itself occurred in such a way to show a wanton atrocity.")

What the jury would have known in the hands of competent defense counsel after the newly discovered evidence and *Brady* evidence had been discovered is reflected Justice Quince's summary of post-conviction evidence:

> 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 believed 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 dissenting].

Clearly, Mr. Swafford would now be able to rebut the State's evidence with exculpatory DNA evidence. Since the State presented evidence that the victim's panties were placed back on her body following a sexual assault, Mr. Swafford could present testimony from Mitotyping Technologies experts to show that mitochondrial DNA testing on a hair removed from Ms. Rucker's panties determined that the hair did not match either Ms. Rucker or Mr. Swafford.

Mr. Swafford could also show that hair found on a towel near the victim's body did not match Mr. Swafford, therefore, his proximity to the victim could also be challenged. Such DNA evidence would be powerful evidence to support Mr. Swafford's claim that he was not the perpetrator of this offense.

Testimony from FDLE analyst Shawn Johnson could be given that there was no acid phosphatase in the highly probative rape kit swabs and that finding is "inconsistent" with Mr. Swafford committing a sexual assault since he has not had a vasectomy and is not aspermic. *Jones v. State*, 709 So.2d 512 (Fla. 1998).

Contrary to the court's ruling, the absence of acid phosphatase in the 2004 testing results and the other DNA results are exculpatory to Mr. Swafford precisely because they substantially discredit the inculpatory evidence presented by the State at his trial. Thus, this sole forensic fact upon which the State predicated its sexual assault charge and the during the course of a sexual assault aggravator would be gone. And the trial court would have no support for that aggravating factor.

The absence of acid phosphatase in the 2004 testing results, the other negative DNA results when considered cumulatively with the *Brady* violations on suspect Walsh and counsel's ineffectiveness further weakens an already circumstantial case and creates a reasonable doubt that would have led the jury to impose a life sentence. This is particularly true considering the penalty phase evidence that could have presented had Mr. Swafford had effective counsel.

Mr. Swafford was represented by Ray Cass and Howard Pearl, two attorneys who were revealed in post-conviction to have been Special Deputy Sheriffs at the time of Mr. Swafford's trial. The total extent of the mitigation presented at Mr. Swafford's penalty phase is a written stipulation:

> MR. CASS: Ladies and gentlemen of the jury, there has been a stipulation that you would be able to consider some testimony that Mr. Swafford, Senior, would have given had he been able to testify and that was to the effect that Roy Clifton Swafford, who is his son, had achieved a grade of Eagle Scout in the Boy Scouts of America.
>
> It's our understanding that Mr. White (the prosecutor) has taken the position that he has no knowledge of this but he does not contest it.

> We feel that that would be a matter that you could consider. (R. 1459-60).

No live witnesses testified nor was any documentary evidence of Mr. Swafford's background offered except his criminal history which was offered as statutory aggravators. Eleven lines of transcript and 99 words, later trial counsel rested its case.

Mr. Swafford's participation as an Eagle Scout with the Boy Scouts of America was a fraction of the mitigating evidence that was available. Postconviction counsel learned that Mr. Swafford is a direct descendant of the Cherokee nation in the State of Oklahoma, better known as the Trail of Tears. It was through the Boy Scouts that Mr. Swafford learned of his heritage and provided a vehicle for him to connect with his love of the outdoors. It was his only escape from the roughest sections of Nashville, Tennessee where he grew up.

Mr. Swafford's experience as a native American profoundly affected his character as Department of Corrections documents showed Mr. Swafford had repressed anger over family issues and toward the US government for taking the land of his Indian family.

Had counsel interviewed Mr. Swafford's family they would have learned that Roy was a lifeguard at the community pool and a counselor for the Red Shield program for inner city Nashville youth and he served three years as a camp counselor for underprivileged children . When the family moved to Dallas, Texas,

Roy was deeply affected when he witnessed President Kennedy's assassination at the Texas Book Repository in 1963. After the assassination, Roy's family decided to move back to Nashville to escape the violence in Dallas.

But the trip radically transformed Roy's character. When he returned to east Nashville, Roy's life changed dramatically. The projects next door to Roy's house were mostly single parent families and their unsupervised teenaged children. The neighborhood was fertile ground for gang activity which broke along racial lines.

When the federal government attempted to enforce desegregation by busing black students into Roy's high school, the reaction from the white community was immediate. Whites picketed the school daily in an attempt to close the high school. When that failed, a mob stormed the administration office and threw the principal of the high school out the window for being a "nigger lover." The National Guard was called in to attempt to protect the non-white population and maintain order.

But when Martin Luther King, Jr. was assassinated in Memphis, east of Nashville, the city became a war zone. President Johnson ordered 4,000 troops to Nashville to quell the violence. Uncharacteristically, Roy began hanging out with Kenneth Spane, a man older than Roy and well versed in the ways of the street.

It was also during this time that Roy was involved in a near fatal car crash. Roy was near death. Although transported by ambulance, the hospital refused to

treat him and he was discharged. Roy's head impacted with such force in the collision that his front eight teeth were driven into his nasal cavities and throat. The resulting swelling rendered him virtually unrecognizable.

Roy's mother attempted to get treatment for Roy at several dentist's offices but they refused to treat him because Roy's condition was so unstable. He suffered constant headaches and became photosensitive. An oral surgeon later said if the blow to Roy's head had been two inches higher he would have died.

After the accident, Roy's entire personality changed. He drank excessively and stayed out all night. He no longer associated with his brothers or other friends and increasingly spent his time with Splane and his crew. Roy began getting into trouble. Minor offenses like car theft became progressively more serious crimes.

Roy began experimenting with alcohol and inhaling solvents. In 1985, solvent inhalants were considered neurotoxins. Their chronic abuse leads to organic brain damage. See K.G. Haglid, et al. *Trichloroethylene Long Lasting Changes in the Brain After Rehabilitation*, Neurotoxicology, pp. 659-73 (1981).

Had trial counsel done even a cursory investigation they would have learned that alcoholism was prevalent in both sides of Roy's family. Roy's father, mother or brothers could have testified that on numerous occasions they found Roy in unconscious from alcohol in the streets. His father would carry Roy home.

As he grew older, Roy's graduated to drug abuse where he ingested methaqualone, cocaine and heroin. In the hands of a qualified mental health expert this evidence of Mr. Swafford's family and social history would have produced statutory and non-statutory mitigation. No mental health expert was employed by the defense though the trial attorney files note that "motion for mental examination seems indicated by prior criminal history. Girl friend Linda says he is " an alcoholic" and when he gets into trouble it is because he had been drinking." But it went undiscovered due to trial counsel's gross ineffectiveness. See, *Strickland v. Washington*, 466 U.S. 668, 688 (1984)("defense counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.")

In the context of all of this mitigation that should have been presented, Mr. Swafford's jury would be swayed by the addition of newly discovered DNA evidence that rebuts the aggravating circumstances as well as Mr. Swafford's guilt. Contrary to the trial court's order, the newly discovered and other post-conviction evidence warrants relief under *Jones v. State*. Cf. *Wright v. State*, 995 So. 2d 324 (Fla. 2008). Because this new evidence negates the only evidence supporting the court's finding of aggravators and establishes Mr. Swafford's innocence of the death penalty, it casts a reasonable doubt on whether Mr. Swafford was the actual perpetrator of the crime. A new trial is warranted.

ARGUMENT II

THE CIRCUIT COURT ABUSED ITS DISCRETION IN NOT PERMITTING MR. SWAFFORD'S OWN DNA EXPERT TO CONDUCT TESTING. THE COURT VIOLATED MR. SWAFFORD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS BY DENYING HIM THE ABILITY TO PROPERLY CONFRONT AND CHALLENGE THE STATE'S FAULTY DNA RESULTS.

A. Introduction

Following this Court's remand ordering the circuit court to permit DNA testing pursuant to Fla. R. Crim. Pro. 3.853, the lower court held an evidentiary hearing on June 11, 2004 to determine what items were capable of being tested for DNA. (PC-R8 39-144) Testimony taken at the hearing established that there were a number of items which contained biological evidence suitable for DNA testing. [12] The court ordered all "biological evidence" found in the Clerk's office and in the property room of the Volusia County Sheriff's Department to be tested. This included anal and vaginal swabs from the victim, Brenda Rucker; fingernail scrapings; cellular debris found in the panties of the victim and believed to contain biological evidence from her attacker; a known blood standard from the victim; swabbings taken from the victim's head; pubic hair combings (including slide-

[12] 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. (PC-R8 142-143)

mounted hairs obtained when the medical examiner performed a rape kit test on the victim's body); and projectile fragments collected from the victim's body. (PC-R8 125-127)

At the June 11, 2004 hearing, FDLE Analyst Harry Hopkins said that FDLE would likely not be successful in conducting DNA testing on any of the hairs collected from the victim's body, which had been preserved on slides using a binding material which made it very difficult (for FDLE analysts, at least) to successfully extract and analyze DNA evidence. In fact, according to Mr. Hopkins, DNA testing by FDLE of those hairs might well be futile because, up to that point, the agency had "zero success" in obtaining DNA profiles from slide-mounted hairs. (PC-R8 99; 101)

In light of FDLE's admissions regarding their inability to successfully test the slide-mounted hairs, Mr. Swafford requested that an independent laboratory – Forensic Science Associates, in Richmond, CA – which had actually had success in obtaining DNA profiles from slide-mounted hairs (as well as other old, degraded, and/or challenging evidence) be allowed to test the evidence.

The lower court rejected this request, and instead ordered the evidence to be submitted to FDLE for analysis and testing (PC-R8 788-789). Upon FDLE's representation that it was unable to perform mitochondrial DNA ("mt-DNA") testing, the parties and the court agreed to have hairs and evidence which were

suitable only for mt-DNA testing to be sent to an independent lab, Mitotyping, PA. PC-R8 84-85; 135; 139-140).[13]

On October 28, 2004, FDLE submitted its findings on the biological evidence submitted by the clerk's office, which included: (1) Exhibit DD (liquid blood standard from victim); (2) Exhibit FF (oral swabs from victim); (3) Exhibit 12 (anal swabs from victim); (4) Exhibit 13 (vaginal swabs from victim); (5) Exhibits BB, CC, and EE (swabbings from victim's head and right ear); and (6) Exhibits 15-19 (projectiles collected from various points on victim's body). (PC-R8 777-778)

FDLE concluded the victim's liquid blood standard had "dried up," and therefore no stain card was able to be produced. Nonetheless, FDLE was able to determine through STR testing that the DNA profile of the victim's blood was "consistent with originating from a female individual." *Id.* As far as the oral, anal, and vaginal swabs obtained from the victim – unquestionably the most important pieces of evidence, as they were likely sources of the perpetrator's DNA – the FDLE reported only that "Semen was not identified on [these] Exhibits." *Id.* Tests for acid phosphatase (an enzyme commonly found in semen, and which the State's trial expert testified *were* present on the swabs when he tested them in 1982) were

[13] Traditional STR testing requires a full hair follicle or root in order to properly obtain a DNA profile. Mitochondrial DNA testing, however, does no require a root and there fore is suitable for testing on virtually all hairs. FDLE does not have the capability to conduct mitochondrial DNA testing. (PC-R7, 83)

also negative. Finally, epithelial cells were seen in a microscopic examination of the swabs, but FDLE inexplicably did not perform any testing on those cells to determine if DNA or other identifying evidence (such as genotyping) could be revealed. There was no attempt by FDLE to determine if those epithelial cells were from the victim, Mr. Swafford, or an unknown third party.

On February 21, 2005, FDLE submitted its findings on the items held by Volusia County Sheriff's Office. 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. However, there was no explanation of how FDLE determined that a mixture was present, or what was contained within the mixture, or why they were unable (or unwilling) to determine to whom the DNA belonged.

b. *White Panties (of the victim)* – FDLE noted chemical indications for the presence of blood in a stain found in the crotch of the panties, but (again inexplicably) FDLE failed to conduct further analysis to determine the source of the blood, through either serological testing or DNA analysis. A presumptive test for the presence of semen came back negative.

c. *White Towel With Flower Pattern*[14] – A hair collected from this towel was consistent with a male individual, but did *not* match Mr. Swafford's DNA profile.

[14] This item was not specifically listed on the evidence property report produced by Volusia County Sheriff's Office in preparation for the evidentiary hearing held June 11, 2004.

d. *Cellular Debris (collected during the pubic hair combing as part of the rape kit test* –Analysis of this exhibit (Q16) gave chemical indications for the presence of blood. However, no further testing appears to have been conducted, including even a basic microscopic examination to see if cellular material capable of DNA testing was present.

e. *Various Slide-Mounted Hair Standards* – While several of these were deemed by FDLE to be suitable for STR DNA testing, no testing was performed at that time.[15]

Based upon FDLE's limited, confusing, and incomplete testing results, as well as their admitted lack of success in obtaining DNA profiles from slide-mounted hairs, Mr. Swafford again requested – this time in a written motion – that Forensic Science Associates be permitted to test the DNA evidence in his case. (PC-R8 652-783). Mr. Swafford requested that FSA be assigned to the case both because of its established success in working with old, degraded, and/or limited biological evidence, but also because the State had used FSA a number of times as its own expert. (PC-R8 653-658) Specifically, Mr. Swafford argued:

> 7) Based on FDLE's findings, Mr. Swafford requests that this Court permit additional testing of this evidence by Forensic Science Associates ("FSA"), a private DNA lab in Richmond, California. FSA, headed by Dr. Edward T. Blake, is a nationally recognized leader in DNA testing. The lab is renowned for its success in obtaining DNA profiles and testable results from old, degraded, and/or limited biological evidence. In addition, Dr. Blake is one of the nation's foremost authorities on the forensic application of DNA. He has been routinely sought out by prosecutors [including in the

[15] Some of these hairs were later tested by FDLE, and those test results were set forth in FDLE's July 22, 2005 supplemental report.

State of Florida], defense attorneys, and innocence projects around the country due to his unmatched success in locating biological material and obtaining DNA results from complicated biological evidence. . . .

8) The results of FDLE's testing indicate that more precise, advanced testing of the evidence in question could produce conclusive results which would exonerate Mr. Swafford. . . .

9) Of particular concern to Mr. Swafford are the anal and vaginal swabs taken from the victim. At the time of trial, these swabs were analyzed by FDLE and yielded a positive result for acid phosphatase, a substance characteristically found in seminal fluid. Then, as now, FDLE was unable to identify any sperm in the samples. However, this does not mean that sperm is not present. Mr. Swafford should be allowed to have a lab with FSA's proven credentials and success rate analyze this difficult biological material to attempt to identify the source of the seminal fluid.

10) Additional testing of the evidence held by FDLE is critical, and in no way harms the State. FDLE has admitted that it is limited in the type of testing that can be conducted by its labs. *See* EH-T at 46-47. In addition, FDLE has admitted that it has been unsuccessful in obtaining DNA profiles through STR testing on certain types of evidence, notably slide-mounted hairs. *See id.* With all respect to FDLE, it is certainly possible that FDLE is currently unable to produce results on precisely the type of biological evidence where FSA has had unparalleled and undisputed success – which is precisely the type of biological evidence that exists in this case. Additionally, CCRC-South is prepared to bear the costs of transportation and analysis by FSA of the evidence currently held by FDLE in this case.

11) The issue at Mr. Swafford's trial was whether he and he alone was in fact the individual who had sexually assaulted and killed Ms. Rucker. The State made no contention that there was more than one perpetrator. At trial, Mr. Swafford maintained his innocence, and he has continued to maintain his innocence in the nearly 22 years since his conviction. Mr. Swafford still maintains his innocence. By showing that he is not the source of the seminal fluid found 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 could establish that someone else sexually assaulted and murdered Ms. Rucker. In addition, the fingernail scrapings collected from Ms. Rucker, on which biological material has already been recognized by FDLE, could help to identify the perpetrator and exonerate Mr. Swafford.
>
> 12) The identity of the perpetrator of the sexual assault and murder of Ms. Rucker was disputed at trial and during all the intervening years of post-conviction litigation. Further DNA testing by Dr. Blake of all of the biological evidence currently held by FDLE could establish that Mr. Swafford did not in fact sexually assault and murder Ms. Rucker. The DNA testing will bear "directly on [Mr. Swafford's] guilt or innocence." *Zollman v. State*, 820 So.2d 1059 at 1063.

(PC-R8 655-658)

The State objected arguing that Mr. Swafford was conducting a "fishing expedition" through an unaccredited laboratory, that Mr. Swafford had no right to additional DNA testing by his own defense expert, and that the only further DNA testing that should be done was STR testing by FDLE or mitochondrial DNA testing by Mitotyping Technologies on the slide-mounted hairs. (PC-R8 640)

The circuit court held a hearing on the matter on March 11, 2005. Counsel for Mr. Swafford argued that due process mandated that Mr. Swafford be permitted to have his own expert conduct testing, per *State v. Dillbeck*, 643 So.2d 1027, 1030 (1994). Additionally, counsel pointed out that the State had stipulated to the use of FSA and Dr. Blake by the defense in at least four cases, including the post-conviction case of *State v. Allen Crotzer*, Case No. 81-6616 (Hillsborough County,

13th Judicial Circuit).[16] These stipulations occurred despite the fact that FSA was not accredited because in those cases other labs, including FDLE**,** were not able to obtain results from limited, degraded evidence. Moreover, FSA had been retained on behalf of the prosecution in several cases in Florida to conduct and testify as to DNA testing.[17]

However, despite the precedent of FSA being utilized in postconviction by both the State and the defense, and despite the limited and incomplete DNA results issued by FDLE, the circuit court orally denied Mr. Swafford's motion, citing the fact that FSA was not "certified" as required by Fla. R. Crim. Pro. 3.853(7). (PC-

[16] In Crotzer's (non-capital) case, FDLE originally examined the physical evidence in 1981 and prepared slides from genital swabs and semen stain deposits from the victim's clothing. In 2003, the State requested testing on the slides be done by Orchid Cellmark in Maryland. When Cellmark was unable to obtain a complete DNA profile from the evidence, the State and defense agreed to have the evidence transferred to Forensic Science Service in England for further testing, including Low Copy Number DNA profiling – even though Forensic Science Service was *not* an accredited agency as defined by Fla. R. Crim. Pro. 3.853(7). Following the testing by Forensic Science Service, the State and Defense stipulated to additional DNA testing by Dr. Blake and FSA for further forensic evaluation – again, the State agreed to FSA's involvement despite the fact that it was not certified. FSA reviewed the physical evidence in the Crotzer case, including the lab results of both Cellmark and FSS, and determined that further DNA testing was recommended. This DNA evidence ultimately exonerated Mr. Crotzer.

[17] These cases include: *State v. Robert Beeler Power*; *State v. Timothy Ray Perry*; *State v. James Bonner*; and *State v. Thomas E. Robinson*.

R5. 75-76). A subsequent motion for rehearing on this issue was denied, as was a renewed motion for DNA testing.[18]

On July 22, 2005, FDLE issued a report summarizing the results of STR DNA testing on slide-mounted hairs collected from the victim. Amazingly, despite having had "zero success" prior to this case in obtaining DNA profiles from old, slide-mounted hairs, FDLE was able to determine that a "DNA mixture" was present on the hairs, a portion of which was attributed to Mr. Swafford.

FDLE did not explain how it determined a mixture was present, what kind of biological material the mixture contained, where the mixture was found on the hairs, or whether it engaged in any of the necessary controls to ensure that the mixture was not caused by a contamination of the testing sample.

B. Argument

In *District Attorney's Office for the Third Judicial District, et al, v. Osborne*, 129 S.Ct. 2308 (2009), the United States Supreme Court reiterated the long-standing principle that the Due Process Clause imposes procedural limitations on a State's power to take away protected entitlements. While the Court refused to find a *substantive* due process right of access to the State's evidence for DNA testing

[18] Mr. Swafford filed his Renewed Motion for DNA Testing based upon defense counsel's concern that the State was taking two contrary positions in two different cases regarding a defendant's right to access additional and/or independent DNA testing. (PC-R8 652-783)

"in the circumstances of [that] case," it recognized that a defendant in postconviction "does have a liberty interest in demonstrating his innocence with new evidence under state law." 129 S.Ct. at 2319. The Court held that when a state, like Florida, institutes a law and procedure by which a defendant may present newly discovered DNA evidence of his innocence, such a "'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" *Id.* (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). To determine whether a postconviction defendant's due process rights have been violated, "the question is whether consideration of [defendant's] claim within the framework of the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Id.* at 2320 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

Here, the circuit court violated Mr. Swafford's due process rights and abused its discretion when it denied him the opportunity to effectively challenge the State's incomplete, unreliable, and faulty DNA results by denying him the opportunity to have the evidence tested by an independent expert. The State of Florida has created a postconviction system (via Fla. R. Crim. Pro. 3.851, 3.853, and §925.11, Fla. Stat. (2010)) in which defendants like Mr. Swafford may pursue

relief from their conviction and sentence through the vehicle of DNA testing. By unreasonably and unconstitutionally limiting Mr. Swafford's ability to (1) obtain DNA results where FDLE failed to find any, and (2) effectively challenge the State's flawed and incomplete findings, the circuit court abused its discretion and took away a state-created entitlement in violation of Mr. Swafford's due process rights. Moreover, to the extent that the state-created rules governing post-conviction DNA testing restrict Mr. Swafford and other defendants from pursuing their liberty interest by denying them a defense-paid expert of their own choosing, such restrictions are also a violation of due process.

Fla. R. Crim. Pro. 3.853(c)(7), which provides the procedure for post-conviction DNA testing, states:

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

The lower court ruled that FSA was prohibited from performing the independent DNA testing in this case because it was not accredited or certified by either ASCLD or NFSTC. However, the court completely ignored the fact that Dr. Blake and Forensic Science Associates have been utilized by both the State and Defense in various cases in Florida, both at trial and in post-conviction. Indeed, there are at

least four other cases in Florida where FSA has been retained by the defendant as part of the post-conviction DNA testing process. In one of these, *State v. Charles Finney,* FDLE had originally reviewed the evidence (a semen stain found at the crime scene) and determined that the evidence was too small for analysis. In 1999, with the approval of the State, the Tampa Police Department sent various scrapings and clippings to FSA for forensic review and testing. Unlike FDLE, FSA was able to obtain a highly discriminating genetic profile on the sperm. Likewise, in *State v. Allen Crotzer,* Case No. 81-6616 (Hillsborough County, 13th Judicial Circuit), the State stipulated to the use of FSA in postconviction after FDLE was unable to obtain DNA profiles from degraded and old biological evidence.

It is a gross violation of Mr. Swafford's due process and equal protection rights to make such unjustifiable distinctions between similarly situated defendants. Indeed, if the circuit court ruling is allowed to stand, the ability of a defendant in Mr. Swafford's position to have DNA testing done at an eminently qualified and respected lab such as FSA is limited to the whim of the prosecution's agreement to such testing. As Mr. Swafford argued to the circuit court in three motions, two hearings, and his 3.851 request for postconviction relief, counsel specifically sought the assistance of FSA because – in addition to being renowned for its unique ability to obtain test results from evidence that other, **accredited** labs

have analyzed without success[19] – it was and is a lab which the State of Florida has utilized for postconviction DNA testing, despite the fact that it was not "certified."

As Mr. Swafford argues in Argument I, FDLE's DNA testing results at this stage are inconclusive and incomplete. Additionally, FDLE's inability to locate acid phosphatase or semen in the anal and vaginal swabs taken from the victim calls the State's case at trial into serious question. The presence of a mixture on pubic hair combings from the victim, without an accompanying control procedure utilized to rule out contamination concerns, also mandates that Mr. Swafford be permitted to have independent DNA experts at FSA review and test the evidence.

It is beyond dispute that Forensic Science Associates is one of the country's foremost forensic DNA labs, one that is routinely sought out by both prosecutors and defense attorneys because of its unmatched experience and success in obtaining DNA test results from complicated, degraded, old, and/or limited biological evidence. More importantly, the lab's accreditation status has nothing to

[19] These cases include, but are not limited to: (1) Calvin Johnson (Georgia; DNA samples obtained from degraded rape kit evidence; Mr. Johnson was subsequently exonerated); (2) Albert Lee (Nevada; the Las Vegas Police Crime Laboratory was unable to identify any sperm in their examination of seminal stains from the victim's clothing; Dr. Blake was able to identify sperm on that clothing and developed a DNA profile; Lee could not be eliminated as source of sperm); (3) Benjamin Crump (Delaware; Dr. Blake was able to identify and generate a DNA profile on sperm from a pubic hair combing; the FBI had previously analyzed the pubic hair and was unable to identify sperm or locate any biological material suitable for DNA testing; Crump could not be eliminated as source of sperm).

do with the reliability or quality of its testing. It is "'well-established that an expert does not need a special degree or certificate in order to be qualified as an expert witness in a specialized area,' but 'can be qualified by his experience, skill, and independent study of a particular field.'" *Darling v. State*, 808 So.2d 145 (2002) (citing *Fay v. Mincey*, 454 So.2d 587, 595 (Fla. 2d DCA 1984) (internal citations omitted) (upholding admission of DNA testimony presented by State's FDLE expert even though she was not a qualified statistician).

Lab accreditation, certification, and/or independent audits are not a prerequisite to admissibility of DNA test results in Florida at trial. Rather, it is well established that admissibility of DNA evidence is dependent upon a court's determination that the testing procedures meet the standards for admission of scientific evidence articulated in *Frye v. United States,* 54 App. D.C. 46, 293 F.1013, 1014 (D.C. Cir. 1923). *See Hayes v. State,* 660 So.2d 257 (Fla. 1995) (addressing for the first time the admission of DNA test results in Florida and holding that such evidence may be admitted so long as it meets the *Frye* test); *Brim v. State,* 695 So.2d 268 (Fla. 1997) (reaffirming Florida's adherence to the *Frye* test for the admissibility of DNA evidence); *Murray v. State,* 692 So.2d 157, 161 (Fla. 1997) (reaffirming *Brim*); *Murray v. State*, 838 So.2d 1073 (Fla. 2002) (rejecting the State's DNA evidence performed by an accredited lab because the State did not meet the *Frye* test burden; the Court held that the issue of DNA testing reliability

"is an issue that can be resolved only case by case **and is always open to question**" (emphasis added)).

This Court has ruled on numerous occasions that issues of certification and outside audits go to the weight of the evidence, not its admissibility. Whether a lab is certified by an outside group is not dispositive. For example, in *Hayes v. State*, the Court pointed to the recommendations of the National Research Council as examples of testing procedures that meet the *Frye* test for admissibility. Among those recommendations were that labs be "'appropriately accredited and its personnel certified.'" 660 So.2d at 263 (quoting Victor A. McKusick, *DNA Technology in Forensic Science* at 133-34). However, no court in this state has ever required that a lab be certified or accredited in order for DNA evidence to be admitted at trial, so long as the evidence passed the *Frye* test. In *Bevil v. State*, the test results and testimony of an FDLE analyst were rejected because the State did not demonstrate that FDLE's database satisfied the *Frye* test – this despite the fact that FDLE's DNA lab was fully accredited by ASCLD at the time. *See* 875 So.2d 1265 at 1269 (1st DCA 2004). *See also Henyard v. State*, 689 So.2d 239 (Fla. 1996) (clarifying that *Hayes* does not hold that testing procedures which do not meet NRC recommendations – including the recommendation that labs be accredited by an outside agency – are per se unreliable and therefore inadmissible).

In fact, a recent Westlaw search of all state cases in the United States could

not find a single case requiring accreditation or certification[20] for admissibility of DNA test results at trial. To the contrary, there are cases around the country holding that the accreditation or certification status of a lab does not render DNA results inadmissible, but rather is a factor that may be considered when assessing the weight a court and jury assign to the evidence. *See, e.g., Henyard*, 689 So.2d at 250 (Fla. 1995) (rejecting defendant's contention that FDLE's lack of accreditation status, among other things, rendered their test results unreliable, because FDLE's testing procedures met other indicia of reliability per *Frye* and the NRC recommendations); *State v. Wommack*, 770 So.2d 365, 272 (La. App. 3d Cir. 2000) (rejecting challenge to DNA results based in part on the fact that when the FBI performed the tests in 1997, its lab was not accredited); *State v. Tankersley*, 956 P.2d 486, 493 (Ariz. 1998) (FSA's test results admitted after *Frye* hearing, where defendant was sentenced to death; the Supreme Court of Arizona held that while "certification by [ASCLD] could arguably provide a useful gauge of reliability . . . it is not required. The appropriate inquiry is whether a lab's techniques have deviated so far from generally accepted practices that the test results cannot be accepted as reliable.")

[20] The terms "accreditation" and "certification" are used interchangeably by Florida courts and courts around the country, and so will also be used interchangeably here. However, to clarify, the review process performed by ASCLD and NFSTC is typically referred to as "accreditation."

There is nothing in Florida's statutes or evidence code, that require a defendant at trial to have independent DNA testing conducted by an ASCLD- or NFSTC-certified laboratory or agency. In fact, if a defendant at trial wishes to have the FDLE conduct testing for use in his defense – including DNA testing – he must first show good cause,[21] and then show that the testing requested "cannot be obtained from any **qualified** private or nonstate operated laboratory within the state or otherwise reasonably available to the defense." Fla. Stat. § 943.33 (emphasis added). This statute does not define the term "qualified," nor does it mandate that the outside lab be certified or accredited.

Meanwhile, FDLE's accreditation status has not prevented it from suffering from contamination and sloppy lab practices.[22] For example, in August 2005, evidence was presented that showed that FDLE has had recent problems with contamination of DNA samples. In *Michael Mordenti v. State*, Case No. 90-3870,

[21] The requirement that a defendant must demonstrate "good cause" in order for FDLE to do testing at his request demonstrates with startling clarity that FDLE is anything but a neutral agency. Rather, FDLE acts as an arm of the prosecution, and test results achieved by its labs and analysts amount to expert testimony on behalf of the State. As a result, it is a violation of Mr. Swafford's due process rights to forbid him from retaining his own expert to conduct testing of the DNA evidence in this case.

[22] Additionally, and as pled in Mr. Swafford's Motion for Rehearing, filed March 29, 2005, at the time Mr. Swafford was pursuing DNA testing, FSA met or exceeded the standards articulated for accreditation by ASCLD and the Congressional DNA advisory board, established in 1994. (PC-R8 799)

it was discovered that samples had been contaminated by FDLE to such a degree that no result could be obtained. 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.

As Mr. Swafford pled in his motions for DNA testing and his 3.851 pleading, the existence of an undefined and unexplained DNA "mixture" on hairs found on the victim -- a mixture which allegedly implicated Mr. Swafford, but with no control or elimination testing conducted by FDLE which would explain how the mixture got on the hairs in the first place – means that contamination of those hairs is a very real possibility. But without the ability to conduct further DNA testing (or even the ability to challenge the contested results in a hearing (*see supra* Argument I), the circuit court and the State imposed an unconstitutional procedural limitation on Mr. Swafford's state-created right to pursue DNA testing and objective, reliable results.

As three members of the Supreme Court recently observed in *Osborne*:

> Forensic DNA testing rarely occurs [under] idyllic conditions. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are [often] messy assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to exposure to heat, light, moisture, or other degrading elements. They can be of minimal or insufficient quantity, especially as investigators seek to push DNA testing to its limits. . . . **And most importantly, forensic samples**

> **often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting test results. . . .**

Osborne, 129 S.Ct. at 2327 (Alito, J., with Kennedy, J. and Thomas, J., concurring) (quoting Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 Emory L.J. 489, 497 (2008) (footnotes omitted))(emphasis added). Here, it was an unconstitutional violation of Mr. Swafford's due process rights for the State and the circuit court to allow FDLE to "simply report[] test results," and then fail both to substantiate its own findings, as well as pursue other readily available avenues for DNA testing.

Moreover, it is a violation of Mr. Swafford's due process rights to deny him access to a defense expert of his own choosing. Insofar as Rule 3.853 requires that only FDLE or another "certified" laboratory may test DNA evidence, the rule is unconstitutional both facially and as applied. Due process mandates that Mr. Swafford be able to obtain a DNA expert of his own choosing in order to "level the playing field" between the defense and the State. *State v. Dillbeck*, 643 So.2d 1027, 1030 (1994) (holding that the State must be permitted to utilize its own mental health expert to counter the defendant's mental health presentation). Mr. Swafford respectfully submits that this same principle applies with equal force in the context of post-conviction DNA testing. FDLE, the *de facto* testing agency

under Rule 3.853, is not a neutral body working without prejudice for both sides. Rather, it is an arm of the prosecution that routinely acts as an expert for the State.[23] It is this close association with the State that turns the scientific method from a truth seeking function to an adversarial litigation function. Indeed, noting the unduly close ties between law enforcement and forensic labs, the National Academy of Science, in its scathing report on the state of forensic science, issued as one of its recommendations that crime labs be removed from law enforcement control. Specifically the report concluded

> The majority of forensic science laboratories are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency. **This system leads to significant concerns related to the independence of the laboratory and its budget.** Ideally, public forensic science laboratories should be independent of or autonomous within law enforcement agencies. In these contexts, the director would have an equal voice with others in the justice system on matters involving the laboratory and other agencies. The laboratory also would

[23] This distinction is illustrated in part by the limitations defendants face in accessing FDLE labs when they want physical evidence tested as part of their defense at trial. *See § 943.33, F.S.* Instead of providing equal access to both the State and the defense at trial, FDLE requires that "the services of such laboratories **shall also be available to any defendant in a criminal case upon showing of good cause and upon order of the court with jurisdiction in the case.** When such service is to be made available to the defendant, the order shall be issued only after motion by the defendant and hearing held after notice ."*§ 943.33, F.S.* (emphasis added). If FDLE were a neutral expert laboratory, then it would not require a defendant to show good cause and get a court order when the State is not subject to those same restrictions.

> be able to set its own priorities with respect to cases, expenditures, and other important issues. **Cultural pressures caused by the different missions of scientific laboratories vis-à-vis law enforcement agencies would be largely resolved.**

Strengthening Forensic Science in the United States: A Path Forward, National Academies Press (2009), at p. 6-1(emphasis added). Thus, the top forensic scientist in the country concluded that a lab such as FDLE has an inherent bias in favor of law enforcement causing significant concerns of its independence. Functionally, that concern for independence surfaced in Mr. Swafford's case with the mysterious declaration of a mixture of DNA on a sample purporting to implicate Mr. Swafford without and explanation or scientific rigor.

It is a plain violation of Mr. Swafford's due process rights to be forced to depend solely upon the State's expert to conduct his post-conviction DNA testing – especially when he is challenging the State's results as incomplete and unreliable. It is an inescapable irony that if Mr. Swafford were standing trial today, he would be entitled to independent DNA testing by Forensic Science Associates. The admissibility of those test results would be determined by the reliability of the procedures utilized not whether the lab is subject to outside audits by two private associations that offer laboratory accreditation for a substantial fee. Instead, as a result of political horse-trading Rule 3.853 and section 925.11 create a standard for postconviction testing with no evidentiary foundation. Allowing Mr. Swafford's

defense expert to conduct DNA testing will keep Mr. Swafford from relying solely upon expert testimony from the State that he has "no effective means of rebutting.'" *Elledge v. State*, 706 So.2d 1340 (1997) (citing *State v. Hickson*, 630 So.2d 172, 176 (1993) and permitting the state's expert to examine a defendant in order to keep the state from being unduly prejudiced "because [the] defendant [would then] not be able to rely on expert testimony that the state has no effective means of rebutting"). As more fully expounded upon in Argument I, *supra*, the inconclusive and incomplete nature of FDLE's DNA testing procedures and results make the denial of independent DNA testing even more prejudicial.

Furthermore, the United States Supreme Court recently recognized that a state court construction of its own DNA testing scheme can violate due process and is cognizable in the context of federal civil rights litigation under section 1983. *See Skinner v. Switzer*, 562 U.S. ___ (2011). To the extent that the rights afforded to Mr. Swafford under Rule 3.853 and section 925.11 are inconsistently and unconstitutionally applied to him, Florida's DNA scheme operates to violate his civil rights. Thus, Mr. Swafford now has available to him in the event his due process rights continue to be violated by the unreasonable and unconstitutional interpretations of Rule 3.853 and section 925.11. *Id.*

Mr. Swafford has steadfastly maintained his innocence for nearly 30 years. Three members of this Court agreed in 2002 that there is "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) (Quince, Pariente, Anstead, J., dissenting). An independent laboratory found powerful exculpatory DNA evidence – a hair belonging to an unknown male in the victim's stained panties, which were placed back on her body following a sexual assault. The most important forensic evidence presented at trial (the acid phosphatase results) has been completely discredited. FDLE has acknowledged that there are DNA profiles available in other key pieces of evidence (e.g., the fingernail scrapings), but the lower court and the State refuse to permit those samples to be sent to a lab where successful results could be obtained. And the only inculpatory DNA results – a "mixture" which purportedly contains Mr. Swafford's DNA – were performed by a State agency that had never successfully tested slide-mounted hairs before Mr. Swafford's case; that failed to abide by established DNA testing protocols to determine whether the evidence could have been contaminated; and that utterly failed to provide any explanation or support as to what the mixture contained and where it was found on the hairs.

The circuit court's refusal to allow Mr. Swafford to fully and fairly litigate his State-created right to DNA testing was an abuse of discretion and a clear violation of his "liberty interest in pursuing the postconviction relief granted by the State." *Osborne*, 129. S.Ct. at 2319. The inconclusive and incomplete results of

FDLE's DNA testing, and the lack of any findings as to contamination and authenticity, make additional DNA testing by an independent testing authority even more necessary. Therefore, Mr. Swafford respectfully requests that this Court reverse and remand this case so FSA may test the inconclusive DNA evidence, and order an evidentiary hearing in which an adversarial testing of the FDLE's inconclusive findings can prove the need for additional DNA testing by FSA.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. SWAFFORD'S DNA CLAIMS THAT PROVE HIS INNOCENCE WHEN THOSE CLAIMS ARE NOT REFUTED BY THE RECORD. THE COURT FAILED TO ATTACH ANY RECORDS TO ITS ORDER IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

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 remand 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."

After another appeal to this Court, leave was granted to convert the Rule 3.853 DNA results into a 3.851 motion for postconviction. Mr. Swafford filed a 3.851 motion with the same DNA claims for relief that had been in previous two postconviction pleadings.

At the case management hearing, Mr. Swafford argued that the time had finally come to have an evidentiary hearing on the FDLE and Mitotyping's DNA results and contamination issues that may have affected the inconclusive outcomes of some of FDLE's testing.

The State, however, went through the DNA testing claims, arguing that each piece of evidence must be evaluated separately, in a vacuum, to determine whether it should be subject to an evidentiary hearing. Mr. Swafford objected to the Court's considering each piece of biological material in a vacuum without

consideration for the cumulative assessment it should be conducting. The objection was overruled.

The trial court followed the State's suggestion and failed to give Mr. Swafford an opportunity to put the FDLE and Mitotyping Technology results to an adversarial testing, save one single item–the acid phosphatase test.

As a result, the DNA results, conclusive and inconclusive, were not entered into evidence or examined in any manner other than to simply report the results to the court. The issue of contamination that the State urged should be reserved for "another day" was never addressed. No testimony whatsoever was offered regarding the subject of this Court's remand.

By sabotaging the DNA postconviction proceedings, the State has, once again, managed to block an adversarial testing of the DNA evidence. Cf. *Ventura v. State*, 794 So. 2d 553 (Fla. 2001) (the state cannot refuse to disclose public information and then argue the defendant did not prove his claims due to the absence of information). At every opportunity, the State first claimed that the evidence was destroyed. Then, the evidence magically reappeared. The State then objected to having the DNA evidence tested by an independent laboratory without a stake in the outcome of the testing. The State urged the trial court to consider authenticity and contamination on "another day," then blocked an evidentiary on the same evidence when "another day" finally arrived. The prosecution, which is

presumably charged with seeking the truth, has blocked, complained and led the trial court down the primrose path of reversal and remand twice. *Moss v. State*, 860 So. 2d 1007 (Fla. 5th DCA 2003)(where postconviction motion based on newly discovered evidence is summarily denied, defendant's factual allegations must be accepted as true to the extent that they are not refuted by the record).

To Mr. Swafford's detriment, the trial court has blindly followed along. As a result, in 2011 the trial court has still not followed this Court's order from 2004 to "**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.**" An adversarial testing remains an elusive idea even though DNA results on two pieces of biological evidence (i.e. the victim's panties and a towel from the crime scene) did not match Mr. Swafford or the victim. Yet, those facts are not in evidence and have not been subjected to one question by either party. *See McClain v. State*, 629 So. 2d 320 (Fla. 1st DCA 1993)(we consider the state's admitted inability to refute allegations without recourse to matters outside the record, warrants reversal of that portion of the order which denied the claims).

In Argument I, Mr. Swafford illustrated how the trial court's order completely ignores completely the bulk of the DNA results. This error was contrary to the mandate of this Court. (PC-R8). The fact of the matter is that the

files and records did not conclusively rebut Mr. Swafford's DNA claims on which the trial court summarily denied an evidentiary hearing. No adversarial testing or hearing of any kind has occurred as to the DNA results.

When this Court ordered the second remand to convert the Rule 3.853 motion into a Rule 3.51 motion, 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. He argued that it is now known that foreign DNA exists on the victim's panties, that unknown DNA mixtures exist and that the acid phophotase test on which the jury based its decision in 1985 was wrong. "[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).

This Court held that once the DNA testing was done, Mr. Swafford should re-raise the claims as Rule 3.851 postconviction claims. He did that and the court still refused to allow a hearing, even though Assistant Attorney General Ken Nunnelly argued that such issues as contamination were properly 3.851 issues.

> What we're hearing about now, the complaints about contamination, the complaints about what does this mixture mean, those are 3.851 issues.

(PC-R7. 218).

The files and records did not rebut Mr. Swafford's claims that the FDLE's analysis on some evidence was contaminated. Mr. Swafford argued in his Rule 3.851 motion that:

> - FDLE's conclusion that there was a DNA mixture on one of the hair follicles was evidence of 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 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 still has no answer as to how or why FDLE could find a DNA mixture on hair follicles when it could only belong to one person. Nor was Mr. Swafford allowed to have his own expert review the physical evidence of what FDLE had done or assist the defense in understanding the results.

No testimony of any laboratory personnel was taken on anything other than the acid phosphatase test. No reports on the other results were authenticated and entered into evidence. As a result, none of the DNA results, testing methods or procedures have been challenged or subjected to the crucible of an adversarial testing.

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].

If the lower court would be ordered to again follow the mandate of this Court and grant an evidentiary hearing on the DNA results and contamination issues, Mr. Swafford could finally show that he is innocent. Inadequate factual development of these claims by the lower court cannot be a legitimate basis on which to give deference. *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003).

Under Florida law, the lower court was required to accept Mr. Swafford's postconviction claims as true. See, *Lemon v. State*, 498 So. 2d 923 (Fla. 1986). The lower court declined to do so because it misconstrued this Court's order and failed to hold a hearing on authenticity, possible contamination and all of the DNA issues, especially those that were exculpatory and impeaching.

The defense has followed the law and followed every instruction of this Court, but the lower court continues to inconsistently and unconstitutionally ignore Mr. Swafford's right to a full and fair hearing on his claims unless the files and record conclusively rebut them. A right to DNA testing, once granted by a state, can violate a defendant's civil rights if the state court's interpretation of its own DNA law is inconsistent. *See Skinner v. Switzer*, 562 U.S. ___ (2011). Mr. Swafford is entitled to equal and consistent application of his due process rights. *Id.*

Moreover, the trial court was required to attach those portions of the trial record that specifically rebut Mr. Swafford's DNA/3.851 claims. There were no such records attached to the court's order. *Spencer v. State*, 842 So. 2d 52 (Fla. 2003)(To support a summary denial, the court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion."); Fla. R. Crim. P. 3.851.

The files and records do not conclusively rebut Mr. Swafford's DNA claims. This Court recognized this fact when it remanded this case twice for an evidentiary hearing on authenticity, contamination and for DNA testing to be completed. A full and fair hearing on Mr. Swafford's claims is still required.

CONCLUSION

Based upon the foregoing, the Appellant, ROY CLIFTON SWAFFORD, urges this Court to grant him a new trial and/or reverse this case for a full and fair hearing on the issues designated by the Court's prior order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze, Daytona Beach, Florida on March 28, 2011.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14 point New Times Roman type, a font that is not proportionately spaced.

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