IN THE SUPREME COURT OF FLORIDA

CASE NO. SC1O-1772

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

REPLY BRIEF OF APPELLANT

TERRI L. BACKHUS
Assistant CCRC-South
Florida Bar #0946427

NEAL DUPREE
Capital Collateral Regional Counsel – South
101 N.E. 3rd Avenue, Suite 400
Ft. Lauderdale, FL 33301
Tel (954) 713-1284
Fax (954) 713- 1299

COUNSEL FOR APPELLANT

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.

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ARGUMENT I

MR. SWAFFORD HAS PROVED THAT NEWLY DISCOVERED DNA EVIDENCE AND 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.

Nine years ago the State refused to recognize what was a growing mountain of concern that Mr. Swafford did not receive a fair trial in 1985. The majority of this Court trusted the State at its word that the *Brady* evidence it withheld did not undermine confidence in the outcome of Mr. Swafford's trial. Cf. *Brady v. Maryland*, 373 U.S. 83 (1963). Justices Pariente, Quince and Anstead disagreed, finding that previous *Brady* violations by the prosecution and police would "probably produce an acquittal at trial." *Swafford v. State*, 828 So. 2d 966 (Fla. 2002). On direct appeal in 1988, Justice Barkett and Justice Ehrlich concurred stating that the probative value of a collateral crimes statement by Mr. Swafford to State witness Johnson of "you just get used to it" neither proved that Swafford had killed in the past, nor was it relevant to any issue at trial, except to show criminal propensity and character. The potential prejudice it posed to Mr. Swafford's case was "substantial." *Swafford v. State*, 533 So. 270 (Fla. 1988)(Barkett dissenting;

Ehrlich concurred in dissent). Thus, five different justices have had problems with this case ***before*** the newly discovered evidence was ever presented.

With the additional DNA evidence that shows foreign profiles in the victim's panties and no acid phophatase existed when prosecutors argued it to the jury 1985, the State continues to bury its head in the sand when its remaining evidence has been discredited. No adversarial testing of the State's evidence could have occurred at the 1985 trial because the evidence was either withheld by the State, improperly admitted, marred by incompetent counsel, or would not surface through DNA testing until 26 years later. See *House v. Bell*, 126 S. Ct. 2064 (2006).

A. The trial court did not find these claims time barred.

At page 30 of its Answer Brief, the State first argues that Swafford's fourth post-conviction motion and the "new" test results are time barred. State's brief, 30. Neither this Court nor the trial court below has found these claims time barred. (PC-R. 8 V. 14, 1443-2445). In March, 2003, the State filed a response to Mr. Swafford's motion for DNA testing, urging the circuit court to deny the motion, arguing that Mr. Swafford "offered nothing but speculation regarding an alternative source (of DNA), let alone one that exculpates him." (PC-R. 5. 75). The State never argued that Mr. Swafford's motion was time barred, only that he had failed to establish a reasonable probability of a different outcome because of

"speculation" as to what the results would be. *Id*. This Court ignored that argument and allowed DNA testing to be done. It should discount the State's argument now after the results have finally been obtained.

The trial court reached the merits of Mr. Swafford's claims, stating:

> The standard for newly discovered evidence requires first, that the asserted facts must have been unknown by the trial court, by the parties, or by the attorneys, at the time of trial, and it must appear that the Defendant or his trial counsel could not have known then by the use of due diligence…[t]his Court finds that the defense has met the first prong of the standard for newly discovered evidence and finds that the negative APT results from the re-testing of the swabs in 2004 qualifies as such

(PC-R. 8, 14, 1443-1445).

The only issue that prevented the trial court from granting post-conviction relief was its misinterpretation of the second prong of the newly discovered evidence test (i.e. that the evidence would not have produced an acquittal, a less severe sentence or result in a life sentence rather than death). See, *Gonzalez v. State*, 990 So. 2d 1017 (Fla. 2008). The trial court never considered that the issue isn't what a judge made of the undisclosed favorable information, but rather how it might of "affected the jury's appraisal" of the evidence presented at trial. *Kyles v. Whitley*, 514 U.S. 419, 450, n. 19 (1995).

Even if the trial court had not addressed the merits, the DNA testing in this case could not have been conducted earlier, as the State suggests, because of the

State's own misconduct. On June 4, 2003, defense counsel Martin McClain argued Mr. Swafford's DNA motion before the trial court. He pointed out that the State "acknowledged that there had been a destruction of the victim's blood samples drawn during the 1986 autopsy, and that was no information I ever had before until they disclosed that that evidence had been destroyed." (PC-R5. 32, 76). Mr. Swafford argued that destruction of evidence was a due process violation. It is unclear how counsel could have "conducted" testing at "any point in the three post-conviction proceedings" before this one when the State itself said the victim's blood standards had been "destroyed." It was discovered later that the blood standards had been kept in evidence in the clerk's office and was found after Mr. McClain's 2003 argument. Cf. State's brief at 30.

The State also ignores that the reason there are "three" prior post-conviction proceedings was because of the State's conduct. The first post-conviction motion had to be filed early when a death warrant was signed on November 13, 1990. The trial court summarily denied the motion and the case was eventually stayed by the Eleventh Circuit Court of Appeals so that Mr. Swafford could exhaust his state remedies. *Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990).

In 1991, the second post-conviction motion was summarily denied by the trial court. This Court relinquished jurisdiction for an evidentiary hearing on the issue of trial counsel's status as a special deputy sheriff, an issue that was not

disclosed by his trial counsel. *Swafford v. State*, 636 So.2d 1309 (Fla. 1994).

In 1994, Mr. Swafford filed a third post-conviction motion that again was summarily denied. This Court reversed and remanded for an evidentiary hearing. *Swafford v. State*, 679 So. 2d 736 (Fla. 1996).

In October, 2002, Mr. Swafford filed his fourth motion for post-conviction relief seeking DNA testing of available physical evidence. The State's response in March, 2003 was to again urge the trial court to summarily deny the motion without an evidentiary hearing, which caused another remand.

It is not Mr. Swafford's fault that the State repeatedly blocked evidentiary hearings when legitimate issues in dispute went unresolved. See, *Ventura v. State*, 794 So. 2d 553 (Fla. 2001)(the state cannot refuse to disclose public information then argue defendant did not prove claims due to absence of information). This Court has relinquished or remanded this case three times for evidentiary development of legitimate issues in dispute. Mr. Swafford's claims are not time barred now.

B. The facts recited in the State's brief are not trial court's findings.

In his Initial Brief, Mr. Swafford argued that 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. Initial brief at 37. He argued that the trial 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);see also *Kyles*, 514 U.S. 450, n. 19.

Further, Mr. Swafford argued that the trial court failed to consider the DNA evidence cumulatively and instead, followed the State's suggestion to analyze each piece of forensic evidence separately and assess the probability that each single piece of evidence standing alone (without cumulative consideration of the other evidence) would probably produce an acquittal or less severe sentence. *Kyles*, 514 U.S. at 436 (Fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item).

In no way did Mr. Swafford "abandon or waive" his arguments as to any of the separate pieces of newly discovered evidence listed in his brief because he did not argue each and every bit of forensic evidence. Instead, Mr. Swafford emphasized a few examples to illustrate his argument. Cf. State's brief at 32. To be clear, Mr. Swafford argues that **all** of the newly discovered evidence, taken as a whole, would have produced an acquittal, less severe sentence or life sentence, especially in light of the gross *Brady* violations and ineffective assistance of counsel claims from previous post-conviction proceedings. See *Melendez v. State*,

718 So. 2d 746 (Fla. 1998); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). The trial court did not conduct the proper analysis here.

While the State cites to *Sears v. Upton*, 130 S. Ct. 3259 (2010) for the proposition that *Strickland* requires a court to "speculate as to the effect of the new evidence," the trial court utterly failed to do so. (PC-R8, V. 14, 1443-1445). Supreme Court precedent requires a court to speculate as to how the new evidence may have changed the outcome of the trial rather than speculating how the aggravating evidence negates the new evidence. *Id.* The State, unsurprisingly, attempts to inject its own "speculation" to fill the void created by the trial court. State's brief at 35. The State's opinion of the evidence is of little value since it has a vested interest in preserving its conviction. It is the trial court that must conduct the speculative analysis. *Sears v. Upton*, 130 S. Ct. at 3266.

The State's suggestion that the trial court conducted a valid cumulative error analysis is belied by the order itself, which contains one cursory sentence at the end that says "all of the issues argued in the previous motions and the most current motions do not create a cumulative effect and would not have effected the outcome of the trial both at guilt phase and the penalty phase and that argument is rejected." (PC-R 8. V. 14, 1443-1445). See, *Gunsby v. State*, 670 So. 2d 920 (Fla. 1996). *Porter v. McCollum*, 130 S. Ct. 447 (2009. This is hardly the in-depth analysis anticipated by *Porter*. Instead, the trial court's analysis is virtually identical to the

model rejected in *Kyles*, 514 U.S. at 441 (the Fifth Circuit's materiality analysis was found to be an unacceptable "series of independent materiality evaluations, rather than the cumulative evaluation required").

The State's opinions cannot be substituted for a trial court's fact findings, when the trial judge did not make them. The court made no detailed fact findings on any of the evidence that it summarily denied, which included all of the newly discovered DNA evidence. It did not compare that evidence with any of the *Brady* evidence or ineffective assistance of counsel claims in previous post-conviction proceedings. See, (PC-R. 8, V. 14, 1443-1445). Most notably, the court compare the newly discovered evidence with the *Brady* evidence or the lack of mitigation presented by trial counsel when compelling and significant mitigation went undiscovered. Nor did the court discuss the probable impact of the DNA evidence on Mr. Swafford's jury. See *Porter v. McCollum*, 130 S. Ct. at 455 (It is not what the court believes but what the jury could have gleaned from this information); see also *Light v. State*, 796 So. 2d 610 (Fla. 2nd DCA 2001)(judge is not examining whether he believes the evidence presented as opposed to contradictory evidence, but whether the nature of the evidence is such that a reasonable jury may have believed it.).

The trial court did not address the claims from the jury's perspective. Nor did court review the DNA evidence when it summarily denied Mr. Swafford's

claim notwithstanding the absence of acid phosphatase was proved at the evidentiary hearing. See (PC-R. 8, V. 14, 1443-1445). In *Kyles*, the Supreme Court specifically noted that each bit of undisclosed favorable evidence presented there may have, standing alone, been insufficient to undermine confidence in the verdict:

> Perhaps, confidence that the verdict would have been the same could have survived the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and the principal police witness was insufficiently informed or candid. *514 U.S. at 454.*

C. DNA evidence would have been significant to the jury's decision at trial.

1. Hair on the white towel was exculpatory.

The State suggests that the DNA testing on a hair taken from a white towel with flowers was of no significance because it was found in suspect Michael James Walsh's vehicle. It also discounts the importance of the male DNA profile on the towel did not match Mr. Swafford. Any evidence that tends to show that Mr. Swafford was not present is exculpatory. See, *Kyles v. Whitley*, 514 U.S. at 441. Instead, the State argues that the hair on the towel exonerates suspect Walsh and dilutes this Court's dissenting opinions from the previous post-conviction appeals.

Swafford v. State, 828 So. 2d 966, 979 (Fla. 2002)Anstead J, dissenting ("There has been absolutely no focus here on the reality of what actually happened.").

Long before Mr. Swafford's name surfaced as a suspect, Walsh was the prime suspect. Walsh matched the composite sketch made by an eyewitness at the time of the crime, and he had a copy of the composite in his back pocket at the time of his Arkansas arrest (PC-R4.Def. Ex. 2). He also was the subject of numerous *Brady* violations from the prior post-conviction appeal in this case in that all information about Walsh and his buddy, Lestz, was withheld. Cf. *Swafford v. State*, 828 So. 2d 966 (Fla. 2002). It was the Arkansas authorities who contacted the Volusia County Sheriff's deputies because of Walsh's strong resemblance to the composite sketch in his possession (PC-R4, 546; Def. Ex. 2).

The State cites to the withheld police reports on Walsh to support its contention that the hair from the white towel is of no significance. Yet, this was not mentioned in its response to the post-conviction motion below. The State simply argued that Mr. Swafford "failed to even allege how the white towel was connected to this crime so as to be relevant or how an unknown, unidentified hair on that towel would affect the outcome of this case." State's response at 19. Nor did the State object to this evidence or claim it to be irrelevant when it was sent to Mitotyping for further DNA testing. Any evidence collected by law enforcement in the investigation that shows Mr. Swafford could not be identified at the scene is

exculpatory. Cf. *Kyles v. Whitley*, 514 U.S. 419 (1995). The fact that the State takes great pains to insulate Walsh from culpability indicates that it is more concerned with preserving its conviction and executing Mr. Swafford than uncovering a truth that can be scientifically certified.

The white towel evidence contained a hair that was tested by FDLE analyst Shawn Johnson in his report dated Feb. 21, 2005 (PC-R8. 413). The hair originated from a male, but did not match Mr. Swafford's DNA profile (PC-R8. 413). The FDLE lab report does not state where the white towel with flower pattern was collected. To the extent that counsel misstated that the towel came from "near the victim" in her Initial Brief, she did previously state that the towel's location was unknown as its origin is not listed on the FDLE lab report. However, it was collected as evidence by the Volusia County Sheriff. Regardless, it is still exonerating to Mr. Swafford in that he is not implicated by the hair. The towel's proximity to the victim was never explored. Neither Walsh nor the evidence that was tested regarding Walsh was disclosed to defense counsel.

Still, any evidence collected by law enforcement that did not point to Mr. Swafford as the perpetrator was exculpatory and favorable to the defense of actual innocence. Cf. *Kyles v. Whitley*, *supra*. The State's argument completely disregards the difference between defense counsel suggesting, based upon evidence, that Walsh could have been involved in the homicide, and defense

counsel presenting evidence that law enforcement initially suspected Walsh was involved in the homicide and memorialized that suspicion in a police report.

In Mr. Swafford's case, the jury did not hear that the police had listed Walsh as a suspect in the homicide. Materiality concerns what inferences the jury could have drawn from such undisclosed information and by extension the newly discovered evidence that the hair on the towel did not match Mr. Swafford. *Kyles*, 514 U.S. at 445 ("Beanie's statements to police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder."). Proper analysis requires consideration of what inferences the jury could have drawn from the fact that police viewed Jones as a suspect immediately, yet failed to investigate him. The fact that police viewed him as a suspect, legitimizes the defense's argument that someone else either committed the murder, or was somehow involved. It also provides a basis for a defense argument and an inference by the jury that the police investigation was shoddy.

Interestingly, the State suggests that the hair from the white towel with flower pattern exonerates Walsh because it came from his vehicle and the police dismissed him as a suspect. Counsel is unaware of whether police ever compared the hair from the white towel to Walsh, Lestz or anyone other male DNA profile because it was not previously tested. If the absence of the victim's hair in Walsh's

vehicle exonerates him, then a negative finding on the hair from the victim's panties exonerates Mr. Swafford. See, State' s brief at 33.

2. Hair in the victim's panties was exculpatory and material.

The State alleges that the exculpatory hair evidence found in the victim's panties is not significant because animal hair evidence, found in victim's socks/shoes, underwear, pants and in Swafford's truck, support the conclusion that Mr. Swafford was the person who raped and killed the victim. This is the first time the State makes this argument. The State cites to FDLE hair analyst Marianne Hildreth, who did not testify at trial and likewise did not testify nor find evidence that animal hairs present in Mr. Swafford's car or on the victim's clothing matched in any way. No such argument or evidence was presented by the State at trial and no such finding was made by the trial court. (PC-R8, V. 14, 1443-1445). It's a novel interpretation unique to this proceeding and it should be waived as not having been made contemporaneously in the court below.

The State attempts to create a fiction that the hair from the victim's panties is a "new" hair "pulled [by FDLE Analyst Shawn Johnson] in 2004 from the victim's underwear…[which] proves nothing" because there was animal hair found elsewhere on the victim's clothing. See, State's Brief at 34. This argument ignores the obvious, that Mitotyping Analyst Kimberly Nelson, Ph.D. found that the hair in the victim's panties was human, not animal (PC-R8. 562). The petri

dish provided by Volusia County Investigator Poncharik was labeled as "FDLE 20040701914001 03.001/19 Q13 (hair) **hair removed from victim's panties 4-25-05 smj,**" not on her pants, socks or shoes. *Id.*

More telling, was the State's theory at guilt phase that the perpetrator ordered the victim to take off her pants, anally abused her, then made her put her pants back on before she was shot. (R. V. 8, 1386). She was fully clothed when discovered by police. Thus, a hair discovered in the victim's panties by an FDLE crime lab analyst would have been exonerating to Mr. Swafford who was convicted of sexually assaulting the victim and that crime was used as an aggravating factor in sentencing him to death. *Swafford v. State,* 533 So. 2d 270 (Fla. 1988).

Neither DNA testing nor a right to DNA testing was in existence in 1986. *See,* Fla. Stat. Sec. 925.11; 925.12; Fla. R. Crim. P. 3.853. Even after the advent of DNA typing, mitochondrial DNA, the type done at Mitotyping had yet to be developed. Therefore, it was only recently that Mr. Swafford could have asked for or obtained the results that Mitotyping was able to achieve. The DNA evidence obtained by Mitotyping is not only exonerating to Mr. Swafford, it would have cast doubt on the State's case in the eyes of the jury. The State argues that the DNA on the panties and the white towel and the other pieces of evidence are issues in dispute, which means Mr. Swafford should have been granted an evidentiary

hearing. The files and records do not conclusively rebut the claims. See *Lemon v. State*, 498 So. 2d 923 (Fla. 1996); Fla. R. Crim. P. 3.851. Mr. Swafford, at the very least, should have been granted an evidentiary hearing on this evidence. See also, Argument III. Instead, the State urged the trial court to deny any testimony from being presented from Mitotyping analyst Nelson and prevented Mr. Swafford from making any evidentiary record on the DNA evidence.

If the State was so adamant that these hairs were animal hairs and of no significance, it should have conceded an evidentiary hearing on the issue instead of urging the trial judge to summarily deny each single piece of DNA evidence. Contrary to the State's brief, FDLE analyst Hildreth did not testify at trial. She was deposed, but was not called as a witness. Her reports only identify animal (ie non-human hair). There is no comparison of the animal hairs to each other. In her deposition, Hildreth said none of the hairs matched Mr. Swafford. Regarding the animal hairs, Hildreth said,

> I did not do any other examinations as far as attempting to determine what type of animal those hairs may have been from and that there was no request to do that and in certain cases there may have been need to do that and I would go further to see if I could tell if it were cat or dog or whatever. In this case I did not go any further than just classifying those as animal hairs.
>
> FDLE Analyst Hildreth deposition at 12-13.

More importantly, the trial court made no findings that the hair evidence in the panties was animal hair. There was no evidentiary hearing on the DNA testing

results and no testimony was taken about the circumstance under which the results were achieved. Had the State been so concerned about validity of the DNA results, it should have conceded an evidentiary hearing and urged the trial court to allow an adversarial testing. As it stands, none of the DNA testing has been subjected to any hearing in court.

The State suggests that the summary denial of the other claims at the Case Management Conference was because there was "no material fact to be determined." State's brief at 36. Ironically, the State has spent a good portion of its brief arguing about the disputed material facts in those same claims (i.e. that summary denial was adequate and Mr. Swafford was not entitled to an expert of his own choosing). Cf. *Lemon v. State*, *supra*, (if files and records do not conclusively rebut the claim an evidentiary hearing is warranted). Moreover, a hair found in the victim's panties that was discovered on her fully clothed body, which does not match the Mr. Swafford is exculpatory and a material disputed fact. Mr. Swafford's jury was entitled to know that fact before convicting him and sentencing him to death.

D. The lack of any evidence of acid phosphatase in this highly circumstantial case is prejudicial.

The State argues that the fact that there was no acid phosphatase (hereinafter referred to as "AP") on the victim at the time of trial is insignificant because former FDLE analyst Keith Paul did not testify "conclusively" that there was

semen on the swabs collected by the medical examiner. See, State's brief at 45. Instead, the State blamed Mr. Swafford's counsel who said there was "proof positive" that there was semen on the swabs. Presumably then, Mr. Swafford cannot show the probability of a different result because his trial counsel actually relied on what the State's experts were saying at trial. This reasoning also ignores the fact that Mr. Swafford alleged his counsel had been ineffective for failing to retain his own expert and for conceding a sexual battery occurred in his closing argument. (PC-R1. 120; 123; 125; 236-238).

The State's recollection of the trial testimony is flawed. The prosecution unquestionably brought out the AP evidence and elicited that it meant that seminal fluid was present, a sexual battery had occurred, and Mr. Swafford was responsible for it. Medical Examiner Dr. Arthur Botting testified that the presence of AP meant that the victim was sexually assaulted. On direct examination, Dr. Botting was asked if he would rely on the reports regarding the swabs "to help you in the formulation of an opinion as to whether or not a – a deceased had be sexually molested or not." (R. 769). He answered, "Yes, sir, I would rely on the analysis of these swabs to make that determination." (R. 769). When asked if the victim was sexually assaulted he said "Yes. A material called acid phosphatase was identified in the swabs from both the vagina and the anus, and this is a known constituent of seminal fluids." (R. 769).

Again on cross-examination, Dr. Botting testified:

> Q: Now, if I may ask, sir, the presence of prostatic acid phosphatase both in the anus and in the vaginal area orifice, there is no other way that cat get in there, is there?
>
> A: No, Sir.
>
> Q: It absolutely establishes the presence of a male organ –
>
> A: Yes, sir.
>
> Q: -- in that area?
>
> A: Yes, sir.
>
> Q: So it's –
>
> A: Not only the male organ there, but seminal fluid being ejaculated into the orifices.
>
> Q: that would have to have been?
>
> A: Yes, sir, because the acid phosphatase is a component of seminal fluid.

(R. 779-780).

FDLE analyst Keith Paul testified on direct examination that semen was present because AP was found. When the prosecutor asked him what the presence of acid phosphatase indicated based on his examination, he said:

> Based on my examination and the sensitivity of the test I use, it's a very strong indication that semen was 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 its kind of a gray area as to whether you should do a typing or not.

I believe just currently they have come out with a new test, in 1984, '85, that can base – that can call a substance like this semen without the presence of sperm cells.

(R. 1019).

On cross-examination, Mr. Paul said:

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

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

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

A: The particular test that I use, yes. Acid phosphatase is found in a variety of substances and is found in vaginal fluid, but in the male prostate, it's – it's like four hundred times the concentration found anywhere else in nature.

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

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

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

A: Correct.

(R. 1021-1022)

In the State's closing argument, the prosecutor plainly said:

> You saw – we heard Dr. Botting testify that he went to the scene, he brought the body back, and he did an autopsy on it. **It is his professional expert opinion that that girl was raped anally** by an individual. And, the results confirmed that. There was evidence of semen – not semen, but **a component of semen;** unfortunately, not enough to get a blood type, but **there was evidence there of semen** which confirmed Dr. Botting's opinion that the girl had been sexually abused and force enough to cause abrasions to her anus. There was blood there.

(R. 1339) (emphasis added).

Any suggestion that all references to the positive AP test and semen came from the defense is belied by the record. The fact that defense counsel ineffectively conceded sexual battery in his closing and defectively cross-examined the State's experts on AP, not knowing that their testimony was wrong, does not negate the fact that the State offered the AP evidence to prove sexual abuse.

It was the State who argued vigorously to the jury that the existence of AP meant that "the girl had been sexually abused" with "force enough to cause abrasions to her anus" and the person who had done that was Mr. Swafford (R. 1339). The jury and the trial judge both found sexual battery as an aggravating factor in imposing a death sentence.

In its direct appeal opinion, this Court also relied, in part, on evidence of sexual abuse to uphold the "heinous, atrocious and cruel" and "during the course of sexual battery" aggravators in affirming the death sentence. *Swafford v. State*, 533 So. 2d at 277-78. There is no question that this evidence would have shown Mr.

Swafford's entire case in a whole new light to the jury. Particularly when Mr. Swafford testified that he has never had a vasectomy, was never diagnosed as aspermic, and had fathered a son who was born on August 10, 1981. (PC-R8. 466-467).

In the face of compelling evidence to the contrary, the post-conviction court had no competent or substantial evidence to support its denial of relief. It did virtually no analysis whatsoever other than simply reciting the trial court's aggravators and making generic statements that the negative AP test would not have rebutted the aggravators. The lower court's reasoning was directly contradicted by the evidence at the evidentiary hearing which showed that the State's experts gave false and misleading testimony to the jury.

Alan Keel, of Forensic Science Associates, testified in post-conviction that he was troubled that the original test given by the State's experts found AP, but no choline. (PC-R8. 372) This is because one of the samples was stored wet, and AP 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 AP 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 AP 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 said that Dr. Botting's testimony was incorrect. Dr. Botting testified at trial that the presence of AP 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, AP 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 AP indicated that a male sexual organ was near the victim, but that 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).

Not once in the State's brief does it address the impact of this exculpatory evidence on the jury, though it cites *Sears* for the proposition that the trial court must "speculate" about the effect this new evidence would have had on the jurors. The trial judge did not do it. The State cannot dispute that evidence of sexual

abuse is some of the most inflammatory and prejudicial evidence that can be presented to a jury. Cf. *Sears v. Upton*, 130 S. Ct. 3259 (2010).

Yet, the State argues that "striking the sexual battery conviction would not affect the first-degree murder conviction which was premeditated: only a felony murder conviction would be affected." State's brief at 37. It then speculates that the State could pursue a kidnapping charge as the underlying felony. *Id*. The State then cites this Court's direct appeal opinion to support its argument. *Id*.

Once again, the State attempts to look at the DNA issue in a vacuum without acknowledging that the jury was not instructed to consider kidnapping as an underlying offense for first-degree murder or as a stand-alone aggravator. It also fails to consider the highly circumstantial evidence has been severely weakened after post-conviction investigations. As stated in the Initial Brief, there were significant ineffectiveness claims, running the gamut from trial counsel Ray Cass and Howard Pearl having conceded issues during closing argument to failing to investigate or prepare their case at all. The sum total of the mitigation case was a written stipulation by Mr. Swafford's father that was read into the record stating that Mr. Swafford was an Eagle Scout. Besides the false and misleading testimony of Dr. Botting and Keith Paul about evidence of a sexual battery, there were the massive *Brady* violations from the State withholding evidence of Michael James Walsh, a suspect who matched the composite sketch based on an eyewitness

description and who had a copy of the composite in his possession when he was arrested by Arkansas police.

Imagine the effect on the jury had Mr. Swafford been able to point to another suspect whose *modus operandi* was to force anal sex, burn the victims with cigarettes, and then shoot them behind the ear as the victim was here. Imagine the impact if Mr. Swafford would have been able to argue that the other suspect had discarded .38 caliber weapons at the Shingle Shack. The jury would have been interested in the fact that Walsh had a copy of the BOLO composite sketch for this crime in his possession at the time of this arrest and he so strongly resembled the picture that Arkansas police called Volusia County authorities.

Effective counsel would have impeached police officers with this evidence, questioning why they had stopped investigating Walsh. Effective counsel would have had the new DNA evidence that shows the inconclusive results of the fingernail scrapings, the exculpatory hair found in the victim's panties, and the negative AP test to argue to the jury. The trial court was required to "engage" with the evidence at trial in light of the newly discovered evidence which it did not do. See, *Porter v. McCollum*. *supra*

The State cannot prevent an evidentiary hearing on the bulk of these claims and then suggest that Mr. Swafford did not prove his case. See *Ventura v. State*, 794 So. 2d 553 (Fla. 2001). Two justices have had doubts about the admissibility

of State witness Johnson's statements on a collateral offense and three justices have had problems with the *Brady* violations with regard to withholding information on suspects Walsh and Lestz. Now, with the new DNA evidence and negative AP testimony, the State cannot say the cumulative effect of these errors is not substantial when the case against Mr. Swafford was weak from the beginning. The State cannot say that from a defense perspective, the impeachment value of the new evidence alone is not significant. See, *Kyles v. Whitley*, 514 U.S. 419 (1995).

Police and law enforcement witnesses could have been impeached with evidence that they failed to effectively rule out Walsh, a more suitable suspect, who had, and still does have, stronger evidence against him than Mr. Swafford. Dr. Botting could have been impeached with his testimony that a sexual battery occurred and it was Mr. Swafford who did it. Mr. Paul could have been impeached on his false AP results. With effective counsel, Johnson's collateral statements could have been suppressed and compelling mitigation could have been presented.

The trial judge failed to accurately apply the second prong of the *Jones* standard and ignored the other evidence gathered in prior post-conviction proceedings. *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998).

The trial court even minimized the value of the witnesses presented at the most recent evidentiary hearing, though their testimony was unrebutted. The State also cherry picks the evidentiary hearing testimony it wishes this Court to review.

Both Mr. Keel and FDLE analyst Shawn Johnson's testimony went uncontested. Their testimony showed how the State's experts' conclusions were flawed.

Mr. Keel testified that the spot test performed initially by FDLE analyst Paul was a screening test and not quantitative. Mr. Keel said, "It's a very simple assay[test]. It requires only a spectrophotometer and setting up a timed reaction, just like the spot test where you produce the color, and then you measure the amount of that color and compare that to know amounts of acid phosphatase… it takes only about 20 minutes." (PC-R8. 352). He also said, "…every lab that I've worked in has had multiple spectrophotometers. It's common." (PC-R8 352). He also explained that "quantitative acid phosphotase testing began in the mid '40s, and it was because people were encountering semen stains that had little to no sperm in them." (PC-R8 357)

In discussing the inaccuracy of Mr. Paul's trial testimony, Mr. Keel testified that the victim was a non-secretor (PC-R8 368). "In the limited information that Mr. Paul had, he would only know that if he got a blood group substance result from the vaginal swabs, if he got an A, a B or an H, which is O, or any combination of those, then that would have to be coming from the semen." (PC-R8 369). Mr. Keel continued on and stated,

> So in light of all that information, the fact that the choline test was negative, which you would expect if there's enough semen present to give you an acid phosphatase result, spot test result, then you would likely get a positive choline test as well.

> And then the fact that there were no sperm, which the microscopical observation of sperm is the most sensitive test that we have for semen. We expect to find sperm from dilutions of semen that are so diluted , we can no longer detect acid phosphatase or P-30 from them, there's still a high number of sperm that we can recover. So that's the most sensitive and, in fact, the most conclusive identification for semen.

(PC-R8 373-374).

Keel opined that the same was true for the anal swabs. "… the same red flags are in place with the rectal swabs as the vaginal swab, even though the rectal swab was dry, because we know there are a lot of bacteria in feces already. So it simply would make you question whether or not your acid phosphatase result is attributable to semen or it's attributed to a non-semen source." (PC-R8 376)

Based on Paul's notes, Mr. Keel said, "[Paul] had no proof of the presence of semen." (PC-R8 377). If he had enough AP for positive test would certainly have done ABO typing. (PC-R8 385). In his opinion, Dr. Botting's testimony was also untrue. (PC-R8 378). He explained that Botting's findings could only be true if, "he were ignorant of the non-seminal sources of acid phosphatase activity, and given the fact that he was a multi-certified forensic pathologist, had extensive training as a forensic pathologist, you would certainly expect that that would be part of his scientific background." (PC-R8 379).

Additionally, FDLE analyst Johnson reviewed the trial testimony and testified during the evidentiary hearing that he would have "expect[ed] to find

sperm cells with positive AP test. (PC-R8 426). If positive AP test and negative P-30 and negative sperm, he would conclude no semen was found, contrary to Mr. Paul's finding in 1986. (PC-R8 428).

The State suggests that Mr. Swafford suffered no prejudice from the State experts' false testimony because trial counsel used the positive AP result in his theory of defense to show that his client had no need for sex since he had just finished an all night sexual liaison with Patricia Atwell. State's brief at 38-43. Unfortunately for the State, the trial judge did not make this finding in its order (PC-R8, V14, 1443-1445). Nor does this reasoning square with the fact that trial counsel, who was a special deputy sheriff, relied on whatever the State's experts were telling him. Certainly, all parties can agree that it was incumbent upon the State to offer expert testimony and evidence that was true. Had trial counsel known of the correct information, his defense theory may have led to more investigation or changed his defense strategy.

The fact that other injuries to the victim may have indicated sexual assault does not preclude relief here. State's brief at 48-51. Regardless of the other injuries, the State still had to prove that **Mr. Swafford was the individual who inflicted the injuries.** The new DNA evidence could have been argued by competent defense counsel to exclude Mr. Swafford as the person who committed the sexual battery and the injuries.

Contrary to the State's argument, the proper analysis on newly discovered evidence is not on whether evidence remaining was sufficient to sustain the convictions without the underlying felony of sexual battery. It is whether the new evidence taken cumulatively with the prior evidence presented in post-conviction and the evidence remaining at trial would have caused reasonable jurors to impose a less severe sentence or life sentence. See *Preston v. State*, 970 So. 2d 789 (Fla. 2007)(new trial warranted if newly discovered evidence weakens the case against the defendant to give rise to reasonable doubt as to his culpability).

The state did not charge a kidnapping as an underlying felony in the indictment. State's brief at 44. It charged a sexual battery which is now in question. It cannot change course just because the trial evidence and testimony it presented is now false. The jury must still be instructed properly on what crimes they are to find as underlying offenses and aggravating circumstances. *Espinosa v. Florida*, 505 U.S. 1079 (1992)(jury's consideration of invalid aggravating circumstance unconstitutionally infects court's sentencing determination).

Contrary to the State's argument, the trial court did not find the AP evidence had degraded from the passage of time. (PC-R8, Vol. 14, 1443-1445). In fact, the opposite was proved.

According to expert testimony at the evidentiary hearing, the AP did not "degrad[e] from the passage of time." State's brief at 44. When asked if the AP

results could have just degraded over time since the trial in 1986, FDLE analyst Johnson said that epithelial cells (E-cells) were also found in the sample and he "would probably not expect to find E-cells in degraded sample." (PC-R8 441) FDLE analyst Johnson said, "the oldest test that I've run on [AP] has been 15 to 20 years." (PC-R8 449). Acid phosphatase is a stable enzyme.

When the State suggested that the AP may have deteriorated over time, Mr. Keel testified that "it's an exceedingly stable enzyme, as long as it's not insulted. As long as it's not subjected to extremes of heat or to moisture such so that bacteria can proliferate and literally eat it, you know, as their food source, it's an exceedingly stable enzyme, and that's why we use it the way we do. (PC-R8 353). "So the fact that there are still epithelial cells present on the rectal swabs demonstrates that the specimen is still well-preserved." (PC-R8 392)

"Essentially, as far as the anal or rectal swabs are concerned, essentially, the specimen appears to be basically the same way as it was when Mr. Paul tested it, except for the passage of time. However, the mere passage of time couldn't account for the loss of acid phosphatase activity because we know acid phosphatase persists for decades." (PC-R8 392).

There was no evidence introduced at the evidentiary hearing that the AP had "degraded from the passage of time" was undetectable, nor did the trial court make that fact finding. The cases cited here do not support the State's position. *Preston*

v. State, 607 So. 2d 404 (Fla. 1992) assumes that the underlying felony has been "proved beyond a reasonable doubt" to the jury. Here, the State assumed it could prove the underlying felony of kidnapping. It was not proven or instructed to the jury. This Court's finding on direct appeal that other facts (such as the victim's abduction) could also support the "heinous, atrocious and cruel" aggravator is irrelevant to the issue here. The fact is that the victim's abduction (if it was proved to the jury) does not support the "during the course of a sexual battery" aggravator. It could only support a "during the course of a kidnapping" aggravator which was never charged or proved at trial. In 1988, when this Court rendered its opinion on the aggravators, it assumed, as the jury did, that the State's evidence was true.

Finally, the State repeatedly argues that the trial court properly considered evidence from prior post-conviction proceedings and reconciled the DNA testing results with Judge Hammond's sentencing findings. Yet, the trial judge does not mention these facts except to recite Judge Hammond's sentencing order. No meaningful cumulative error analysis was conducted here. As a result, no competent or substantial evidence existed to support the trial court's order because it ignored what a reasonable jury could have found credible. See, *Porter v. McCollum*, *supra*. The unrebutted evidence from the post-conviction hearing, in conjunction with previous *Brady* violations and ineffectiveness claims against trial counsel would have convinced reasonable jurors to impose a "less severe

sentence." Mr. Swafford was entitled to an "individualized sentencing" and reliable guilt phase after all of the evidence had survived an adversarial testing. To achieve the objective of an "individualized sentencing" trial counsel has to develop and present a detailed picture of the defendant's case to the jury. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976); cf. *Strickland v Washington*, 466 U.S. 668 (1984) . Mr. Swafford is entitled to a new trial.

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.

The State's argues that this issue is procedurally barred because this Court denied Mr. Swafford's motion seeking additional DNAtesting by Forensic Science Associates (FSA) in a previous appeal. State's brief at 54; *Swafford v. State*, 946 So. 2d 1060, 1061 (Fla. 2006). While the Court did make that ruling, it did so with the belief that the trial court was going to give Mr. Swafford a full and fair evidentiary hearing on his DNA issues. The trial court, however, summarily denied the DNA evidence without an evidentiary hearing, even though exculpatory and exonerating evidence had been obtained from Mitotyping, Inc. and FDLE.

Mr. Swafford was not allowed to call DNA analysts from Mitotyping, Inc. to perfect the record or testify about the significance of their findings. Ironically, Forensic Science Associates analyst Alan Keel was permitted to testify about his review of records on the issue of the presence of acid phosphatase, but he was not allowed to test any evidence or testify about his opinions of the DNA results. It is the arbitrary application of the rule and statute that is at issue here. In the Initial Brief, Mr. Swafford argued this Court's denial was an equal protection violation in that other similarly situated defendants had been allowed to have Forensic Science Associates as their experts, even though they are not certified. See Initial Brief at 64. In *Charles Finney v. State*, Case No.91-1611, the Tampa Police Department used FSA to test and review DNA evidence in that case which was admitted in the Thirteenth Judicial Circuit in Hillsborough County. In *Allen Crotzer v. State*, Case No. 81-6616, FSA tested DNA evidence after FDLE was unable to obtain DNA profiles from old and degraded biological evidence which was admitted in Hillsborough County circuit court. FSA's results ultimately led to Mr. Crotzer's exoneration.

Here, the State does not address the equal protection violation or the arbitrary application of state law in allowing some defendants the benefit of choosing their own defense expert at their own expense to conduct DNA testing while denying others. Mr. Swafford listed other cases throughout the country in

which FSA was allowed to conduct testing and testify. See Initial Brief at 66. While the State may have the "flexibility" to frame post-conviction procedures, it does not have the right to limit them in an arbitrary fashion as to deny equal protection and due process. *Skinner v. Switzer*, 131 S. Ct. 1289 (2011)(right to DNA testing can violate defendant's rights if state court's interpretation is inconsistent); cf. *District Attorney's Office for Third Judicial Circuit v. Osborne*, 129 S. Ct. 2308 (2009).

Here, Mr. Swafford at his own expense sought to have the inconclusive results of FDLE testing resolved by FSA. The purpose of Fla. R. Crim. P. 3.853(7) was to limit the financial exposure of the state by requiring its own agency to conduct the bulk of the DNA testing. The State would incur no expense and instead would benefit by the possibility of receiving definitive answers to the inconclusive FDLE results. Mr. Swafford is entitled to same treatment under the law as Mr. Crotzer and Mr. Finney. Mr. Swafford should be allowed to have additional DNA testing done by a defense expert of his choosing.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. SWAFFORD'S DNA CLAIMS THAT 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.

While most of this claim is addressed in Argument I, the State's procedural bar argument is new. State's brief at 56. This claim cannot be procedurally barred when the trial judge did not rule on the scope of the evidentiary hearing until after the Case Management hearing and after this Court's last remand. This Court's ruling that the trial judge had "complied" with this Court's order was based on whether to entertain the issues under Fla. R. Crim. P. 3.851 or 3.853. *Swafford v. State*, 946 So. 2d 1060 (Fla. 2006). It had nothing to do with the scope of the hearing. Without being clairvoyant, this Court had no way of knowing whether the trial court was going to attach records to its order justifying its conclusions. No records were attached to the trial court's order. *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); Fla. R. Crim. P. 3.851 (5)(B)[the court "shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review."]. Here, the trial court attached no records to its order and did not address the summarily denied claims, thus no meaningful appellate review can occur. *McClain v. State*, 629 So. 2d 320 (Fla. 1st DCA 1993).

Finally, the "contamination" issue was specifically postponed by the trial court to another day. Then, the trial judge never gave Mr. Swafford that day. It

cannot be the law of the case if a hearing never occurred on the contamination issue. Mr. Swafford was not allowed to call any witnesses about the issue. This was a due process violation. See, *Skinner v. Switzer*, 131 S. Ct. 1289 (2011). The files and records do not conclusively rebut the DNA issues in this case. An evidentiary hearing is required

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 August 5, 2011.

CERTIFICATION OF TYPE SIZE AND STYLE

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/s/ Terri L. Backhus

TERRI BACKHUS
Florida Bar No. 946427
Assistant CCRC-S

CRAIG TROCINO
Florida Bar No. 996270
Assistant CCRC-S

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
COUNSEL FOR APPELLANT