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IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC16-1178
	)	L.T. Case No. 82-0661-C
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Fourteenth Judicial Circuit
In and For Bay County, Florida
[Criminal Division]

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Counsel for Appellant, KAYLE BARRINGTON BATES, certifies that the following persons and entities have or may have an interest in the outcome of this case.

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The Honorable Hentz McClellan
Circuit Court Judge, Fourteenth Judicial Circuit
(Post-Conviction Court Judge)

Kayle Barrington Bates, DC #088568
(Appellant/Defendant)

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THE CIRCUIT COURT ERRED IN FINDING THAT "OVERWHELMING EVIDENCE OF GUILT" IN THIS CASE PREVENTS THE APPELLANT FROM MEETING HIS "REASONABLE PROBABILITY" BURDEN. IN FACT, THE INSTANT MOTION FOR DNA TESTING SHOULD BE GRANTED ON THE MERITS BECAUSE DNA TESTING OF THE REQUESTED ITEMS OF EVIDENCE, IF FAVORABLE, WOULD INDICATE UNEXPLAINED SEMEN AND OTHER

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PRELIMINARY STATEMENT

Kayle Bates was the defendant and the State was the prosecution in the Criminal Division of the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, Florida. This is an appeal from an order summarily denying a Motion for DNA Testing filed under Fla. R. Crim. P. 3.853. In the brief, the parties will be referred to as Bates, Defendant or the Appellant and as the State, respectively.

The following symbols will be used:

"T" = Trial Transcript

"R" = Record on Appeal Filed in this Proceeding

All other citations to pleadings and orders that were made part of the record on appeal will be referenced as appropriate.

STATEMENT OF THE CASE

On July 6, 1982, Mr. Bates, an African-American Muslim, was charged by indictment with first-degree murder, kidnapping, sexual battery, and armed robbery of a Caucasian insurance clerk in Panama City. At the end of the three-day trial, the jury found Mr. Bates guilty of first-degree murder, kidnapping, attempted sexual battery, and armed robbery. On May 25, 1995, after one mistrial and two reversed death sentences, the circuit court again sentenced Mr. Bates to death, following the jury's 9 to 3 recommendation for death and despite significant mitigating evidence. (2R XV 836).

This Court affirmed the death sentence. *Bates v. State*, 750 So. 2d 6 (Fla. 1999), and the United States Supreme Court denied certiorari on October 2, 2000. *Bates v. Florida*, 531 U.S. 835 (2000). The Supreme Court of Florida had previously affirmed the conviction on direct appeal. *Bates v. State*, 465 So. 2d 490, 493 (Fla. 1985).

On September 10, 2001, Mr. Bates filed his initial motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.851. (PC-R2 II, 325-30). The motion detailed previously undisclosed evidence of corruption and unfair influence in Bay County by prosecutor Appleman, Sheriff Lavelle Pitts, investigator Frank McKeithen, and investigator Guy Tunnell,[1] the latter two being the individuals that

[1] Before the evidentiary hearing, Guy Tunnell was forced to resign as the head of

Mr. Bates claimed drugged him to induce a confession. (D.E. 1, 81). Mr. Bates filed an Amended Motion to Vacate on September 24, 2004 raising 18 claims focusing on issues of ineffectiveness of counsel, corruption, and misconduct. (PC-R2.IV, 528-612). On March 4, 2005, the circuit court denied Mr. Bates an evidentiary hearing on all claims except one part of an ineffective assistance of resentencing counsel claim. (PC-R2. 688-97). Mr. Bates' evidentiary hearing was held October 16-17, 2006. The circuit court denied relief on February 28, 2007. (PC-R2. 889-900). This Court affirmed the denial on January 30, 2009. *Bates v. State*, 3 So. 3d 1091 (Fla. 2009). Rehearing was denied on February 24, 2009 and the mandate issued on March 12, 2009.

FDLE for making racist remarks and for covering up a video depicting the murder of 14-year-old Martin Anderson , which occurred at a Bay County boot camp that Tunnell started as Bay County Sheriff. Email evidence also showed that Frank McKeithen was complicit in the cover-up. *St. Petersburg Times*, March 31, 2006. Tunnel had a long history of racial insensitivity. *See* Lucy Morgan, *Boot Camp Notoriety Chased FDLE Chief*, St. Petersburg Times, April 22, 2006.

Mr. Bates also discovered that Frank McKeithen had caused a reversal of a conviction by the Eleventh Circuit Court of Appeals for continuing to question a defendant after he had invoked his right to counsel. *Cannady v. Dugger*, 931 F.2d 752, 754-755 (11th Cir. 1991). This same disregard by McKeithen was evident in Mr. Bates' case where he alleged that McKeithen, Pitts, and Tunnell threatened harm to his family if he did not confess. (D.E. 1). In 2013, McKeithen as Bay County Sheriff was rebuked by Judge Fensom for covering up the misconduct of his deputies in illegally placing a GPS device on a drug suspect's car and then accidentally erasing the data on the dates surrounding the crime. The misconduct and the cover-up resulted in the case being dismissed. See *Jeffrey Gage v. State of Florida*, Case No. 032011CF002861 and 032011CF002766.

Prior to the 2006 post-conviction evidentiary hearing, Mr. Bates moved to disqualify the Bay County State Attorney's Office and the judge, but was denied (D.E. 1).

On March 16, 2009, Mr. Bates filed a federal petition for writ of habeas corpus in the Northern District of Florida. (D.E. 1). On September 28, 2012, the petition was denied and the Eleventh Circuit affirmed that denial. *Bates v. Sec'y Fla. Dept. of Corr.*, 768 F.3d 1278 (11th Cir. 2014). Mr. Bates petitioned the United States Supreme Court for certiorari review, which was denied. *Bates v. Florida*, 136 S. Ct. 68 (2015).

Most relevant here, on September 30, 2003—on the last day of the statute of limitations that existed at that time in the postconviction DNA testing law—Mr. Bates filed a Motion for DNA Testing Pursuant to Fla. R. Crim. P. 3.853, seeking DNA testing on numerous items of evidence, including the victim's rape kit and clothing worn during the crime, that contained semen likely from the perpetrator. (PC-R2 II325-330). He alleged that no DNA testing had been performed on these items and that the State used the existence of the semen and the lack of a detected blood type revealed through testing of that semen as evidence that Mr. Bates was the perpetrator of this rape-murder because he is a non-secretor. Thus, Mr. Bates argued, DNA testing excluding him from having contributed the semen would demonstrate that he was innocent of this crime and that the State had incorrectly attributed the biological material to him.

However, on March 17, 2004, the circuit court denied the request for postconviction DNA testing stating that there was no reasonable probability that

the defendant would be acquitted or would have received a lesser sentence if the DNA evidence would have been admitted at trial. (PC-R2 III, 451-57). The circuit court relied on the following facts to deny the testing:

(a) Mr. Bates had given two statements admitting he was at the scene (even though those statements were recanted);

(b) Those statements were consistent with the primitive blood-typing results available at the time of trial;

(c) The unidentified semen on the victim's panties and on the vaginal swabs could have been from the victim's husband who told authorities he had sex with the victim two days before the crime (even though DNA testing could also be compared to the husband's DNA to exclude him as a contributor);

(d) The jury found Mr. Bates guilty of attempted sexual battery. Thus, the presence of semen in the vagina of the victim was irrelevant to Mr. Bates' guilt or innocence; and

(e) Mr. Bates did not deny being at the scene, which could account for the blood on his clothing.

On January 30, 2009, this Court, in an opinion also denying claims filed in a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, affirmed the denial of the request for postconviction DNA testing. *See Bates v. State*, 3 So. 3d

1091, 1098-1100 (Fla. 2009). Specifically, this Court cited to numerous items of evidence as indicia of guilt and held that "[g]iven this accumulation of evidence, we find no error in the postconviction court's conclusion that DNA testing would not 'give rise to a reasonable probability of acquittal.'" *Id.* at 1099. While conceding that the prosecutor argued a rape theory at trial and that DNA testing of the requested semen from the victim's vagina could exclude Mr. Bates, this Court nonetheless relied on the fact the jury did not find Bates guilty of sexual assault but, rather, found Bates guilty of attempted sexual assault in order to find that "the DNA of the semen in the victim's vagina 'was not a critical link in the proof against the defendant at trial.'" *Id.* at 1099-1100.

On January 8, 2016, Mr. Bates, through undersigned counsel, filed a second Motion for Postconviction DNA Testing, pursuant to Fla. R. Crim. P. 3.853. (R. 1-30). On February 3, 2016, the circuit court ordered the State to respond to the Motion and the State filed its Response opposing the requested DNA testing on March 24, 2016. (R. 31, 32-48). On April 14, 2016, Mr. Bates filed his Reply. (R. 49-62). On May 23, 2016, the circuit court denied this Motion for Postconviction DNA Testing, finding (1) that collateral estoppel barred the testing on seven of the ten items requested for testing in the instant Motion,[2] as these items were requested

[2] These items are (1) the victim's panties, (2) the victim's vaginal swab, (3) semen smear slides, (4) the victim's bra and hosiery, (5) the acid phosphatase test, (6) the victim's vaginal washing, and (7) the blue cord used to strangle the victim. *See*

for DNA testing in the 2003 Rule 3.853 proceeding, that request was denied and the denial was affirmed on appeal (R. 66-67, 69-70), and that (2) irrespective of the procedural bar, the Motion is legally insufficient, as there is "not a reasonable probability that the results of any DNA testing would exonerate him or lessen his sentence" due to the "overwhelming evidence" identified in the order. (R. 67-68, 70-71).

On June 7, 2016, Mr. Bates filed a Motion for Rehearing raising four points of law or fact overlooked by the circuit court in its Order, most notably that the circuit court ignored case law that does not bar testing on items of evidence requested for the first time in a subsequent Rule 3.853 motion. (R. 163-71). The circuit denied the Motion for Rehearing on June 14, 2016. (R. 172-84).

On June 28, 2016, Mr. Bates timely filed a Notice of Appeal and, on September 22, 2016 (R. 191-92), this Court entered an order setting a briefing schedule requiring Mr. Bates to file his initial brief no later than November 1, 2016. Mr. Bates files the instant initial brief in compliance with this Court's order.

STATEMENT OF THE FACTS

In his Rule 3.853 motion below, the Appellant alleged the following facts, with an emphasis on facts related to the evidence requested for DNA testing:

Order, at 5 (R. 67). The circuit did not address whether collateral estoppel similarly barred the three remaining items of evidence that were not requested for testing in the 2003 Rule 3.853 proceeding.

On June 14, 1982, the body of Renee White was discovered by law enforcement behind the insurance office where she worked. She had been sexually assaulted and killed. Mr. Bates was found near the crime scene and was the only black man in the vicinity. He was immediately apprehended at gunpoint. Within the hour, Frank McKeithen, began interrogating him. (R. 569; 6/14/82 Lynn Haven Police Report). Police did not find the victim until 2:27 p.m. nearly an hour after a plainclothes, off duty Officer Cioeta had confronted Mr. Bates with a shotgun. (R. 44). Assistant Medical Examiner Sapala testified that the cause of death was suffocation and multiple stab wounds, and that he believed the victim had been sexually assaulted. The medical examiner listed the victim's time of death at 2:10 p.m., a time when Mr. Bates was already in custody at the Bay County Sheriff's Office [ ]. Police did not search for or compare the forensic evidence to any other person.

Mr. Bates made incriminating statements during his interrogation. Yet, these statements to police were conflicting and inconsistent with the crime scene. He made them without an attorney and within an hour of being threatened with a shotgun and being ordered to "get in the car" during his arrest. He repudiated his confessions almost immediately after giving them. His attorney moved to have them suppressed in court based on his belief that Bates had been drugged and he denied giving the second statement in which he confessed to the crime. Attorneys Bajocsky and Bowers both testified that Bates was "out of his head" when he first spoke with them after his arrest.

Within days of his arrest, Mr. Bates was charged with first-degree murder, kidnapping, sexual battery, and armed robbery, in connection with this crime.

At his trial, Assistant Medical Examiner Sapala testified that he had gathered vaginal and anal swabs, collected vaginal washings and blood samples from the victim for submission to the Florida Department of Law Enforcement ("FDLE") for examination. DNA testing did not exist at the time of Mr. Bates's original trial.

FDLE Analyst Suzanne Harang testified at trial that she conducted serological examination and ABO blood typing tests of the exhibits submitted to her. While such examinations could determine the type

of biological evidence and possibly the blood-type of the contributor, they could not match the biological material to a specific contributor to the exclusion of all others. Her testing produced the following inconclusive results:

- The victim's saliva standard was unsuitable for testing at that time. (T. 539);
- The victim's vaginal swab was positive for semen but the blood grouping tests were inconclusive. (T. 551);
- Semen smear slides indicated the presence of semen but it could not be typed for blood group. (T. 540);
- State's exhibit #17, the victim's purple skirt and pantyhose, tested positive for the victim's blood type but other blood on the skirt was inconclusive. (T. 541);
- State's exhibit #20, the victim's blue panties, tested positive for semen, but not for blood. Enzyme tests of that semen sample were inconclusive. (T. 542). In addition, she only tested a semen stain on the inside of the panties and did not test a stain on the outside of the panties. (T. 554).
- State's exhibit #22, the defendant's blue shirt, tested positive for blood type A, the same blood type as the victim and a large percentage of the general population, but the donor of that blood was not conclusively identified. (T. 543);
- State's exhibit #21, the defendant's white briefs, tested positive for semen, but could not be typed for ABO antigens. (T. 544);
- State's exhibit #19, the defendant's green pants, tested positive for type A blood, but was not identified conclusively as the victim's blood. (T. 544);
- State's exhibit #26, an acid phosphatase test, which Ms. Harang did not examine because it was "wet". (T. 546);
- State's exhibit #28, a vaginal washing of the victim, tested positive for non-motile intact sperm. It could not

be grouped with ABO typing and the PGM analysis was inconclusive. Ms. Harang testified that it was possible that this was consistent with a non-secretor. She determined that an examination of Bates's saliva was consistent with a non-secretor. (T. 546-47; 555); and

- State's exhibit #29, a piece of blue cord used to strangle the victim, tested positive for blood type A, but she could not identify the source (T. 547-48).

Analyst Harang could not say where the semen on the victim's panties, vaginal swabs, washings came from nor could she identify the semen contributor. (T. 556). Because Mr. Bates was a non-secretor and the blood-type results on the semen on these items were inconclusive, the State attributed the semen to Mr. Bates and argued its presence as proof that that he raped and murdered the victim. (T. 866).

In fact, prosecutor Appleman argued that the victim "was, in fact, sexually assaulted." (T. 282). The indictment charged Mr. Bates with sexual battery by "vaginal penetration by the penis." (T. 272). During closing argument, Appleman repeatedly argued that Mr. Bates raped the victim. (T. 591, 605, 606, 607, 636). He also said that fibers found on the victim's body and the presence of semen on her panties proved that Mr. Bates had committed the murder (T.608, 611). Appleman explicitly and plainly argued that the "Defendant unzipped his pants" and "had sexual intercourse with his penis with her." (T.632). Despite the jury convicting Mr. Bates of attempted sexual battery, the prosecution's entire theory of the case was that Mr. Bates raped and murdered the victim and the physical evidence purportedly proved this theory.

(R. 6-9).

In its Order, the circuit court pointed to the following evidence from the record in an attempt to refute the Appellant's allegation of an entitlement to relief:

The Defendant gave five separate accounts of the events that he claimed occurred on the day of the crime. In an unrecorded statement, he told Investigator Frank McKeithen that the first time he got near

the victim's office building was when he saw Officer Ciota after picking cattails in the woods. (Trial Tr. – Vol. IV at 314-315.) He first claimed that the blood on his shirt was an old stain; after he used the shirt to wipe his bleeding mouth. (Trial Tr. – Vol. IV at 315.) In a separate unrecorded statement, the Defendant alleged that he went in the victim's office and asked her for directions to a local business. (Trial Tr. – Vol. IV at 319-320.) He then drove to the end of the road and went into the woods to look for cattails. (Trial Tr. – Vol. IV at 320.) Upon seeing the victim's body in the woods, he claimed to have picked up her arm to check for a pulse; he stated that her blood may have gotten on his shirt as a result of that contact. (Trial Tr. – Vol. IV at 320-321.)

In his first recorded statement, the Defendant claimed that he parked his truck next to the office building and went inside where he asked the victim for directions to a local business. (Trial Tr. – Vol. IV at 335-336.) He then drove his truck to the end of the road and parked it where it could not be seen. (Trial Tr. – Vol. IV at 337.) After taking his lunch break, he walked into the woods to collect some cattails. (Trial Tr. – Vol. IV at 337.) Upon returning to his truck, he looked into the woods where he saw the victim's body. (Trial Tr. – Vol. IV at 343.) He walked over and checked her pulse, but when he realized that she was dead, he panicked and ran back into the woods. (Trial Tr. – Vol. IV at 344-345.) He made contact with police after he exited the woods. (Trial Tr. – Vol. IV at 346.) In his third unrecorded statement, the Defendant claimed that he parked his truck at the end of the road and walked back toward the building. (Trial Tr. – Vol. IV at 353.) He stated that he saw a white man wrestling with a woman inside the office and went in to help. (Trial Tr. – Vol. IV at 353.) He claimed that the man hit him in the mouth, as evidenced by the cut on his lip. (Trial Tr. – Vol. IV at 353.) He stated that the man ran out of the building and into the woods. (Trial Tr. – Vol. IV at 353.)

In his second recorded statement, the Defendant claimed that he went into the building to speak with the victim, who got angry with him for no apparent reason. (Trial Tr. – Vol. IV at 376.) He stated that after she tried to squirt him with mace, she grabbed a pair of scissors. (Trial Tr. – Vol. IV at 378-79.) He then claimed to have carried her into the woods, but he initially denied having sex with her. (Trial Tr. – Vol. IV at 380, 382.) Upon further questioning, he admitted that he tried to have sex with the victim. (Trial Tr. – Vol. IV at 382-383.) He

claimed that by the time they got to the edge of the woods, he was unable to find her pulse. (Trial Tr. – Vol. IV at 381.) Although the Defendant never issued a clear confession to the crimes in his statements to police, he admitted that he was at the scene and that the victim's blood was on his shirt. (Trial Tr. – Vol. IV at 379-82.) He also admitted to being with the victim when she was stabbed, and he did not claim that a third party was present at the time the stabbing occurred. (Trial Tr. – Vol. IV at 379-82.) Notably, during their conversation while the Defendant was at the police station, he told his wife, "I killed that woman." (Trial Tr. – Vol. IX at 54.)

Additional evidence places the Defendant at the scene of the crime at or near the time of the victim's murder. On the day of her murder, the victim returned to work around 1:05 p.m.; officers arrived at her office approximately fifteen minutes later and saw the Defendant emerge from the woods shortly thereafter. (Trial Tr. – Vol. I at 43-45; Trial Tr. – Vol. II at 107, 113.) Items belonging to the Defendant (or, at the very least, items consistent with the items owned by the Defendant) were found at the crime scene, including a watch pin [fn3], a baseball cap [fn4], and a knife case. [fn5] (Trial Tr. – Vol. IV at 351-52; Trial Tr. – Vol. IX at 11.) Footprints consistent with the tennis shoes the Defendant was wearing at the time of his arrest were found at the crime scene. (Trial Tr. – Vol. III at 218, 228-232; Trial Tr. – Vol. IX at 82-83.) The victim's blood was found on the Defendant's shirt. (Trial Tr. – Vol. III at 288-289.) Evidence located on the victim's person also places the Defendant in her presence at or near the time of her death. Fibers from the Defendant's pants were found on the victim's clothes. (Trial Tr. – Vol. III at 249-253.) Semen retrieved from the victim's vaginal washing was contributed from a non-secretor, and the Defendant was determined to be a non-secretor. (Trial Tr. – Vol. III at 281-282, 291.) Other circumstantial evidence also places the Defendant at the scene of the crime. The Defendant was in possession of the victim's wedding ring [fn6], and there was evidence to suggest that the ring had been forcibly removed from her finger. (Trial Tr. – Vol. II at 197, 189-190.) The Defendant's vehicle was parked in such a manner that it was not easily visible from the victim's office building, as the Defendant himself admitted. (Trial Tr. – Vol. II at 162-163; Trial Tr. – Vol. IV at 314.) The victim's wounds were consistent with wounds that would have been caused by the

> Defendant's knife. [fn7] (Trial Tr. – Vol. II at 184; Trial Tr. – Vol. III at 208-209.)
>
> > [fn3] The Defendant claimed that he lost his watch pin while making a delivery at another local business. (Trial Tr. – Vol. IV at 350.) At a hearing on the Defendant's motion to suppress, the State presented testimony that the employee with whom the Defendant allegedly dealt with could not corroborate this story. (Trial Tr. – Vol. II at 110.)
> >
> > [fn4] The Defendant admitted to having lost his cap in the woods. (Tr. Of Mot. To Suppress Hrg. at 37-38.)
> >
> > [fn5] The Defendant's knife case was identified by multiple witnesses at trial. (Trial Tr. – Vol. II at 130-132, 135-137, 150-152.)
> >
> > [fn6] The Defendant tried to conceal the ring from police. (Trial Tr. – Vol. IV at 317.) The Defendant first claimed that the ring belonged to his wife; upon hearing that the victim's husband had identified the ring as belonging to the victim, the Defendant changed his story and claimed that he found the ring outside the victim's office building. (Trial Tr. – Vol. IV at 318-320.)
> >
> > [fn7] Multiple witnesses were able to describe the type of knife the Defendant regularly carried. (Trial Tr. – Vol. II at 130-131, 136-137.)

(R. 67-68). While the Appellant does not dispute that the circuit court accurately cited these record portions, the circuit court merely recited facts unfavorable to the Appellant, many of which were disputed before or at trial. In the Argument section *infra*, the Appellant will demonstrate that the proposed favorable DNA testing results on the requested evidence would allow a jury to resolve much of this disputed evidence in favor of the Appellant.

SUMMARY OF THE ARGUMENT

POINT I: The circuit court erred in determining that DNA testing of requested items that finds semen or other biological material that is foreign to Mr. Bates and foreign to the victim's husband inside the victim, on other items from her rape kit, on her clothing, or under her fingernails, would not lead to a reasonable probability of acquittal. The circuit court merely recited a list of evidence from trial indicating guilt, rather than performing the correct materiality analysis, which required it to assess how the proposed DNA test result would impact the entirety of the evidence in the case.

POINT II: The lower court committed reversible error in denying the Appellant's Motion for DNA Testing by finding that it was procedurally barred by the doctrines of collateral estoppel and law of the case. Essentially, the lower court erroneously treated the instant motion as successive to a previously-filed Rule 3.853 motion when finding that the previous denial order and affirmance on appeal barred testing in this case. However, the instant Rule 3.853 motion requested DNA testing on additional hairs and debris from the victim's clothing. No court has ever been presented with these items, nor has any court ever reached the merits of testing, denied such testing, or affirmed the denial of such testing on these items. Therefore, collateral estoppel and law of the case cannot apply as procedural bars to a request for DNA testing on these hairs.

In addition, there is no explicit bar to filing of successive Rule 3.853 motions and no deadline for filing such requests. Given the clear entitlement to testing on the merits and the complete lack of procedural restrictions in Rule 3.853 (as opposed to Rule 3.850 and 3.851), there is no valid rationale for denying such testing based merely on procedural grounds in a case where Mr. Bates is subject to the irreparable sentence of execution.

STANDARD OF REVIEW FOR EACH ARGUMENT

Because the materiality inquiry in Rule 3.853(c)(5)(C) presents a mixed question of law and fact, the appellate court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*. *See Bates v. State*, 3 So. 3d 1091, 1098-99 (Fla. 2009); *Tompkins v. State*, 872 So. 2d 230, 242-43 (Fla. 2005); *Hitchcock v. State*, 866 So. 2d 23, 27-28 (Fla. 2004). Here, as to **Point I**, whether the circuit court erred in finding that the Appellant was not entitled to DNA testing on the merits because results of that testing would not lead to a reasonable probability of acquittal, this Court can determine the merits *de novo* based on the record before it. As to **Point II**, whether the circuit court erred in denying the Motion for DNA Testing as procedurally barred by collateral estoppel and law of the case, it is strictly a legal question. Thus, this

Court can review that decision to deny the Motion for DNA Testing as successive *de novo.*

ARGUMENT

POINT I

THE CIRCUIT COURT ERRED IN FINDING THAT "OVERWHELMING EVIDENCE OF GUILT" IN THIS CASE PREVENTS THE APPELLANT FROM MEETING HIS "REASONABLE PROBABILITY" BURDEN. IN FACT, THE INSTANT MOTION FOR DNA TESTING SHOULD BE GRANTED ON THE MERITS BECAUSE DNA TESTING OF THE REQUESTED ITEMS OF EVIDENCE, IF FAVORABLE, WOULD INDICATE UNEXPLAINED SEMEN AND OTHER BIOLOGICAL MATERIAL INSIDE AND ON THE VICTIM THAT WOULD TEND TO DEMONSTRATE THAT THE APPELLANT DID NOT MURDER THE VICTIM. SUCH A RESULT WOULD NECESSARILY GIVE RISE TO A "REASONABLE PROBABILIY" OF ACQUITTAL.

In order to obtain relief based on a facially sufficient postconviction DNA testing motion, filed pursuant to Fla. R. Crim. P. 3.853, a litigant must demonstrate how the proposed DNA testing would exonerate him. *See* Fla. R. Crim. P. 3.853(b)(3). This Court has interpreted this "how DNA will exonerate" language to mean that DNA testing of the requested evidence will be allowed if the results would create a reasonable probability that the movant would have been acquitted had these results been available at trial. *See Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004); *see also Knighten v. State*, 829 So. 2d 249 (Fla. 2d DCA 2002); Fla. R. Crim. P. 3.853(c)(5)(C). In order to demonstrate a "reasonable probability of

acquittal," this Court held that the movant "must lay out with specificity . . . the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." *Hitchcock*, 866 So. 2d at 27; *see also Gore v. State*, 32 So. 3d 614 (Fla. 2010); *see also Helton v. State*, 947 So. 2d 495 (Fla. 3d DCA 2006). This Court has cautioned against granting relief on requests that are based on mere speculation, noting that Rule 3.853 is not intended to be a "fishing expedition." *See Gore*, 32 So. 3d at 618 (citing *Lott v. State*, 931 So. 2d 807, 820-21 (Fla. 2006)).

In an effort to satisfy this standard, the Appellant specifically listed the items of evidence he wanted tested in his motion. In his Rule 3.853 Motion for Postconviction DNA Testing filed below, the Appellant requested testing on nine pieces of evidence, in addition to samples taken from the victim to be used as reference samples:

(a) State's exhibit 20 [FDLE ex.25]—blue panties of victim;
(b) State's exhibit 12 [FDLE ex.9]—Rape kit, including victim's vaginal swab;
(c) Semen smear slides;
(d) State's exhibit 17 [FDLE ex.23A-B]—Victim's skirt and pantyhose;
(e) State's exhibit 26 [FDLE ex.34]—acid phosphatase test;
(f) State's exhibit 28 [FDLE ex.41]—Victim's vaginal washing that tested positive for non-motile intact sperm;
(g) State exhibit 29 [FDLE ex.42]—blue cord that was used by perpetrator to strangle victim;
(h) State's exhibits 2, 5-12 [FDLE ex.24, 26, 17, 33]—debris from victim's clothing (underwear, purple skirt, pantyhose, striped shirt, white bra and white sheets used by ambulance to transport the victim) including hair samples;
(i) FDLE ex. 21—fingernails clippings from victim;

(j) State exhibits 2, 23, and 27 [FDLE ex. 9c, 39, 12, 13]—saliva standard, blood sample, and hair (head and pubic) standards of victim that could be used for comparison purposes during DNA testing.

(R. 9-10, 27). Then, in the argument section of the Rule 3.853 motion, the Appellant grouped these items by likeness and provided a detailed and thorough explanation of what type of DNA testing could be performed on each item of evidence to maximize the chance to achieve a useable DNA test result and further explained how a favorable result on each piece of evidence would both bolster his defense and undercut the State's evidence, such that it would exonerate the Defendant by leading to a "reasonable probability of acquittal." (R. 12-21).

The circuit court, while finding that the Appellant's Rule 3.853 motion was in fact facially sufficient, nonetheless found that:

> [I]t remains legally insufficient because there is not a reasonable probability that the results of any DNA testing would exonerate him or lessen his sentence. [internal citation omitted] The Defendant has failed to show how DNA testing of the requested evidence will exonerate him in light of the overwhelming evidence identified herein as well as in the decisions of prior courts. The law cited in support of his argument does not permit the Court to find that DNA testing is appropriate in light of the overwhelming evidence of guilt. As the Court cannot find that there is a reasonable probability that DNA testing would result in acquittal or a reduced sentence, the Defendant's motion is due to be denied.

(R. 71).

While the circuit court, in its order, alluded to a recitation of evidence it viewed as the overwhelming evidence of guilt, it made no attempt to perform the

analysis required to determine whether there would in fact be a reasonable probability of acquittal resulting from the proposed DNA testing. This "reasonable probability of acquittal" standard is the same standard as the materiality standard in an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), and claims made under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which interpret the "reasonable probability of acquittal" standard to mean a probability sufficient to undermine confidence in the verdict.

The Supreme Court of the United States provided guidance on how to interpret and apply the "reasonable probability of acquittal standard." First, the standard is not a preponderance of the evidence test. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). Additionally, the "reasonable probability of acquittal" standard is not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *See id.* at 434-35. Like exculpatory

evidence illegally suppressed by the prosecution that would be available in a *Brady* proceeding, the proposed favorable DNA results offer precisely the same opportunity to assess the case in light of the introduction of significant exculpatory evidence—reliable, probative scientific evidence as to who did and who did not deposit biological material on key pieces of physical evidence in this instance.

Thus, a court making its "reasonable probability" finding pursuant to Rule 3.853(c)(5)(C) must accept the proposed favorable DNA results alleged in the motion[3] and not simply add them into the mix of evidence from trial to determine whether there is still evidence of guilt remaining. That is the sufficiency of the evidence test that the Supreme Court of the United States cautioned against. Rather, the court must assess the impact of the proposed favorable DNA results on **the entirety** of the evidence in the case to determine whether "the favorable

[3] The inquiry in Rule 3.853 cannot be whether the State or court believes results will be obtained, but instead whether the proposed favorable results would lead to a reasonable probability of acquittal if the jury knew of them. Both Rule 3.853 and case law interpreting it require the court to presume the favorable DNA test result in order to perform the materiality analysis. Rule 3.853(b)(3) requires the movant to assert in his pleading, among other things, how DNA testing would exonerate him. The Court must then do a similar analysis in its required findings by determining whether the requested DNA testing, if favorable, would lead to a reasonable probability of acquittal. *See* Fla. R. Crim. P. 3.853(c)(5)(C). Implicit in both of these provisions is the assumption of what favorable results would look like if the testing was granted and had already occurred. This Court makes the same assumption by requiring the movant to demonstrate "nexus between the **potential** results of DNA testing on each piece of evidence and the issues in the case." *Hitchcock*, 866 So. 2d at 27 (emphasis added)

evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

This is so because the weight of the trial evidence is not static. The Second District Court of Appeal aptly noted that "rule 3.853 is not to be construed in a manner that would bar testing based on the notion that it might substitute a postconviction court's judgment for that of the jury. On the contrary, it offers a chance to ensure the validity of the jury's verdict in certain unique situations." *Dubose v. State*, 113 So. 3d 863, 866 (Fla. 2d DCA 2012). After all, every case where someone has been convicted contains facts indicating guilt; the question in this proceeding is whether the DNA testing can unravel those facts such that we now view them differently and, in turn, our confidence in the verdict is undermined.

The lower court short-circuited this required, thorough analysis by merely reciting the evidence favorable to the State, characterizing it as overwhelming, and then concluding that the Appellant could not meet the "reasonable probability" standard. This is at best the prohibited sufficiency of the evidence test or, at worst, no analysis at all. Had the circuit court done the correct analysis, it would have recognized that neither it nor the State have a reasonable explanation for the proposed presence of semen foreign to the Appellant or the victim's husband that was collected from inside or on the victim, or from her clothing.

It is undisputed that this was a single-perpetrator murder with reliable signs that the victim was raped during the crime by this same perpetrator. The State charged the Appellant with sexual battery, and the crime scene investigation and forensic examination were performed with the purpose of collecting routine rape-related evidence and subjecting it to biological examination in order to include the Appellant as a potential contributor of the semen found on multiple items of evidence. In fact, despite obtaining an inconclusive blood-typing result on semen from the victim's vaginal swab, smear slide, vaginal washing and blue panties, the FDLE analyst concluded that the depositor of the semen could have been a non-secretor and the State at trial attributed the semen to the Appellant because he was among the approximately 20% of the population who were also non-secretors. (T. 546-47; 555). It was the State's theory that the semen found inside and on the victim and on her clothing was from the perpetrator who also murdered her, and the State argued that this perpetrator was Kayle Bates. This Court conceded as much in its 2009 affirmance of the denial of postconviction DNA testing. *See Bates*, 3 So. 3d at 1099.

Given this undisputed single-perpetrator theory of the case asserted by the prosecution at trial and the undisputed physical evidence that supported the theory, the significance of the identity of the contributor of that semen is clear. In his motion below, the Appellant argued that if the requested DNA testing of the items

containing semen produced a male DNA profile excluding the Appellant and the victim's husband—her only consensual sexual partner who she had intercourse with within two days of the murder—it would mean that there is unknown male DNA from biological material associated with a sexual and violent crime that has no reasonable explanation in the facts of the case for being where it was found other than it came from a still-unidentified perpetrator who is not the Defendant. (R. 13-15, 57-58).

The same holds true for the fingernail clippings where the Defendant pointed to scientific studies regarding the transfer to and prevalence of foreign DNA under the fingernails of victims of violent and intimate contact, as well as for the blue cord, which was indisputably used by the perpetrator to strangle the victim. The Appellant alleged in the motion below that were he and the victim's only consensual partner excluded as contributors of foreign male DNA found on the items and the State cannot provide a record-based explanation for that foreign DNA, the only logical explanation remaining for that biological material is that it was deposited by the actual perpetrator and is, therefore, exculpatory. (R. 15-19). Additionally, if there is a redundancy or match between the foreign, exclusionary male profiles found on any of the requested items, that would provide further confidence that the DNA found is from the perpetrator rather than from some innocent deposit at an unrelated time. (R. 20).

Despite the cogent allegation of the nexus between the evidence requested for DNA testing and the perpetrator, the circuit court did not attempt to explain the proposed presence of foreign male DNA in such a scenario because it did not do any ascertainable "reasonable probability" analysis.

Moreover, had it attempted the appropriate materiality standard, it could not simply explain away foreign, unidentified semen in the victim's rape kit, inside of her, or on her clothing by pointing to the myriad facts and pieces of evidence from the trial record that on their face provide indicia of guilt. This is so because when the new DNA test results are weighed against that trial evidence, the DNA evidence changes the character and nature of what was once thought to be "overwhelming evidence of guilt." For example, the State and circuit court below pointed to what was likely the strongest evidence against the Appellant at trial: the Appellant's multiple, shifting admissions before trial. While the Appellant repudiated these admissions and disputed them at trial claiming they were coerced, the admissions on their face were compelling evidence of guilt. Yet, the proposed DNA test results that place an unknown person's semen inside or on the victim or on her clothing, that lacks explanation, would undermine the veracity of those admissions and bolster previous claims that they were false and coerced. This new DNA result might have caused the circuit court to refuse to admit the admissions as evidence or, if they were allowed at trial, the DNA result may have led the jury

to resolve the dispute about the veracity of the admissions in favor of the Appellant.

Similarly, the proposed DNA result would undermine what we now know to be equivocal forensic evidence used by the State, the significance of some the circuit court overstated in its Order. The State at trial, the lower court in this proceeding, and even this Court in previous postconviction proceedings, attributed the blood found on the Appellant's clothing upon arrest as that of the victim because it shared the victim's blood type. (R. 68). This is a scientifically invalid characterization; blood typing cannot determine the actual identity of the contributor of the biological material. The proposed DNA result would have bolstered defense arguments that the biological material on the Appellant's clothing was not the victim's blood and, rather, was simply biological material of a foreign contributor who shared the victim's blood type that was deposited on his clothing at an unrelated time. The circuit court also pointed to fibers on the victim's clothes as unequivocally being from the Appellant's pants, as well as footprints and physical evidence found at the scene that were attributed to the Appellant. (R. 68). The proposed DNA result would allow a jury to conclude that these conclusions were incorrect.

In this way, the proposed DNA result would have undermined confidence in the guilty verdict, as evidence once thought to be compelling evidence of guilt would be transformed into evidence of lower value and weight.

Courts have routinely granted DNA testing (or reversed the denial of such testing) where there is a single perpetrator of a rape and evidence that is a by-product of that rape was left behind during the crime and collected as evidence. This is true regardless of whether the victim was also murdered and regardless of the apparent strength of the indicia of guilt otherwise present in the case:

- Where single, stranger eyewitnesses identified the defendant as the perpetrator. *See Reddick v. State*, 929 So. 2d 34, 36 (Fla. 4th DCA 2006).
- Where a single eyewitness, who had previous interaction with the defendant, identified him as the perpetrator. *See Ortiz v. State*, 884 So.2d 70, 72 (Fla. 2d DCA 2004) ("Although Ortiz was apparently known to the victim, his identity as the perpetrator was at issue, and DNA testing would speak directly to this point").
- Where multiple eyewitnesses identified the defendant as the perpetrator. *See Dubose v. State*, 113 So. 3d 863, 866 (Fla. 2d DCA 2012).
- Where pattern forensic evidence, like fingerprints, connect the defendant to the crime. *See Huffman v. State*, 837 So. 2d 1147 (Fla. 2d DCA 2003); *Zollman v. State*, 854 So. 2d 775 (Fla. 2d DCA 2003).

- Where previous DNA testing of probative items of evidence linked Defendant to the crime scene. *See Cardona v. State*, 109 So. 3d 241, 243 (Fla. 4th DCA 2013) (holding that DNA testing on numerous items, including hairs found at the scene of the crime, was proper despite inculpatory DNA results on toothbrush found at scene of rape); *Overton v. State*, 976 So. 2d 536, 546 (Fla. 2007) (noting that the circuit court granted testing on fingernail scrapings despite previous inculpatory DNA results from semen on the victim's bedsheets).
- Where previous serology results include the defendant as a possible contributor of biological evidence. *See Haywood v. State*, 961 So. 2d 995, 997 (Fla. 4th DCA 2007); *Manual v. State*, 855 So. 2d 97, 99 (Fla. 2d DCA 2003).

The unifying feature of these cases and the instant case is that the proposed DNA test result, if it excluded the movant and any known possible contributors, would support an entitlement to DNA testing irrespective of the other evidence in the case. This is so because the objective facts and prosecution theory of the case create a strong nexus between the evidence requested for testing and the perpetrator. In short, if such a favorable result were achieved on the many items containing semen or sperm in this case, and it excludes the Appellant and the victim's husband as possible contributors, the only remaining reasonable

explanation is that it was deposited by the perpetrator. Because that nexus has been established here, this cannot be characterized as a speculative allegation or a fishing expedition. Rather, this Court's own precedent supports a reversal of the denial of the instant Rule 3.853 motion. *Hitchcock*, 866 So. 2d at 27; *see also Hampton v. State*, 924 So. 2d 34, 36 (Fla. 3d DCA 2006) (holding that where the proposed DNA result can account for all potential contributors and excludes the movant, such a result would exonerate the movant); *Jordan v. State*, 950 So. 2d 442, 444 (Fla. 3d DCA 2007).

Moreover, the fact that the jury at the Appellant's trial, after hearing the evidence, convicted the Appellant of attempted rape is also unavailing here because the case was tried with the theory and the objective facts in the case indicate that the victim was raped by the same individual who murdered her and that individual left semen and sperm inside and on the victim and on her clothing during the crime. While this Court pointed to the failure of the jury to convict of a completed sexual battery as one basis for affirming the denial of testing in its 2009 opinion, *see Bates*, 3 So. 3d at 1099-1100, it rejected a similar argument by the State as a proper basis for denying relief in a strikingly similar case.

In *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), this Court considered the impact of the results of postconviction DNA testing already completed where the defendant was not charged or convicted of sexual battery, but the case was clearly

tried on the theory that the same person raped and murdered the victim. The State then attributed semen found on the victim's panties to Hildwin because serological examination of the semen did not reveal a blood type and Hildwin was a non-secretor:

> [T]he State heavily relied on the scientific evidence at trial that pointed to Hildwin as the person who murdered the victim and also excluded Haverty, the person that Hildwin alleged was the actual murderer. The State presented evidence at trial that the victim was found naked in the trunk of her car, with her T-shirt tied around her neck, her blue jean shorts and underwear missing, and her torn bra and shoes found in the woods. A pair of blue jean shorts, with underwear inside of them, was found on the top of a bag of dirty laundry inside the victim's car. Near the shorts and underwear was a white washcloth. The State presented evidence pertaining both to the biological material on the underwear that the victim likely wore on the day she disappeared and to the biological material on a white washcloth found in the same location.
>
> Specifically, the scientific testing revealed that both the semen on the underwear and the saliva on the washcloth belonged to a nonsecretor—a subgroup of the population to which only eleven percent of the overall male population belonged. In addition, the State further presented evidence that the victim's live-in boyfriend, Haverty, could not have been the producer of the biological material found on these items because he was a secretor. Hildwin, however, was a nonsecretor, which matched the State's theory of the case and discredited Hildwin's.

Id. at 1188. This Court, while overturning Hildwin's conviction and death sentence based on exclusionary DNA test results, specifically went on to find that it is the objective facts of the case and how the State used the physical evidence at trial—

not the prosecutor's charging decision or jury's eventual verdict—that dictate the significance of DNA results:

> While the State attempts to minimize the significance of this newly discovered DNA evidence by asserting that it did not approach this case as a rape case, the State certainly presented evidence and argument consistent with a rape having occurred prior to the murder.

Id. If the State's failure to charge Hildwin with sexual battery did not negate the significance of exclusionary DNA results on semen on the victim's panties in that case, then surely the jury's decision in this case to convict of attempted sexual battery instead of a completed sexual battery could similarly have no negative impact on the significance of the proposed favorable DNA result on semen in this case. Thus, this Court in *Hildwin* appears to have rejected one of the primary reasons the circuit denied DNA testing in this case in 2003 and that this Court used in affirming that denial in 2009. *See Bates*, 3 So. 3d at 1099-1100 (holding that because "the jury did not find Bates guilty of sexual assault but, rather, found Bates guilty of attempted sexual assault . . . , we agree with the trial court that the DNA of the semen in the victim's vagina 'was not a critical link in the proof against the defendant at trial'").

Additionally, while the circuit court recognized this Court's amendment to Rule 3.853 in 2007 allowing individuals who pled guilty to obtain DNA testing if they could otherwise meet the requirements of the rule, it appears to have found

that postconviction DNA testing is nonetheless prohibited in cases that contain a confession by the defendant. Specifically, the circuit court stated that:

> The Court recognizes that the Defendant is attempting to argue that a guilty plea is equivalent to a confession. However, without any law in support of such a theory, this Court is unable to find that the amendment was intended to apply in situations where a guilty plea was not entered.

(R. 70).

The circuit court, however, misconstrued the Appellant's argument below. His argument was that there has never been a prohibition of postconviction DNA testing in cases where the defendant confessed nor is there support in Florida law for such a prohibition. Rather, this Court's 2007 amendment to remove the explicit prohibition of postconviction DNA testing in guilty plea cases, following the Florida Legislature's similar amendment to Fla. Stat. 925.11 the year before, was a clear recognition by this Court and the Legislature that in limited instances innocent individuals admit to crimes they did not commit for reasons that have nothing to do with being guilty, and postconviction DNA testing must remain available to this class of litigants. This decision was based in part on the data that indicates approximately 25% of the known individuals who were exonerated by postconviction DNA testing made a false confession or admission that contributed to their wrongful conviction. *See* Innocence Project, False Confessions and

Admissions, *at* http://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited October 25, 2016).

To accept the circuit court's prohibition of DNA testing in cases containing a confession would create a completely absurd result. In the circuit court's paradigm the Appellant would be eligible for postconviction DNA testing if he had simply waived his right to a jury trial and entered a guilty plea in 1982, admitted to the factual basis for the crime under oath in open court in a non-coercive setting, and the court was satisfied after a colloquy comporting with constitutional standards for waivers that the plea was knowing, understanding, and voluntary. Yet, where, as here, he made admissions, in allegedly coercive confrontations with law enforcement, that were subsequently repudiated, the circuit court would subject the Appellant to a prohibition that finds no support in Florida law.

A court ***may not*** summarily deny a facially sufficient Rule 3.853 motion for DNA testing unless the factual allegations that make up the defendant's claim are conclusively refuted by the record. *See Collins v. State,* 869 So. 2d 723, 724 (Fla. 4th DCA 2004); *Brown v. State*, 967 So. 2d 398, 399 (Fla. 1st DCA 2007); *Ackerman v. State*, 958 So. 2d 450 (Fla. 2d DCA 2007); *Jordan v. State*, 950 So. 2d 442, 444 (Fla. 3d DCA 2007); *Hampton v. State*, 924 So. 2d 34, 36 (Fla. 3d DCA 2006); *Carter v. State*, 913 So. 2d 701, 703 (Fla. 3d DCA 2005); *Block v. State*, 885 So. 2d 993, 994 (Fla. 4th DCA 2004); *Walker v. State*, 956 So. 2d 1249,

1250 (Fla. 2d DCA 2007); *Schofield v. State*, 861 So. 2d 1244, 1246 (Fla. 2d DCA 2003). Here, nothing in the circuit court's record attachments conclusively refutes the allegation that DNA testing of the biological material, particularly semen and sperm, on the requested items of evidence that excluded the Appellant and the victim's husband, would demonstrate that that evidence was deposited by the still-unidentified perpetrator during the crime. In fact, the State's theory, as it is expressed in the trial record **is** that this semen belongs to the perpetrator that also murdered the victim as part of a single criminal episode. DNA can answer the question of who murdered the victim and, therefore, there is a reasonable probability that the proposed favorable result would lead to an acquittal.

Thus, the Appellant urges this Court to reverse the denial of postconviction DNA testing and grant the testing or, in the alternative, remand the case for an evidentiary hearing. *See Riley v. State*, 851 So. 2d 811, 813 (Fla. 2d DCA 2003) (holding that if the record does not refute defendant's claim, the trial court must conduct an evidentiary hearing to consider the merits of the claim).

POINT II

THE LOWER COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DNA TESTING AS PROCEDURALLY BARRED BY BOTH COLLATERAL ESTOPPEL AND LAW OF THE CASE.

In the circuit court's order below, it also summarily denied the Rule 3.853 motion because it found that the motion was barred by the doctrines of collateral estoppel and law of the case. Specifically, the circuit court stated:

> While the rule does not specifically prohibit the filing of successive Rule 3.853 motions for postconviction DNA testing, collateral estoppel prevents the same parties from relitigating issues that have already been fully litigated and determined. The Florida Supreme Court has determined that additional postconviction DNA testing is barred by the doctrine of collateral estoppel where a defendant is "seeking additional DNA testing based on variations of the same arguments he made in his previous motion for DNA testing[,]" the denial of which has already been affirmed. Zeigler v. State, 116 So. 3d 255, 258 (Fla. 2013).
>
> Seven of the ten items of evidence specifically identified in the Defendant's present Motion were also identified in his initial motion for DNA testing. These items include: (1) the victim's panties, (2) the victim's vaginal swab, (3) semen smear slides, (4) the victim's bra and hosiery, (5) the acid phosphatase test, (6) the victim's vaginal washing, and (7) the blue cord used to strangle the victim. In his initial motion, the Defendant identified each of these items and requested that they be subjected to DNA testing. He claimed that the use of new testing technology on the items would exonerate him. Although the Defendant uses more specific technological terms in his present Motion, his request and claims are practically identical: that new technology would exonerate him. Because the Defendant seeks additional testing based on arguments that are nearly identical to those presented in his initial motion that was previously denied and subsequently affirmed on appeal, the Defendant is collaterally estopped from obtain [sic] relief as to these seven items of evidence. Zeigler, 116 So. 3d at 258.

(R. 66-67).

Given that the Appellant demonstrated in his instant Rule 3.853 and herein his entitlement to postconviction DNA testing, the interest in finality at the center

of the collateral estoppel and law of the case doctrines is substantially diminished. This is especially true in this proceeding where the governing rule—Rule 3.853—contains none of the procedural restrictions to uphold the interest in finality that exist in its counterparts, Rule 3.850 and Rule 3.851.

Florida Rule of Criminal Procedural 3.850, which governs motions for postconviction relief, has codified the collateral estoppel doctrine by explicitly barring successive and abusive motions, calling such a motion an "extraordinary pleading":

> (2) A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion.

Fla. R. Crim. P. 3.850(h).

Rule 3.851 has an even stricter embodiment of collateral estoppel codified in the rule:

> (2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial

> court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

Fla. R. Crim. P. 3.851(e)(2).

Unlike Rule 3.850 and 3.851, Rule 3.853 shares no such explicit bar against the filing of successive or abusive filings. This Court knew about the bar to successive postconviction motions contained in what is now Rule 3.850(h) and Rule 3.851(e)(2) when it enacted Rule 3.853 in 2001, and in each of the subsequent amendments to Rule 3.853. Yet, this Court specifically chose not to include such a codified version of collateral estoppel in Rule 3.853. Most notably, while Rules 3.850 and 3.851 were amended in 2013 to tighten procedural restrictions on filing and obtaining relief, the Supreme Court of Florida actually removed procedural barriers to obtaining DNA testing, when, in 2007, it dispensed with a statute of limitations on filing Rule 3.853 motions. It amended Rule 3.853(d) to allow such motions to be filed and considered "at any time" after the movant's judgment and sentence became final. This is against the backdrop of Rules 3.850 and 3.851 having rigid statutes of limitations for filing.

The statutory interpretation doctrine of *expressio unius est exclusio alterius* is applicable here. This doctrine dictates that because this Court included specific language (the bar against successive/abusive motions) in other sections of the rules of criminal procedure (Rules 3.850(h) and 3.851(e)(2)), but omitted that language

from another section of the rules (Rule 3.853), we must presume that the exclusion of the language was intentional.

The circuit court's reliance on this Court's opinion in *Zeigler v. State*, 116 So. 3d 255 (Fla. 2013), is also misplaced. The circuit court pointed to *Zeigler* for the proposition that collateral estoppel bars the DNA testing in this case. *Zeigler*, however, is distinguishable from the instant case. Zeigler filed a first request for DNA Testing in 2001, which was granted, and then filed another request in 2003 along with a motion to vacate his conviction based on newly discovered evidence. *See Zeigler v. State*, 967 So. 2d 125, 127 (Fla. 2007). After a two-day evidentiary hearing, apparently related exclusively to the newly discovered evidence claim, the circuit court denied Zeigler relief notwithstanding DNA results that he already had in hand, finding that "even if the alleged newly discovered evidence resulting from the DNA testing had been admitted at trial, there is no reasonable probability that Defendant would have been acquitted." *Id.* Zeigler then made an additional request for DNA testing, which the circuit court rejected based on collateral estoppel, determining that the previous denial of relief of a newly discovered evidence claim based on DNA results already obtained barred the current request for DNA testing. *Zeigler*, 116 So. 3d at 258. This Court then affirmed the denial of what appeared to be a third request for DNA testing based on collateral estoppel. *Id.*

The Appellant's procedural posture is completely different as he has not obtained any DNA tests, as no previous testing was ever granted, the results of which would obviate the need for additional testing or demonstrate that he could not meet the materiality standard for getting the additional testing.

To the extent the doctrine of collateral estoppel does apply,[4] it has been defined as barring claims "stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule." *Ochala v. State*, 93 So. 3d 1167, 1169 (Fla. 1st DCA 2012) (citing *McCrae v. State,* 437 So. 2d 1388, 1390 (Fla. 1983). Furthermore, "for the doctrine of collateral estoppel to bar relitigation of an issue, the identical issue must have been actually adjudged in the prior proceeding." *Id.* (citing *Rogers v. State*, 970 So. 2d 884 (Fla. 2d DCA 2007)).

The body of case law interpreting the entitlement to postconviction DNA testing has become substantially developed since the time of Appellant's 2003 Rule 3.853 motion, which was hastily filed at the last moment before the now-defunct statute of limitations for filing such requests. At the time of that filing, Rule 3.853 was still in its infancy, with little understanding of how it was to

[4] Because the Appellant has never previously sought DNA testing on State's exhibits 2, 5-12—debris from victim's clothing (underwear, purple skirt, pantyhose, striped shirt, white bra, and white sheets used by ambulance to transport the victim), which includes hair samples, the issue related to DNA testing of these items has necessarily not been fully litigated nor determined. Thus, a bar against successive motions and the doctrine of collateral estoppel cannot be used to bar the instant request for postconviction DNA testing as to those items.

operate. Since that time, the law has evolved substantially. In the instant Rule 3.853 Motion and Reply filed below, the Appellant cited to numerous cases that suggest an entitlement to DNA testing in this case. (R. 51-54). He also noted the aforementioned opinion by this Court in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014), which appears to repudiate one of the bases for this Court affirming the denial of the Appellant's first Rule 3.853 motion in 2009. (R. 54).

In this way, the request for DNA testing now presented to the Court cannot be "identical" nor can it be "substantially based on the same grounds," because the foundation of the request is no longer void of legal support. It is buttressed by substantial legal authority entitling the Defendant to relief that was not available to him or this Court at the time his first Rule 3.853 motion was denied in 2003. Thus, a bar against successive motions and the doctrine of collateral estoppel cannot be used to bar the instant request for postconviction DNA testing.

Additionally, "the doctrine of the law of the case is limited to rulings on questions of law actually presented and considered on a former appeal." *Delta Prop. Mgmt. v. Profile Invs., Inc.*, 87 So. 3d 765, 770 (Fla. 2012) (citing *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1063 (Fla. 1983)). While former counsel clearly challenged the denial of its 2003 request for postconviction DNA testing on appeal to this Court, the vast body of legal precedent informing the legal question in that proceeding was not presented to or considered by the Supreme

Court of Florida, undercutting the State's assertion below that the doctrine of law of the case now operates to bar the instant request for postconviction DNA testing. Furthermore, "the law of the case doctrine is inapplicable [where] there has been intervening legislative action and intervening decisions" since the denial of the prior motion. *Dedge v. State*, 832 So. 2d 835, 836 (Fla. 5th DCA 2002) (citing *McBride v. State*, 810 So. 2d 1019, 1022 n.3 (Fla. 5th DCA 2002); *Dicks ex rel. Montgomery v. Jenne*, 740 So. 2d 576, 578 (Fla. 4th DCA 1999)).

Rule 3.853 is devoid of any indications that it was to contain the common procedural restrictions used in other similar, related contexts to uphold the interest in finality. Instead, Rule 3.853 was designed to uphold a countervailing interest. This Court stated the explicit purpose of Rule 3.853 upon its promulgation in 2001 "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 (quoting *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring)). Only when the DNA testing procedures would "shed no light on the defendant's guilt or innocence" is such testing unwarranted by Fla. R. Crim. P. 3.853. *Zollman*, 820 So. 2d at 1063.

Here, if the Court agrees that the Appellant, based on the status of case law interpreting Rule 3.853 at this time, is entitled to postconviction DNA testing irrespective of collateral estoppel, it would mean that there is a credible concern that that an injustice occurred and that DNA testing could necessarily shed light on the question of guilt or innocence in this case. If this Court agrees that the Appellant is entitled to postconviction DNA testing notwithstanding the doctrine of collateral estoppel, it would make little sense to ignore its own stated purpose for Rule 3.853 in favor of a procedural restriction that undermines that stated purpose and finds no basis in the text of the rule, particularly where the Appellant is subject to the irrevocable sentence of death.

CONCLUSION

The lower court erred by denying the instant Motion for DNA Testing on the merits and as procedurally barred by the doctrines of collateral estoppel and law of the case. The Appellant met his burden in the argument sections of both his Motion for DNA Testing and his Reply to demonstrate an entitlement to postconviction DNA testing. Moreover, the doctrine of collateral estoppel does not apply and should not be invoked to bar DNA testing where, as here, such an entitlement to relief has been established.

For the foregoing reasons, this Court should reverse the lower court's denial, find that there is a reasonable probability of acquittal if the requested DNA testing

leads to DNA results favorable to the Appellant, and ORDER the requested DNA testing at a private laboratory—DNA Diagnostics Center in Fairfield, Ohio—on that basis. Alternatively, this Court should reverse and remand for an evidentiary hearing.

The Appellant respectfully requests oral argument be granted in this appeal and has filed a separate request with this Court.

Respectfully submitted,

/s/ *Seth E. Miller*

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with the requirements of Florida Rule of Appellate Procedure 9.210(a).

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail, to the following persons, this 1st day of November 2016.

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