In the Supreme Court of Florida

KAYLE BARRINGTON BATES,

Petitioner,

v.

CASE NO.: SC16-1178
CAPITAL CASE

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The State objects to oral argument in this case. This is a successive motion for DNA testing requesting DNA testing of many of the same items that the defendant sought DNA testing of in his first motion for DNA testing. That first motion for DNA testing was denied by the trial court and that denial was affirmed on appeal by this Court. *Bates v. State*, 3 So.3d 1091, 1098-99 (Fla. 2009). Not only should this Court follow its standard practice of not conducting oral argument in appeals from the denial of DNA testing motion, but it certainly should not conduct an oral argument regarding the denial of a second DNA motion.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's denial of a second motion for DNA testing in a capital case.

On the afternoon of June 14, 1982, Janet White, a State Farm Insurance clerk, returned from lunch around 1:00 p.m., as was her normal practice. As she came into the office, she answered the phone. Unknown to her, she was not alone. She knew that Kayle Barrington Bates had stopped by the office earlier that day, talked with her, and left. She did not know that, having seen that she was alone in the office, Bates had returned to the area and parked his truck in the woods some distance behind the building where it could not be seen and waited. She did not know that while she was out at lunch he had broken into the office and was there waiting for her to return. When Bates surprised White she let out a bone-chilling scream and fought for her life. He overpowered her and forcibly took her from the office building to the woods where he savagely beat, strangled, and attempted to rape her, leaving approximately 30 contusions, abrasions, and lacerations on various parts of her face and body. *Bates v. Sec'y, Fla. Dep't. of Corr.*, 768 F.3d 1278, 1283 (11th Cir. 2014), *cert. denied*, 136 S.Ct. 68 (2015).

Bates was convicted of first-degree murder, armed robbery, attempted sexual battery, and kidnapping. *Bates v. State*, 465 So.2d 490 (Fla. 1985). Bates raised several guilt phase issues on appeal, none of which was the voluntariness of his confession. The Florida Supreme Court affirmed the convictions but remanded for reconsideration of the trial court's sentencing order. *Bates*, 465

So.2d at 493. The trial court sentenced Bates to death again and the Florida Supreme Court affirmed the death sentence. *Bates v. State*, 506 So.2d 1033 (Fla. 1987). The state postconviction court granted relief on an ineffectiveness claim. *Bates v. Dugger*, 604 So.2d 457 (Fla. 1992). A second penalty phase was conducted at which Bates was again sentenced to death. *Bates v. State*, 750 So.2d 6 (Fla. 1999). Bates' jury recommended death by a vote of nine to three (9-3). The trial court found three aggravating circumstances: 1) capital murder committed during an enumerated felony (kidnapping and attempted sexual battery); 2) pecuniary gain; and 3) the murder was especially heinous, atrocious, or cruel (HAC). *Bates*, 750 So. 2d at 9. The Florida Supreme Court again affirmed the death sentence. *Id.* at 18.

Bates filed a petition for writ of certiorari in the United States Supreme Court. On October 2, 2000, the United States Supreme Court denied review. *Bates v. Florida*, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000)(No. 99-9526).

On September 10, 2001, Bates filed a motion for postconviction relief in state court. On September 24, 2004, Bates filed an amended postconviction raising 18 claims. (2PCR Vol. IV 528-612). On October 26, 2004, the State filed an answer. (2PCR Vol. IV 616-682). The postconviction court conducted a *Huff* hearing.[1] On October 16-17, 2006, the postconviction court held an evidentiary

[1] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

hearing on two claims of ineffectiveness regarding mitigation. The trial court denied the postconviction motion.

On September 30, 2003, as part of the state postconviction proceedings, Bates filed a rule 3.853 motion for DNA testing of several items of evidence. (2PCR Vol. II 325-330). The State filed a response opposing the motion. (2PCR Vol. III 357-373). On March 18, 2004, this Court, Judge Sirmons presiding, denied the first motion for DNA testing. (2PCR Vol. III 451-457).

Bates appealed the denial of his postconviction motion and the denial of his DNA motion to the Florida Supreme Court. *Bates v. State*, 3 So.3d 1091 (Fla. 2009). The Florida Supreme Court affirmed the denial of the postconviction motion and the denial of the first motion for DNA testing. Bates also filed a petition for a writ of habeas corpus raising two claims of ineffective assistance of appellate counsel, which the Florida Supreme Court denied. *Bates*, 3 So.3d at 1106-07.

On March 13, 2009, Bates filed a petition for writ of habeas corpus in the federal district court raising 17 claims, none of which was the voluntariness of his confession. *Bates v. McNeil*, 5:09-cv-00081-MCR (N.D. Fla.). The federal district court denied habeas relief. The district court, as part of its prejudice analysis regarding one of the claims, noted the "overwhelming" evidence of Bates' guilt including his confession; his presence at the scene just minutes after the crime; the victim's ring in his pocket; a watch pin found inside the victim's State Farm office and Bates watch having a missing pin; his hat near the victim's body;

and the knife case found near the stabbed victim being the exact type that Bates wore. (Doc #30 at 11).

The Eleventh Circuit affirmed the denial of federal habeas relief. *Bates v. Sec'y, Fla. Dep't. of Corr.*, 768 F.3d 1278, 1284 (11th Cir. 2014). The Eleventh Circuit noted, in its written opinion, that the "evidence of guilt presented against Bates during the three-day trial was overwhelming." *Bates*, 768 F.3d at 1284.

Bates then filed a petition for writ of certiorari in the United States Supreme Court. The United States Supreme Court denied review on October 5, 2015. *Bates v. Jones*, 136 S.Ct. 68 (2015)(No. 14-9864).

On January 8, 2016, Bates represented by Seth Miller of the Innocence Project of Florida, Inc., filed a second motion for DNA testing pursuant to Florida rule of criminal procedure, rule 3.853. (2016 PC motion record 1-30). On January 28, 2016, the trial court, Judge Fensom presiding, ordered the State to respond to the motion for DNA testing. On March 24, 2016, the State filed a response to the successive DNA motion. (2016 PC motion record 32-48). On April 14, 2016, Bates filed a reply. (2016 PC motion record 49-62). The trial court denied the motion for DNA testing. (2016 PC motion record 63-162).

On June 7, 2016, Bates filed a motion for reconsideration. (2016 PC motion record 163-171). The State filed a response to the motion for reconsideration. (2016 PC motion record 185-190). On June 14, 2016, the trial court denied the motion for

reconsideration. (2016 PC motion record 172-184). This appeal follows.

SUMMARY OF THE ARGUMENT

The successive motion was barred by the law-of-the-case doctrine. Many of the items Bates sought DNA testing of in his second motion were the same items as he had sought DNA testing of in his first motion. This Court affirmed the denial of the first motion for DNA testing. *Bates v. State*, 3 So.3d 1091, 1098-1099 (Fla. 2009). A defendant simply may not file motion after motion seeking DNA testing of the same items.

Alternatively, the trial court properly denied the motion because there is no reasonable probability that DNA testing if performed would result in an acquittal in light of the massive evidence of Bates' guilt. As this Court noted in its opinion affirming the denial of the first DNA motion, "Bates was arrested at the scene of the crime just ***minutes*** after the victim's death." *Bates*, 3 So.3d at 1099. This Court recounted that Bates "had the victim's diamond ring in his pocket, and he tried to conceal it from law enforcement officers." And that a watch pin "consistent" with Bates' watch was found inside the victim's office, and Bates' watch was missing a watch pin. Footprints "consistent" with Bates' shoes were found behind the State Farm office building. Bates' hat was found near the victim's body. Two green fibers were found on the victim's clothing-one on her blouse and one on her skirt-that were consistent with the material that Bates' pants were made of." *Id.* This Court noted:

> knife case was found near the victim's body, and that case was identified by various witnesses as being the exact type

> that Bates wore. The victim's two fatal stab wounds were consistent with the type of buck knife that Bates carried in that case. The consistency between the stab wounds and Bates' knife was striking; the wounds were four inches deep, and Bates' knife was four inches long; the width of the wounds was consistent with the width of Bates' knife; and as was testified to at the resentencing, there were abrasions at the bottom of the wound that were consistent with marks that Bates' knife would have made.

Bates, 3 So.3d at 1099.

The Florida Supreme Court also noted that "Bates' statements to investigators and at his trial also placed him either at the scene of the crime or directly involved in the victim's murder. Bates stated during a telephone call to his wife after his arrest that he killed a woman." *Id*.

And, as the federal district court noted, in its denial of the habeas petition, the "overwhelming" evidence of Bates guilt including his confession; his presence at the scene just minutes after the crime; the victim's ring in his pocket; a watch pin found inside the victim's State Farm office and Bates watch having a missing pin; his hat near the victim's body; and the knife case found near the stabbed victim being the exact type that Bates wore.

The motion for DNA testing included none of this evidence or facts. Nor did the motion explain how DNA testing of any of the items would put any of this evidence in a different light. Bates did not explain how DNA testing would change any of the evidence

including the taped statement to the officers and his confession to his wife. Bates must explain how DNA testing would account for his presence; for his having the victim's ring; for his watch missing the pin and that pin being found in the victim's office; and for his hat and knife case near the victim's body. Bates did not attempt to explain how DNA testing would eviscerate his statement to law enforcement in which he confesses to carrying the victim; attempting to rape the victim; and to stabbing the victim with scissors. Bates basically confessed to this murder. Bates must also explain how DNA testing would negate his confession to his own wife on the day of the murder that he just murdered a woman, which is not alleged to have been coerced.

But, Bates, in his motion, ignored all the evidence of his guilt and merely asserted that there was no DNA testing performed on the items he lists. Bates ignored all of the evidence but the trial court properly did not ignore this evidence in its ruling denying the motion for DNA testing. Rather, the trial court properly followed the applicable statute and rule, which requires that the request for DNA testing be evaluated in light of the other evidence. The trial court properly denied the successive motion for DNA testing.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE SUCCESSIVE MOTION FOR DNA TESTING SEEKING TO TEST NUMEROUS ITEMS MANY OF WHICH BATES HAD PREVIOUSLY SOUGHT TESTING OF IN THE FIRST MOTION FOR DNA TESTING? (Restated)

Bates asserts the trial court abused its discretion in denying a successive motion for DNA testing which sought to test many of the same items as in the first motion for DNA testing. The successive motion was barred by the law-of-the-case doctrine. This Court affirmed the denial of the first motion for DNA testing. *Bates v. State*, 3 So.3d 1091, 1098-1099 (Fla. 2009). On the merits, the second motion for DNA testing was properly denied for much the same reasons the first motion was denied. The second motion for DNA testing fails to explain how the DNA testing would exonerate Bates in light of his confessions to the police and his wife, as well as the other evidence of guilt. Bates, in his motion, ignores all the evidence of his guilt and merely asserts that there was no DNA testing performed on the items he lists. There is no reasonable probability that DNA testing if performed would result in an acquittal of Bates in light of the confession and the other evidence. Therefore, the trial court properly denied the motion.

Standard of review

The standard of review is abuse of discretion. *Cf. Reed v. State*, 116 So.3d 260, 267 (Fla. 2013)(stating that a "trial court's determination with regard to a discovery request is reviewed under

an abuse of discretion standard" and concluding that the postconviction court did not abuse its discretion by denying Reed's motion for discovery of a fingerprint card in postconviction proceedings).

Furthermore, it is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate him or mitigate the sentence. *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013); *Hitchcock v. State*, 866 So.2d 23, 28 (Fla. 2004). Bates has not even attempted to met this burden.

Contrary to opposing counsel assertions, the "conclusively refuted by the record" test for summarily denials of rule 3.851 motions does not apply to rule 3.853 motions for DNA testing. IB at 32 (citing district court cases). While rule 3.851 contains such language, rule 3.853 does not. Instead, rule 3.853(c)(5) requires that there be a "reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." And, as this Court has stated, motions for DNA testing are not intended to be "fishing expeditions." *Hitchcock v. State*, 866 So.2d 23, 27 (Fla. 2004).

The trial court's ruling

Bates filed a second motion for DNA testing pursuant to Florida rule of criminal procedure, rule 3.853. (2016 PC motion record 1-30). Bates, in his motion, asserted that there was no DNA testing performed on the items he listed. The motion sought to test many of the same items as the items in the first motion for DNA testing.

The State filed a response to the successive DNA motion. (2016 PC motion record 32-48). Bates filed a reply. (2016 PC motion record 49-62).

The trial court denied the motion for DNA testing. (2016 PC motion record 63-71). The trial court noted that the defendant had previously filed a motion for DNA testing to be performed on many of the same items identified in the current motion for DNA testing and concluded that the defendant was "collaterally estopped from relitigating issues related to those items." (2016 PC motion record 63). Regarding the items that had not been previously litigated, the trial court found, due to the "overwhelming evidence" of the defendant's guilt, that the defendant was "not entitled to DNA testing" because there was "no reasonable probability that such testing would exonerate him." (2016 PC motion record 63).

The trial court recounted the facts of the crime and procedural history of the case, including that a prior motion for DNA testing was filed on September 30, 2003. (2016 PC motion record 63-64). The prior motion for DNA testing sought testing of: 1) the victim's saliva standard; 2) the victim's vaginal swab; 3) the semen smear slides; 4) the victim's skirt and hosiery; 5) the victim's panties; 6) the defendant's blue shirt; 7) the defendant's white briefs; 8) the defendant's green pants; 9) the acid phosphatase test; 10) the victim's vaginal washing; and 11) the blue cord used to strangle the victim. (2016 PC motion record 64). The trial court noted that the defendant acknowledged that he previously sought testing of these same items in his first motion for DNA testing but sought to relitigate the issue based on amendment to rule 3.853 and

subsequent case law permitting DNA testing even in cases where there was strong evidence of guilt. (2016 PC motion record 64).

The trial court discussed the legal standard for granting DNA motions. (2016 PC motion record 64-65). The trial court concluded that the motion was facially sufficient. (2016 PC motion record 65). The trial court analyzed the motion item by item. (2016 PC motion record 65-66).

The trial court concluded that the defendant was collaterally estopped from seeking DNA testing of the same items listed in the first DNA motion. (2016 PC motion record 66 citing *Zeigler*, 116 So.3d at 258). The trial court noted that seven of the ten items listed in the second DNA motion were the same as those in the first DNA motion, including: 1) the victim's panties; 2) the victim's vaginal swab; 3) the semen smear slides; 4) the victim's skirt and hosiery; 5) the acid phosphatase test; 6) the victim's vaginal washing; and 7) the blue cord. (2016 PC motion record 67). The trial court noted that the requests regarding these items in the second DNA motion were "practically identically" to those in the first DNA motion and therefore, the defendant was collaterally estopped from seeking DNA testing of these items. (2016 PC motion record 67).

The trial court then recounted the evidence against Bates. (2016 PC motion record 67). The trial court noted that Bates gave five accounts of the events on the day of the crime. (2016 PC motion record 67). In an unrecorded statement to Investigator McKeithen, Bates stated that he was near the victim's office to pick cattails in the woods. (2016 PC motion record 67). But then in a second

unrecorded statement, Bates admitted going into the victim's office to ask for directions. Bates first claimed the blood on his shirt was an old stain but then claimed the blood was from his bleeding mouth. (2016 PC motion record 67). Bates stated that, while in the woods looking for cattails, he found the victim's body and may have gotten her blood on his shirt by checking for a pulse. (2016 PC motion record 67). In the first recorded statement, Bates stated that he saw the victim's body and in a panic ran back into the woods. (2016 PC motion record 67).

In the second recorded statement, Bates stated that the victim got angry with him for no reason and tried to spray him with mace. (2016 PC motion record 67-68). She then grabbed a pair of scissors and, as they fought, the scissors slipped and the victim was stabbed in the chest. (2016 PC motion record 68). He then carried the victim into the woods. He first denied having sex with the victim but then admitted to trying to have sex with her. (2016 PC motion record 68).

In the third recorded statement, Bates stated that, after parking his truck at the end of the road, he walked back to the victim's office and saw a white man wrestling with the victim. (2016 PC motion record 67). He stated that the white man hit him in the mouth and then the white man ran into the woods. (2016 PC motion record 67). While at the police station, Bates told his wife he "killed a woman." (2016 PC motion record 68). When the officer arrived at the victim's office at approximately 1:20 p.m., they saw Bates walking out of the woods. (2016 PC motion record 68). Bates' watch pin, baseball cap, and knife case were found at

the crime scene. (2016 PC motion record 68). Bates had the victim's wedding ring. (2016 PC motion record 68). The victim's wounds were consistent with the type of knife Bates routinely carried in both the length and width of that knife. (2016 PC motion record 68).

The trial court noted that every appellate court to review the case had found the evidence of Bates' guilt was overwhelming, including the Florida Supreme Court when affirming the denial of the first DNA motion. (2016 PC motion record 69-70).

The trial court found the 2007 amendment to the rule governing motions for postconviction DNA testing, rule 3.853, was not applicable. (2016 PC motion record 70). The trial court also rejected Bates' argument that DNA testing is warranted even when there is strong evidence of guilt, because the evidence in the cases cited by Bates were cases where the evidence, in fact, was "very limited." (2016 PC motion record 70 distinguishing cases). The trial court also noted that the Caucasian hair on the victim was, according to the trial testimony of a FDLE analyst, consistent with that of the victim's own hair. (2016 PC motion record 71).

The trial court concluded that there was "not a reasonable probability" that the results of DNA testing would exonerate Bates. (2016 PC motion record 71). The trial court observed that Bates failed to show how DNA testing would exonerate him "in light of the overwhelming evidence" and denied the motion. (2016 PC motion record at 71).

First DNA motion and first appeal

In 2003, as part of the initial postconviction proceedings, Bates filed a motion for DNA testing of many of the same items he sought to have tested in his second DNA motion. The prior motion for DNA testing sought testing of: 1) the victim's panties; 2) the victim's vaginal swab; 3) the semen smear slides; 4) the victim's skirt and hosiery; 5) the acid phosphatase test; 6) the victim's vaginal washing; and 7) the blue cord. (2016 PC motion record 64).

The trial court denied the first motion. The trial court found that there was "no reasonable probability that the defendant would have been acquitted" if the DNA has been admitted at trial. Order at 1-2. The trial court noted that Bates "gave two taped interviews in which he admitted being at the scene of the murder" and that these statements were "freely and voluntarily made." Order at 2. The trial court also detailed the different versions of the events that Bates gave to law enforcement. Order at 2-3. The trial court noted that in the second taped interview, Bates admitted to being present when the victim was stabbed and never stated that anyone else was present at the time of the stabbing. Order at 3. Bates also admitted to carrying the victim to the woods in the taped statement. Order at 3. The trial court then quoted from the statement, where after vacillating, Bates admits to attempting to have sex with the victim. Order at 3-4. The trial court quoted Bates as saying during the statement that the "scissors went in the chest." Order at 5. Bates thought that he threw the scissors across the road but was not sure where he disposed of them. Order at 6. The trial court concluded that

there was "no reasonable probability" that DNA evidence would exonerate the defendant. Order at 6. The trial court relied heavily on Bates' admission during the taped interview, stating that the defendant has failed to explain, "how the DNA testing will exonerate him or will mitigate his sentence in light of his various statements to police." Order at 7. The trial court then denied the first DNA motion.

The Florida Supreme Court affirmed the denial of the first motion for DNA testing. *Bates v. State*, 3 So.3d 1091, 1098-1099 (Fla. 2009). The Florida Supreme Court found that "it was reasonable for the postconviction court to conclude that the results of the testing that Bates seeks in his motion would not produce a reasonable probability of Bates' exoneration." *Bates*, 3 So.3d at 1099. The Florida Supreme Court noted that "Bates was arrested at the scene of the crime just ***minutes*** after the victim's death." *Bates*, 3 So.3d at 1099 (emphasis in original). The Florida Supreme Court recounted:

> Bates had the victim's diamond ring in his pocket, and he tried to conceal it from law enforcement officers. A watch pin consistent with Bates' watch was found inside the victim's office, and Bates' watch was missing a watch pin. Footprints consistent with Bates' shoes were found behind the State Farm office building. Bates' hat was found near the victim's body. Two green fibers were found on the victim's clothing-one on her blouse and one on her skirt-that were consistent with the material that Bates' pants were made of.

Bates, 3 So.3d at 1099.

The Florida Supreme Court continued:

> the knife case was found near the victim's body, and that case was identified by various witnesses as being the exact type that Bates wore. The victim's two fatal stab wounds were consistent with the type of buck knife that Bates carried in that case. The consistency between the stab wounds and Bates'

> knife was striking; the wounds were four inches deep, and Bates' knife was four inches long; the width of the wounds was consistent with the width of Bates' knife; and as was testified to at the resentencing, there were abrasions at the bottom of the wound that were consistent with marks that Bates' knife would have made."

Id. at 1099. The Florida Supreme Court also noted that "Bates' statements to investigators and at his trial also placed him either at the scene of the crime or directly involved in the victim's murder. Bates stated during a telephone call to his wife after his arrest that he killed a woman." *Id.* The Florida Supreme Court found "no error in the postconviction court's conclusion that DNA testing would not give rise to a reasonable probability of acquittal." *Id.* The Florida Supreme Court therefore, affirmed the denial of the first DNA motion.

Law-of-the-case doctrine

The successive DNA motion is barred by the law-of-the-case doctrine. The doctrines of collateral estoppel and law-of-the-case, which are designed to prevent relitigation of the same issues, apply to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015)(citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)).[2] The law-of-the-case doctrine bars consideration of those legal issues that were actually considered

[2] While the trial court denied DNA testing of the same items in the first motion for DNA testing based on the collateral estoppel doctrine, because the denial of the first motion was appealed to the Florida Supreme Court and affirmed by the appellate court, the law-of-the-case doctrine is the more accurate description of the preclusive effect of the prior DNA litigation. If there had been no appeal of the trial court's first ruling, then res judicata or collateral estoppel would be the correct term.

and decided in a former appeal. *Fla. Dep't. of Trans. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001).

In *Zeigler v. State*, 116 So.3d 255 (Fla. 2013), the Florida Supreme Court affirmed the denial of a second rule 3.853 motion for DNA testing based on the collateral estoppel doctrine. Zeigler originally filed a motion for DNA testing as part of his postconviction proceedings. The trial court ruled that Zeigler's motion for DNA testing was time barred because Zeigler failed to request DNA testing earlier. The Florida Supreme Court affirmed the denial of DNA testing. *Zeigler v. State*, 654 So.2d 1162, 1164 (Fla. 1995). The Florida Supreme Court first noted that Zeigler had waited in excess of two years before first raising the request for DNA testing in 1994. *Zeigler*, 654 So.2d at 1164. Alternatively, the Florida Supreme Court concluded that Zeigler did not present a scenario under which new evidence resulting from DNA typing would have affected the outcome of the case because "Zeigler admitted that he was at the scene of the crime" and to accept Zeigler's theory of the case, "the jury would have had to disbelieve at least three witnesses who testified at the trial." *Zeigler*, 654 So. 2d at 1164. The Florida Supreme Court stated that "Zeigler's request for DNA typing is based on mere speculation and he has failed to present a reasonable hypothesis for how the new evidence would have probably resulted in a finding of innocence." Id. Later, in 2009, Zeigler filed a third motion for DNA testing under rule 3.853 requesting testing of numerous items. *Zeigler*, 116 So.3d at 257. The trial court in *Zeigler* denied the motion.

The Florida Supreme Court affirmed the denial of DNA testing finding the successive DNA motion was "barred by collateral estoppel." *Zeigler*, 116 So.3d at 258. The Florida Supreme Court explained that the collateral estoppel doctrine "prevents the same parties from relitigating issues that have already been fully litigated and determined." *Zeigler*, 116 So.3d at 258 (citing *State v. McBride*, 848 So.2d 287, 290–91 (Fla. 2003)). The Florida Supreme Court observed that Zeigler in his successive motion was seeking additional DNA testing "based on variations of the same arguments he made in his previous motion for DNA testing" which the Court had "already affirmed the circuit court's decision of these issues against him" in the first appeal. *Zeigler*, 116 So.3d at 258. Because "we already decided these same issues against Zeigler," the successive motion was barred by collateral estoppel. *Id.* The Florida Supreme Court also rejected an argument asserting the manifest injustice exception to the collateral estoppel doctrine applied.

Here, as in *Zeigler*, the appellate court affirmance of the denial of the first motion for DNA testing means the second motion is barred by the law-of-the-case doctrine. Seven of the ten items listed in the second DNA motion, including 1) the victim's panties; 2) the victim's vaginal swab; 3) the semen smear slides; 4) the victim's skirt and hosiery; 5) the acid phosphatase test; 6) the victim's vaginal washing; and 7) the blue cord, are barred by the law-of-the-case doctrine. Bates may only seek DNA testing of the three remaining items not raised in the first motion.

Opposing counsel's attempt to distinguish *Zeigler* is unavailing. IB at 37. This Court's reasoning in *Zeigler* did not depend on procedural posture of the case. The doctrine does not depend on the prior request for DNA testing being granted. A prior denial of DNA testing is entitled preclusive effect as well. Nor does the preclusive effect of a prior ruling depend on subsequent case law unless the manifest injustice exception applies. But opposing counsel does not argue the exception applies and this Court rejected a manifest injustice exception in *Zeigler* as well. The trial court properly relied on this Court's controlling precedent of *Zeigler* and properly found the law-of-the-case doctrine barred the successive motion as to all the items in the first motion.

Opposing counsel also argues that the force of the law-of-the-case doctrine is diminished because rule 3.853 does not contain an explicit prohibition on successive or abusive DNA motions. IB at 35-37. The law-of-the-case doctrine is a judicially created doctrine designed to prevent abusive litigation which in large part is exactly what this second motion for DNA testing is. It does not have to be repeated in every statute and rule of criminal procedure to apply. It is the maxim of statutory construction that legislatures are presumed to know the law when enacting statutes (and courts when making rules) that applies to this case, not the *espressio unius est exclusio alterius* maxim. *Holland v. Florida*, 560 U.S. 631, 646 (2010)(applying equitable tolling to a statute that had no explicit provision for tolling because equitable tolling was the standard law at the time Congress enacted the statute and so, Congress was likely aware that courts would apply

the doctrine of equitable tolling). The trial court properly found that the law-of-the-case doctrine applied to bar testing of most of the items listed in the second motion for DNA testing.[3]

Inconsistent positions in postconviction proceedings

In his motion for reconsideration in the trial court, Bates asserted that the State is taking inconsistent positions in this case where the State opposed the DNA testing from its position in the *State v. James Card* case where the State agreed to DNA testing. (2016 PC motion record 163-171); *Card v. State*, 992 So.2d 810, 814, n.5 (Fla. 2008).

First, there currently is no federal constitutional prohibition on the State taking inconsistent positions. The due process concept of inconsistent positions has never been adopted by the United States Supreme Court. It is an open question whether such a concept even exists. *Bradshaw v. Stumpf*, 545 U.S. 175, 190, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005)(Thomas, J., concurring)("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."). It is only some federal circuits, such as the Eighth Circuit in *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000), that have prohibited the State from taking inconsistent positions

[3] There were three items raised in the second motion for DNA testing that were list in the first motion: 1) the defendant's blue shirt; 2) the defendant's white briefs; and 3) the defendant's green pants. The law-of-the-case doctrine does not apply to these three items and the merits of the motion for DNA testing regarding these three items will be discussed in the merits section of this brief.

under the federal due process clause. But other circuits disagree including the Eleventh Circuit. *United States v. Hill*, 643 F.3d 807, 832 (11th Cir. 2011)(observing that "it is not at all plain that a defendant has a right to prevent the prosecution from using inconsistent theories to prosecute two separately tried defendants charged with the same crime"). The Florida Supreme Court has also declined to address the issue. *Marek v. State*, 8 So.3d 1123, 1128 (Fla. 2009)(noting the court had rejected an inconsistent-theories claim on the basis that the State's theories were not inconsistent, without addressing whether such a due process right was established); *Parker v. State*, 542 So.2d 356 (Fla. 1989)(holding that the State did not have a duty to tell the jury that it was taking an inconsistent position). It is unlikely that the United States Supreme Court will ever flatly prohibit the State from taking inconsistent positions.[4]

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[4] A simple example will illustrate why the United States Supreme Court will not ever adopt a rule totally prohibiting the State from taking inconsistent positions. Suppose, in the era prior to DNA, the state prosecuted defendant A for rape based on the positive eyewitness identification of defendant A by the rape victim. The first jury convicted defendant A. After the advent of STR DNA, however, it was scientifically established that defendant A was not the rapist. In other words, the jury convicted the wrong guy in the first trial. The State releases defendant A based on the DNA results. The DNA results, however, also reveal the identity of the real rapist. The DNA database CODIS identifies defendant B as the real rapist and the State then seeks to try defendant B for the same rape. The State's theories are as inconsistent as it is possible to be - at the first trial, the prosecution took the position that defendant A was the rapist but at the second trial, the prosecution takes the position that defendant B is the actual rapist. A total ban on the State taking inconsistent theories of prosecution would prevent the State from ever prosecuting the real rapist in a second trial. A clearly guilty rapist would get off scot-free if the Supreme Court ever

Second, even those circuits that have prohibited the State from taken inconsistent positions, have done so for trials, not in postconviction proceedings. Both the DNA motion in this case and the DNA motion in Card were part of the postconviction proceedings. Indeed, the DNA motions were part of successive postconviction proceedings in both cases. There is no jury in postconviction proceedings. The prohibition on inconsistent positions does not extend to postconviction proceedings.

Third, even assuming the prohibition on inconsistent positions applied, the concept has always been limited to a prohibition on the State taking inconsistent ***factual*** positions, such as who was the actual triggerman. The concept does not extend to inconsistent ***legal*** positions. *Cf. Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 288 F.3d 491, 504 (2d Cir. 2002)(limiting application of judicial estoppel to inconsistent factual position, not legal conclusions); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 226 (4th Cir. 2001)(noting "the position sought to be estopped must be one of fact rather than law or legal theory"); Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L.Rev. 1244, 1254, 1262 (1986)(explaining that the policy underlying the doctrine, is

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held that due process prohibits the State from presenting inconsistent theories of prosecution under any circumstances. This result hardly accords with any possible reasonable view of due process.

The most the United States Supreme Court is ever going to require is that the defense be allowed to inform the second jury that the State took a different position in front of the first jury.

simple and sound: a party who commits perjury should be forced to eat his words but it is necessarily limited to factual inconsistencies). The concept is limited to matters of fact, not matters of law. The concept is designed to prevent a prosecutor from obtaining a death sentence by telling the jury at the first trial that defendant A was the actual triggerman and then turning around obtaining a death sentence by telling a different jury at the second trial that defendant B was the actual triggerman. But the State is doing nothing of the sort here. But the State did not take inconsistent positions in front of Bates' jury. The State has only taken one position in this case which is that Bates was the one who murdered the victim. The State is perfectly free to agree to a motion in one case and to object to the same type of motion in another case without violating the prohibition on inconsistent positions.

Fourth, the concept only applies to cases that have a factual connection between them, such as cases involving co-defendants. *United States v. Higgs*, 353 F.3d 281, 326 (4th Cir.2003)(stating that due process may be violated if an inconsistency exists at the core of the prosecutor's cases against the defendants for the same crime). *Bates* and *Card* did not involve the same crime. This case and the *Card* case have no factual relationship to each other whatsoever. The only connection is that DNA motions were filed in both cases. The entire concept of a prohibition on inconsistent positions does not apply to these two totally unrelated cases.

And finally, even if the concept extended to legal positions and across cases, it would not apply to these two particular cases

because the cases are not similar. The two cases are not procedurally or substantively the same. Procedurally, the State has a law-of-the-case doctrine defense in this case, unlike *Card*. While Card filed a DNA motion he did not appeal its denial to the Florida Supreme Court. *Card v. State*, 992 So.2d 810, 814, n.5 (Fla. 2008)(noting that while Card also filed a notice of appeal concerning the trial court's denial of his motion for DNA testing, he failed to raise the issue in his brief and conceded at oral argument that he was abandoning the issue). The State could not invoke the law-of-the-case doctrine in *Card* because the DNA motion issue was not raised on appeal or ruled on by the Florida Supreme Court. But, in this case, the Florida Supreme Court did address the denial of the first DNA motion and issued a written opinion affirming the denial of the first motion for DNA testing. *Bates*, 3 So.3d at 1098-99. The Florida Supreme Court concluded that "it was reasonable for the postconviction court to conclude that the results of the testing that Bates seeks in his motion would not produce a reasonable probability of Bates' exoneration." *Bates*, 3 So.3d at 1099. The Florida Supreme Court found "no error in the postconviction court's conclusion that DNA testing would not 'give rise to a reasonable probability of acquittal.'" *Id*. So, the law-of-the-case doctrine clearly applied to Bates' case. The State has a procedural defense in this case that it does not have in *Card*.[5] Substantively, the cases are not similar either. This

[5] The State could probably assert some sort of collateral estoppel defense in *Card* in the trial court but it does not have a valid law-of-the-case doctrine defense because the denial of the

case, unlike *Card*, involves a confession. The Florida Supreme Court noted that "Bates' statements to investigators and at his trial also placed him either at the scene of the crime or directly involved in the victim's murder. Bates stated during a telephone call to his wife after his arrest that he killed a woman." *Bates*, 3 So.3d at 1099. Bates basically confessed twice to this murder. Bates gave a taped statement to law enforcement. Bates also confessed to his wife on the day of the murder that he just murdered a woman.

Indeed, these types of differences between cases is one of the reasons the concept of inconsistent positions has never been expanded to legal positions or to factually unrelated cases, even in those jurisdictions that prohibit the State from asserting inconsistent factual positions. It is perfectly proper for the State to take into consideration the sheer strength of its case, both procedurally and factually, in agreeing or objecting to motions for DNA testing. Bates simply may not invoke the prohibition on inconsistent positions regarding the denial of his DNA motion.

Merits

Regarding the three remaining items not raised in the first motion, which are not barred by the law-of-the-case doctrine, the trial court properly denied the DNA testing of those items. The three items are: 1) the defendant's blue shirt; 2) the defendant's

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DNA motion was not appealed in *Card*.

white briefs; and 3) the defendant's green pants. But there is no reasonable probability that Bates would be exonerated based on DNA testing of these items. Bates' motion for DNA testing fails to explain how the DNA testing of his blue shirt; white briefs; or green pants would exonerate him in light of his confessions to the police and his wife, as well as the other evidence of guilt. Bates ignored all the evidence of his guilt in his motion for DNA testing and merely asserted that there was no DNA testing performed on the items he listed. Nor does he explain why another perpetrator's DNA would be expected to be found on his clothing. As the trial court concluded, there is no reasonable probability that Bates would be acquitted if the DNA testing was done on his blue shirt; white briefs; or green pants.

DNA testing statute and rule

There is both a statute and a rule of criminal procedure governing the granting of postconviction DNA testing. The postsentencing DNA statute, § 925.11, Florida Statutes (2016), requires that a petition for DNA testing contain a "statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result." The statute requires that a court find that "there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial" before granting a request for DNA testing.

The Florida Supreme Court has established a rule of criminal procedure detailing the steps to be taken by any defendant wishing postconviction DNA testing as well as the steps trial courts presented with such motions are to take. The rule of criminal procedure governing postconviction DNA testing, rule 3.853, provides:

> (a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.
>
> (b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:
>
> (1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;
>
> (5) a statement of any other facts relevant to the motion; and
>
> (6) a certificate that a copy of the motion has been served on the prosecuting authority.
>
> (c) Procedure.
>
> (1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.
>
> (2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority shall be ordered

to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, Florida Statutes.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) Time Limitations. The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(e) Rehearing. The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

> (f) Appeal. An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

No reasonable probability of exoneration

The second motion for DNA testing does not meet the requirement of either the statute or the rule. The successive motion for DNA testing did ***not*** "explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate him" as the motion is required to do. *Jackson v. State*, 147 So.3d 469, 491 (Fla. 2014)(affirming denial of motion for DNA testing); *Scott v. State*, 46 So.3d 529, 533 (Fla. 2009); *Robinson v. State*, 865 So.2d 1259, 1265 (Fla. 2004). Bates did not "lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence." *Bates*, 3 So.3d at 1098-99 (affirming the denial of a motion for DNA testing). Bates did not "demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." *Gore v. State*, 32 So.3d 614, 618 (Fla. 2010).

Furthermore, the items that Bates seeks to DNA test are unlikely to contain a third party's DNA. His blue shirt; his white briefs; and his green pants were the clothes he was wearing during the murder. While the other items listed in the motion, such as the semen smear slides and the victim's vaginal swab, would naturally and obviously be likely to contain the perpetrator's DNA, that statement it is not true of Bates' own clothing. The remaining

three items at issue are all Bates' own clothing. While Bates, in his motion for DNA testing, baldly asserts that the perpetrator would have left his DNA on the various items, he does not explain how that would be true regarding these three items. His blue shirt, his white briefs, and his green pants would naturally contain his DNA, not necessarily a third party's DNA. Bates offers no theory as to why his clothing would contain the "real" perpetrator's DNA rather than his own DNA. A trial court is not required to grant a motion for DNA testing when the movant offers no explanation at all of why the "real" perpetrator's DNA would be on the items he seeking DNA testing of.

And, as Bates admitted in his recorded confession to law enforcement, he carried the victim. So, even under his version of events, the victim's DNA would likely be on his clothes. If his clothes contained the victim's DNA, which one would expect from his own version and admissions, that would tend to inculpate Bates, not exonerate him. And DNA results showing the victim's DNA on the defendant's clothing would be totally consistent with the State's theory at the original trial in this case. His own DNA being recovered from his clothes would be meaningless and would not exonerate him. Testing of these three items would not exonerate him in any manner.

Bates, in his brief to the Court, ignores all the other evidence of his guilt. As the Eleventh Circuit characterized it, the "evidence of guilt presented against Bates during the three-day trial was overwhelming." *Bates*, 768 F.3d at 1284. The motion for DNA testing did not account for any of this evidence. There is no

reasonable probability that DNA testing if performed would result in an acquittal in light of the evidence of Bates' guilt. As this Court noted in its opinion affirming the denial of the first DNA motion, "Bates was arrested at the scene of the crime just ***minutes*** after the victim's death." *Bates*, 3 So.3d at 1099. This Court recounted that Bates "had the victim's diamond ring in his pocket, and he tried to conceal it from law enforcement officers." A watch pin "consistent" with Bates' watch was found inside the victim's office, and Bates' watch was missing a watch pin. Bates' hat was found near the victim's body. Two green fibers were found on the victim's clothing - one on her blouse and one on her skirt - that were consistent with the material that Bates' pants were made of." *Id.* This Court noted that the "knife case was found near the victim's body, and that case was identified by various witnesses as being the exact type that Bates wore. The victim's two fatal stab wounds were consistent with the type of buck knife that Bates carried in that case. The consistency between the stab wounds and Bates' knife was striking; the wounds were four inches deep, and Bates' knife was four inches long; the width of the wounds was consistent with the width of Bates' knife; and as was testified to at the resentencing, there were abrasions at the bottom of the wound that were consistent with marks that Bates' knife would have made." *Id.* The Florida Supreme Court also noted that "Bates' statements to investigators and at his trial also placed him either at the scene of the crime or directly involved in the victim's murder. Bates stated during a telephone call to his wife after his arrest that he killed a woman." *Bates*, 3 So.3d at 1099.

And, as the federal district court noted, in its denial of the habeas petition, the "overwhelming" evidence of Bates guilt including his confession; his presence at the scene just minutes after the crime; the victim's ring in his pocket; a watch pin found inside the victim's State Farm office and Bates' own watch having a missing pin; his hat near the victim's body; and the knife case found near the stabbed victim being the exact type that Bates wore.

Bates must explain how DNA testing would eviscerate his statement to law enforcement in which he confesses to carrying the victim; attempting to rape the victim; and to stabbing the victim with scissors. Bates basically confessed to this murder. Bates must also explain how DNA testing would negate his confession to his own wife on the day of the murder that he just murdered a woman, which is not alleged to have been coerced. Bates does not explain how DNA testing of his own clothes would change any of that other evidence including the taped statements to the officers and his confession to his wife. Bates must also explain how DNA testing would account for his presence; for his having the victim's ring; for his watch missing the pin and that pin being found in the victim's office; and for his hat and knife case near the victim's body. He explains none of these facts. He fails to explain how the DNA testing of his own clothes would exonerate him in light of this evidence.

Bates' reliance on *Hildwin v. State*, 141 So.3d 1178 (Fla. 2014), is misplaced. IB at 28. In *Hildwin*, this Court concluded that the newly discovered evidence of the victim's boyfriend's DNA on her underwear and a washcloth rather than the defendant's DNA required

a new trial. The State's theory at the original trial in *Hildwin* was that the biological material on her underwear and the washcloth was the defendant's, not the boyfriend's. A theory that was "woven throughout" the State's presentation of evidence. Hildwin's defense at trial was that the boyfriend killed the victim. This Court concluded that the "new scientific evidence completely discredits the scientific evidence that the State relied upon at trial" and that "the new scientific evidence actually supports Hildwin's defense." The Court concluded that the new DNA evidence was "of such nature that it would probably produce an acquittal on retrial" and gave "rise to a reasonable doubt as to his culpability." Originally, in 2006, this Court, by a four-to-three vote, while acknowledging that the DNA was "significant" new evidence, denied Hildwin to a new trial. *Hildwin v. State*, 951 So.2d 784, 789 (Fla. 2006). But the Florida Supreme Court granted a new trial in its latest opinion.

Hildwin is distinguishable both legally and factually. In *Hildwin*, there was new additional information in the form of CODIS results showing the boyfriend's DNA between the denial of the first motion and the second motion. But, here, unlike *Hildwin*, nothing has changed between the denial of the first motion for DNA testing and the second motion. There is no new information in this case. Moreover, here, the DNA results would not be inconsistent with the State's original theory of prosecution. DNA results showing the victim's DNA on the defendant's clothing would be totally consistent with the State's theory at the original trial in this case. Unlike *Hildwin*, DNA results showing either Bates or the

victim's DNA on his clothing would be perfectly consistent with the State's theory of this case. The reasoning of *Hildwin* does not apply to this case.

Furthermore, contrary to opposing counsel's claim, the identity of the murderer is not genuinely disputed in a case with taped confession. Opposing counsel ignores the confession to the wife and instead focuses on the taped statement of law enforcement. While opposing counsel ignores Bates' confession to his wife, the trial court certainly was not required to ignore it.

Confessions and DNA motions

The trial court properly considered Bates' confessions in denying the DNA motion in this case. The Florida Supreme Court has relied, in part, on admissions and confessions to affirm the denial of DNA testing. *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995)(denying DNA testing, in part, because "Zeigler admitted that he was at the scene of the crime").

Opposing counsel insists that the confession does not prohibit a trial court granting a motion for DNA testing but this is a misunderstanding of the role of a confession in the context of a motion for DNA testing. IB at 31. Bates would have a trial court ignore the fact that the defendant confessed in determining a DNA motion but the DNA statute demands otherwise. While the existence of a confession would not preclude a trial court from granting a DNA motion, unless the defendant provides a reasonable explanation for his confession, a confession is certainly a valid basis for a trial court to deny the motion. Bates provides no such reasonable

explanation. The trial court properly considered the confessions in its ruling denying the DNA motion as required by the statute.

Additionally, while opposing counsel asserts that the taped statements to law enforcement were given in a "coercive environment while under the influence of drugs," that is a legal argument regarding voluntariness of the statement, not properly litigated inside a motion for DNA testing. Bates may not litigate the voluntariness of his confessions inside a DNA motion. Once the confession was not suppressed, it is a fact in this case that the trial court is required to consider, under the statute, when deciding the motion for DNA testing.

Moreover, Bates' claim during his trial testimony that he only confessed because someone put something in his orange drink, a claim he repeated in his motion for DNA testing, was rejected by the jury. The orange drink explanation for his confession is unreasonable and was understandably rejected by the jury. A motion for DNA testing may not be used to relitigate a defense that was already rejected by the jury during the original trial. If the first jury already rejected the explanation for the confession then there is no possibility of an acquittal on retrial as required by the statute and rule.

And, contrary to opposing counsel's argument, this is not a circumstantial evidence case; this is a direct evidence case because it involves multiple confessions to various people including a taped confession. Confessions are direct evidence, not circumstantial evidence. *Bell v. State*, 152 So.3d 714, 717 (Fla. 4th DCA 2014)("Since the main evidence used against Bell was his

own confession, the State provided direct evidence of his guilt"); *Meyers v. State*, 704 So.2d 1368, 1370 (Fla. 1997)("Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case."). This is a direct evidence case and the trial court is entitled to consider that it is a direct evidence case in its denial of a motion for DNA testing. Indeed, the trial court is required to consider that evidence, under both the statute and the rule. § 925.11, Fla. Stat. (2016); Fla.R.Crim.P. 3.853.

Accordingly, this Court should affirm the trial court's denial of the successive motion for DNA testing.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the denial of the successive rule 3.853 DNA motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by electronic mail via e-portal to Rachel Lawrence Day, 1 East Broward Blvd, Ste 444, Fort Lauderdale, FL 33301-1827 Phone: 954-713-1284; email: dayr@ccsr.state.fl.us; ccrcpleadings@ccsr.state.fl.us and Scott Gavin, 1 East Broward Blvd, Ste 444, Fort Lauderdale, FL 33301-1827 Phone: 954-713-1284; email: gavins@ccsr.state.fl.us and ccrcpleadings@ccsr.state.fl.us; Seth E. Miller of The Innocence Project of Florida, Inc., 110 East Park Avenue, Tallahassee, FL 32301 Phone (850) 561-6769 email: smiller@floridainnocence.org this 17th day of November, 2016.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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