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.	)	
	)	
_____	)	

REPLY 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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ARGUMENT

A. In Defending Against the Merits of the Request for DNA Testing on the Appellant's Clothing, the Appellee Conceded That The Other Items of Evidence It Claims Are Procedurally Barred From Being Tested Are Likely to Contain the Perpetrator's DNA. This Admission Undercuts Its Own Argument for Invoking the Collateral Estoppel and Law of the Case Doctrine, and Demonstrates an Entitlement to the DNA Testing.

In its Answer Brief, the Appellee asserts that postconviction DNA testing on seven of the ten items requested for postconviction DNA testing in the Appellant's most recent Rule 3.853 motion were procedurally barred by the doctrines of collateral estoppel and law of the case because the circuit court denied DNA testing of those same items in a 2003 Rule 3.853 proceeding and this Court affirmed that denial on the merits. The Appellant reiterates the arguments made in his initial brief: that the doctrines of collateral estoppel and law of the case do not apply or, at least, should not be invoked in this case. There is, however, one additional point related to the procedural bar issue that emanates from the Answer brief to which the Appellant must reply.

In defending against the merits of the remaining three items of evidence (which the Appellee claims includes the Appellant's clothing), the Appellee appears to have conceded that the Appellant is entitled to relief on other items of evidence requested in the instant Rule 3.853 motion. Specifically, the Appellee compared the probative value of the Appellant's clothing to other items requested for DNA testing:

> 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 [sic] is not true of Bates' own clothing.

(Answer Brief, at 30) (emphasis added). In doing so, the Appellee conceded the point that the Appellant tried to make in the 2003 Rule 3.853 proceedings and which he made more clearly, cogently, and forcefully in the instant proceedings: that a number of the items—including the (1) blue panties of victim; (2) rape kit, including victim's vaginal swab; (3) semen smear slides; (4) victim's skirt and pantyhose; (5) acid phosphatase test; and (6) victim's vaginal washing that tested positive for non-motile intact sperm—are highly likely to contain the semen of the perpetrator. This evidence can be DNA tested and, if the Appellant and the victim's husband are excluded as contributors, would turn this case on its head. It would indicate that an unknown man left his semen in the victim, on the victim, or on her clothing.

The Appellee has not provided any explanation for such a result. Nor is the fact that the Appellee believes that the DNA testing would simply reveal that the Appellant is in fact the perpetrator a valid basis to deny the DNA testing, as Rule 3.853 contemplates courts to presume the favorable result in determining its materiality to the case. Because the Appellee cannot provide a record-based

explanation for a result from semen that excludes the Appellant and the victim's husband, it would fall squarely within the myriad single-perpetrator rape cases dealt with by this Court and the district courts of appeal that have found an entitlement to postconviction DNA testing in similar circumstances.

The Appellee would likely respond that this is of no consequence because DNA testing on those other, more probative items is procedurally barred. The Appellee, however, asserted in the 2003 Rule 3.853 proceedings that any semen that would have been found on these items would be from the victim's husband. The circuit court denied on that basis, and this Court affirmed that denial. Now, the Appellee has apparently changed its position to admit that these other items it previously argued would not be probative "**would naturally and obviously be likely to contain the perpetrator's DNA**." (Answer Brief, at 30) (emphasis added). Had the Appellee agreed in previous 2003 Rule 3.853 proceedings that at least six of the items requested for DNA testing likely contained the perpetrator's DNA, the circuit court would have been required, as a matter of law, to grant the DNA testing.

It is completely disingenuous for the Appellee to rely on collateral estoppel and law of the case to bar DNA testing of these items where it has now abandoned the arguments proffered in the previous Rule 3.853 that formed the basis of the previous denial on the merits and affirmance by this Court on appeal. Where the

Appellee has conceded the highly probative nature of most of the items requested for DNA testing and changed its position on the probative value of these items from the previous proceeding, there is no longer any rationale for invoking collateral estoppel and law of the case to bar such DNA testing. This is especially so where the Appellant has a sentence that is irreparable once carried out.

The bottom line is that the parties agree that most of the items requested for testing are highly likely to contain the DNA of the perpetrator. Given this and the gravity of the sentence imposed on the Appellant, this Court should grant the DNA testing on these items to answer the question of the perpetrator's identity once and for all.

B. The Appellee Erroneously Argues Against Testing Items That the Appellant Did Not Request for Testing and Failed to Respond to the Request for DNA Testing of Items Not Requested in the Previous Rule 3.853 Proceedings.

In its Answer Brief, at 26-33, the Appellee identifies the three remaining items of evidence not requested in the previous Rule 3.853 proceeding as 1) the Appellant's blue shirt; 2) white briefs; and 3) the Appellant's green pants. (Answer Brief, at 26-27). The Appellee then goes on to correctly explain how DNA testing of items of the Appellant's clothing worn at the time of the crime would not lead to a reasonable probability of acquittal.

The problem for the Appellee, however, is that the Appellant did not request postconviction DNA testing on these items in this proceeding. (R. 9-10, 27; Initial

Brief, at 17-18). The only mention of the Appellant's white briefs and green pants was in this proceeding was in portions of the Rule 3.853 motion below and the Initial Brief in this Court discussing pre-trial serological examination on those items performed by FDLE. (R. 7-8, Initial Brief, at 9-10). In fact, contrary to the Appellee's assertion, the Appellant did request DNA testing on these items in the 2003 Rule 3.853 motion, but did not again request postconviction DNA testing on these items of the Appellant's clothing in this proceeding.

Instead, in addition to items previously requested, the Appellant requested postconviction DNA testing on three additional items: (1) 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; (2) fingernails clippings from victim; and (3) reference samples from the victim that would be used comparison purposes during DNA testing. (R. 10; Initial Brief, at 17-18). The Appellant stands by the detailed arguments on the merits of testing those items that it made in the instant Rule 3.853 motion (R. 15-20) and in his Initial Brief, at 16-33. Because the Appellee did not respond to the grounds for reversal on these items, this Court should reverse and remand to the circuit court for the relief requested or an evidentiary hearing on these items of evidence.

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, his Reply to demonstrate an entitlement to postconviction DNA testing, and in his instant appellate pleadings. Moreover, the doctrines of collateral estoppel and law of the case should not be invoked to bar DNA testing where, as here, such an entitlement to relief has been established and the Appellee concedes that most of the items requested for DNA testing are likely to contain the DNA of the perpetrator.

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.

Respectfully submitted,

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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 7th day of December 2016.

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