IN THE FLORIDA SUPREME COURT

BRETT A. BOGLE,

Petitioner,

v. **CASE NO. SC01-1607; SC01-1701**

Lower Court Case No. 91-12952

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

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REPLY TO STATE'S RESPONSE TO PETITION

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ARGUMENT IN REPLY

What Respondent has certainly failed to grasp is that Mr. Bogle's position is premised upon the principle that he was denied his constitutional right to a fair trial by a jury.[1] The State violated the fundamental principles outlined in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Rather than acknowledge the constitutional deprivation, the State wants to turn the post-conviction process into a gambling table. The State's effort to conduct DNA testing is the classic "double or nothing" exhortation of the gambler who is losing. The State wants to turn the Brady/Giglio violations into a non-event, yesterday's news. The State wants the DNA testing because of its hope to find something that was not presented to Mr. Bogle's jury that could be used to render the Brady/Giglio violation moot and/or

[1]Mr. Bogle would note that this is a case of first impression. This case will establish the precedent for how the process for post-conviction DNA testing works. When Mr. Bogle first filed his petition with this Court, it was before the Rule had been formulated and before the Statute became effective. In this Reply, Mr. Bogle specifically relies on both the Rule and the Statute as additional authority supporting his position.

harmless error.

Mr. Bogle is confident of his innocence and has surely been tempted to throw caution to the wind. However, he is entitled to a new trial because the State failed to disclose exculpatory evidence and knowingly presented false evidence. Before that new trial, Mr. Bogle fully anticipates that DNA testing will occur. Thus, on a simplistic level the question may be which comes first, the DNA testing or the order granting a new trial. The reality is that the State with its "double or nothing" gamble wants to preclude a new trial order from ever issuing. If the results are favorable to Mr. Bogle, the State ostensibly may fold. If the results, are adverse or inconclusive, the State will argue no new trial is warranted -- any trial error was harmless. Mr. Bogle fears that the State's effort to conduct the DNA testing before the new trial is granted is a ploy to cheat Mr. Bogle out of the new trial to which he is entitled.

The basis for this fear is in the facts of the case. There is a good chance the results of testing will be inconclusive. The evidence that Mr. Bogle knows may be subject to testing is a hair that forensic examination found

to be microscopically similar to hair came from the victim.[2] The Brady/Giglio violation occurred when the State presented evidence that the hair was a pubic hair when the records from the examination establish that it was a head hair. Certainly, DNA testing of the hair may produce the result that the hair was not from the victim at all. However, even if the testing produces results that the hair has the victim's DNA profile, the result is not inconsistent with Mr. Bogle's Brady/Giglio claim. Because Mr. Bogle acknowledged contact with the victim the night of her death, the State relied on the examiner's false testimony that the hair was a pubic hair and not a head hair as reflecting more than casual contact that Mr. Bogle acknowledged with the victim. Thus, even if the hair has the victim's DNA profile, it is not inconsistent with either Mr. Bogle's defense at trial, i.e. innocence, or his post-conviction Brady/Giglio claim.

But even more troubling to Mr. Bogle is the fact that internal FBI records establish that the testimony regarding the results of the FBI's pre-trial DNA testing was false. He

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[2]The FBI notes indicate that the samples that were subject to pre-trial DNA testing were used up in the process and nothing is left to test. Certainly, the State has made no showing that there is anything left to test as would be required if the State were obligated to show cause for the testing or was obligated to comply with Florida Rule of Criminal Procedure Rule 3.853.

has a basis in fact for not trusting the State. The State hid the fact that FBI's testing was inconclusive from Mr. Bogle and from the jury. He did not have a full and fair adversarial testing as to the DNA testing which occurred.

The State argues that the fact Mr. Bogle has recently rejected the State's offer to send the evidence to a mutually agreed upon, independent laboratory somehow reflects Mr. Bogle's confidence in his innocence. However, not only does the State omit the details of the negotiation[3], but also fails to recognize the true issue of the appeal.[4] The State was held to no burden or criteria in securing testing. Issues of what evidence exists, what testing can occur, contamination and admissibility have been ignored. Certainly, under Rule 3.853 a defendant who seeks DNA testing has burdens to meet before he can obtain the testing.

Subsequent to Mr. Bogle's Initial Petition, this Court

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[3]The State offered to submit the evidence to an independent laboratory, which as the State concedes will have to occur because the Floirda Department of Law Enforcement does not conduct mitochondrial DNA analysis. In fact only a handful of laboratories, nationally, have been accredited to conduct the type of analysis required. In exchange, the State requested that Mr. Bogle dismiss the appeal.

[4]The State has not been required to plead what is to be tested and for what purpose. It has not been held to make any showing of what there is to test or what result of the testing is possible that would be of benefit.

promulgated Rule 3.853 which is substantially similar to Florida Statute § 925.11. The Rule requires a post-conviction defendant to satisfy his burden under the Rule in order to obtain DNA testing of evidence. These burdens mirror those in the Statute. Neither the Rule nor the Statute address whether the State can petition for DNA testing. Thus, two questions arise. Does the Rule and/or the Statute permit the State to conduct DNA testing of evidence, and if so, does the State bear the same burden imposed upon a defendant before the testing is authorized?

The State concedes that the Statute and Rule do not address the State's ability to conduct DNA testing.[5] Thus,

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[5]The State does argue that obtaining Mr. Bogle's blood sample is not a discovery request, therefore the rules governing post-conviction discovery do not apply when seeking to conduct DNA testing. (Response at 13). The State's position is ludicrous, as even it seemed to recognize in its shotgunned Response which alternatively announced that the State does not in fact need a blood draw to obtain Mr. Bogle's DNA because it already has it (Response at 13). With this announcement it would seem that the State cannot show any cause for a blood draw.

The State also inexplicably argues that § 943.325(11), Fla. Stat. (2001), overruled Schmerber v. California, 384 U.S. 757 (1966). However, it seems to be well settled law that the Legislature cannot overturn United States Supreme Court decisions restricting the power of the States on the basis of the United States Constitution. The State neglects to cite any decision by a court interpreting the statutory provision vis-a-vis Schmerber. Nor does the State address alternative and less intrusive means of obtaining DNA samples from Mr. Bogle , besides an invasive blood draw. Again, because the State was not held to show cause in circuit court, none of

the State concludes that nothing limits the State's ability to test the evidence and no standards apply to the State. Yet, during last August's argument on the comments to Rule 3.853, the Attorney General's office took the position that the Rule did arguably prohibit the State from conducting post-conviction DNA testing:

> . . . I think there are two deficiencies to add to the Rule that would not change the posture of the Rule, and that is to ensure that there is no limitation with regard to the State examining DNA evidence at the point in time in postconviction, that this Rule does not serve as a bar to that, . . .

http://wfsu.org/gavel2gavel/transcript/01-363_01-1619.htm.

This Court did not revise the Rule to include any provision allowing the State to test evidence.[6]

In fact, there are valid reasons that post-conviction DNA testing by the State should not be allowed.[7] Such testing

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these matters were addressed. And that is the real issue: Is the State required to make some kind of showing in circuit court to pursue post-conviction DNA testing?

[6]Ms. Snurkowski's stated concern that Florida Statute § 925.11 and Rule 3.853 could be construed to prohibit the State from conducting DNA testing in post-conviction is conveniently overlooked in the Response filed herein. Further, the fact that this Court chose to not address the "deficiencies" cited by Ms. Snurkowski would appear to be a conscious decision by this Court.

[7]Rule 3.850 requires a movant to plead and prove a violation of a constitutional right that undermines confidence in the trial's outcome. The defendant bears the burden.

would infringe on a capital post-conviction defendant's right to have evidence maintained and preserved. The Statute specifically places an obligation on the State to maintain and preserve any evidence subject to DNA testing. The State even admits that "Plainly, the intent of that provision [requiring agencies to maintain forensic evidence] is to prevent the *disposal* of evidence to insure that it is available if the defendant wishes to seek post-conviction testing." (Response at 9)(emphasis in original).[8] Without any basis in the record, the State first argues that the State's testing evidence does not equate with disposal.[9] Apparently aware of

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Additional inculpatory evidence gathered by the State is irrelevant to issues challenging the adequacy of the adversarial testing that was the trial. Certainly, the State would have a better argument for its own DNA testing if the defendant has obtained DNA testing and is arguing the results establish the defendant's innocence.

[8]The State would seem to be conceding that the Rule and the Statute provide a defendant with a protected interest in preserving evidence which may be subject to DNA testing. Certainly, such an interest is governed by due process.

[9]When making the argument that "testing of evidence [does not] equate[ ] with disposal," the State continues "If that were true, the statute would limit the State's right to test evidence initially." (Response at 9). This is, of course, Mr. Bogle's point, once a criminal defendant is convicted and the statute's preservation requirement kicks in to effect, it does not permit the State to "initially" test the evidence. So apparently, if DNA testing constitutes "disposal," the State agrees that the testing cannot occur. Yet, on the same page of the Response, the State argues that when it gave "notice of its intent to conduct additional testing," Mr. Bogle was put

the weakness in that position, the State also argues the inconsistent proposition that under the disposal provision in the Statute, Mr. Bogle has been notified that the evidence will be tested, i.e. disposed of, and he has failed to request his own testing, thus waiving his interest in the evidence. However, § 925.11(4)(c) authorizes "disposal" of the evidence after notice of the intent to dispose if the defendant does not respond by sending either a petition for DNA testing "or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired." At this point, Mr. Bogle does not know whether it is the State's position that the proposed testing would in fact destroy evidence, or it's the State's position that it will not. Until that is resolved, surely he has not been given adequate notice and an opportunity to be heard that comports with due process. Moreover, his objection to the testing on the grounds that it will destroy the evidence and his initiating this action surely should be adequate to prevent the disposal of the evidence.

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on notice that "the evidence may be destroyed." (Response at 9). Accordingly, his failure to file a petition for DNA testing "waived any right to complain" about the disposal of the evidence (Response at 9-10).

To comport with due process and extinguish a defendant's right to access to evidence for DNA testing, Rule 3.853 should preclude DNA testing without notice to the defendant of what is to be tested and may be destroyed.[10] Therefore, Rule 3.853 and the Statute, by creating a right, would seem to preclude the extinguishment without notice. Therefore, there is a limitation on the State's right to conduct such testing.[11]

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[10]In Ford v. Wainwright, 477 U.S. 399 (1986), in her concurring opinion, Justice O'Connor found that due process may attach to postconviction proceedings. Justice O'Connor, relying on precedent, stated: "'[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of the States.'" 477 U.S. at 428,(J. O'Connor concurring in part, dissenting in part)(quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). Justice O'Connor made clear: "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." Ford, 477 U.S. at 428-429. Thus, the fact that this Court and the Florida Legislature have provided for a right to DNA testing and the preservation of evidence for a postconviction defendant, the State cannot violate the defendant's right and the due process which attaches to that right.

[11]Of course, what the State has also overlooked here is the fact that testable DNA evidence may have been admitted into evidence. Such evidence cannot be tested without obtaining a court order releasing the evidence. That imposes an additional limitation on the State's ability to conduct DNA testing of evidence. In fact, the more relevant the evidence, the more likely it was introduced into evidence at the original trial. There is absolutely no reason that the State should be able to obtain access to such evidence on a basis not available to the defense. The playing field should be level, and the State should be required to comply with Rule 3.853.

Therefore, if the State is to have access to DNA testing, it should be required to make the same (or parallel) showing as the defendant.

Florida Statute § 925.11 and Rule 3.853 set forth the defendant's burden that must be met before post-conviction DNA testing is authorized. Rule 3.853 states in pertinent part:

> (b) **Contents of the Motion.** The motion for postconviction DNA must be under oath and must include the following:
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> (1) a statement of the facts relied on 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;
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> (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;
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> (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 . . .;
>
> (4) a statement that identification of the movant is a genuinely disputed issue in the case . . .;
>
> (5) a statement of any other facts relevant to the motion; . . .

Additionally, the circuit court must also determine whether any evidence exists and **whether the results of the test would**

be admissible at trial. See Fla. R. Crim. P. 3.853 (c)(5)(emphasis added); Fla. Stat. § 925.11. Certainly issues of contamination, chain of custody and reliability of testing are all matters that must be considered by the court.[12]

The State makes no argument as to why the State does not have to satisfy these parallel requirements before it can obtain DNA testing. Below, the State's position was that it need not demonstrate cause for the testing. The State argued that it could do it because it wanted to do it. Of course, that has never been the law as to a capital defendant. Historically, he could only get DNA testing if the State agreed to permit it. See Answer Brief of the State at 25-28, Gudinas v. State, FSC Case No. SC00-954. And of course, that is the reason that the Statute and the Rule have been adopted, to change the law in that regard.

The State has not attempted to argue that it can satisfy the burden imposed by the Rule and/or the Statute. The State's Response makes clear that the State's sole motivation in requesting a blood sample for testing is to convince this Court and the circuit court to reject the outcome

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[12]None of these matters were considered by the lower court in granting the motion to obtain a blood sample from Mr. Bogle. In fact, it appears that the semen samples may no longer exist.

determinative test under which Mr. Bogle's post-conviction claims must now be judged and adopt a more stringent prejudice analysis of his constitutional claims. The State avers:

> The State filed its Answer to Defendant Bogle's Motion on July 16, 2001, agreeing that an evidentiary hearing is warranted on, among other things the DNA claim. **In light of specific allegations made in defendant Bogle's motions for Post-Conviction Relief concerning DNA testing**, the State made an Ore Tenus Motion to the trial court on June 6, 2001, to have blood samples taken from the defendant for DNA testing of evidence in the instant case.

(Response at 5)(emphasis added). The State's assertion that DNA testing can rebut specific allegations raised by Mr. Bogle is specious. Mr. Bogle's claims are largely premised upon the discovery of Brady/Giglio violations at trial. At a minimum, the State failed to disclose a wealth of evidence impeaching the forensic case presented by the State, and it appears to counsel that, in fact, the State knowingly presented false evidence. As to the DNA testimony at trial, Mr. Bogle has examined the FBI's files and discovered that materials in the file demonstrate that the testimony presented in court was false and misleading as to the testing that was conducted and what the results of the testing were. New DNA testing is irrelevant as to whether at the time of the trial the testimony was false and misleading or subject to impeachment by the FBI's own undisclosed files. At issue in Mr. Bogle's

Rule 3.850 motion is whether Mr. Bogle's trial was constitutionally adequate.

Mr. Bogle has raised claims regarding Brady violations and ineffective assistance of counsel. Specifically, Mr. Bogle's Brady claim contains allegations that the scientific testing and testimony presented to the jury that convicted him was untrue and misleading. The State cannot "fix" the problem that false testimony and argument was presented to the jury by attempting to generate new evidence of guilt.[13]

In Kyles v. Whitley, 514 U.S. 419, 445-446 (1995), the Supreme Court discussed the Brady prejudice analysis. The Court explained: "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

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[13]Imagine the logical conclusion of the State's position if new testing implicated Mr. Bogle: 1) Mr. Bogle presents unrebuttable evidence that false and misleading test results and testimony was presented to his capital jury; 2) The State presents inculpatory evidence based on new testing; 3) Mr. Bogle challenges the new testing through his own experts and tests. Rather than a jury hearing evidence and rendering a verdict about whether Mr. Bogle is guilty or not guilty, the State requests that the judge who must determine whether or not the confidence in Mr. Bogle's verdict is undermined, to conduct a harmless error analysis by looking at new evidence, not subjected to a jury, to determine that Mr. Bogle is guilty. A jury, not a postconviction judge should be the trier of fact in regard to new testing and what weight they would assign such evidence.

fair trial, understood as a trial resulting in a verdict worthy of confidence." Id at 1566. Similarly, DNA testing does not alter the fact that Mr. Bogle's trial was constitutionally unsound and that he is entitled to a new trial. There is no harmless-error review for constitutional claims of ineffective assistance of counsel and Brady violations. Kyles, 514 U.S. at 1567.

Recently, the Supreme Court rejected the Fourth Circuit Court of Appeal's adoption of a more stringent prejudice analysis in reviewing an ineffective assistance of counsel claim. Williams (Terry) v. Taylor, 529 U.S. 362 (2000). The Fourth Circuit Court of Appeals determined that the Strickland prejudice analysis which is "outcome determinative" was the wrong standard under which to analyze an ineffective assistance of counsel claim. Id. at 371. The Supreme Court reversed and rejected the modified standard for determining prejudice: "[T]he Virginia Supreme Court read our decision in Lockhart to require a separate inquiry into fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." Id. at 394. Because Williams proved that his counsel's ineffective performance "probably affected the outcome" of his trial, he was entitled to relief,

even though he may have been guilty of the crime, or his case may have warranted a death sentence. [14]

Under the law, the State is entitled to rebut Mr. Bogle's claims, but DNA testing cannot assist the State to maintain an unconstitutional conviction by rebutting claims of prejudicial error in post-conviction, as the State suggests. (See Response at 14).[15] Clearly, the State is attempting to re-prosecute Mr. Bogle in a more favorable procedural posture than a trial setting and without conceding that his conviction

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[14]The prejudice test for Brady violations was lifted from the prejudice test for ineffective assistance of counsel claims. United States v. Bagley, 473 U.S. 667 (1985).

[15]For example, at trial the jury heard testimony from FBI Agent Michael Malone that the hair matched the pubic hair standard of the victim. The prosecutor, Karen Cox argued to the jury that the pubic hair match was particularly incriminating because it is "not something that you just pick up in a casual encounter." (R. 560). After an independent review of Agent Malone by the FBI, Mr. Bogle has learned that the testimony and argument presented to his capital jury was false. The documentation regarding hair analysis illustrates that Agent Malone compared the hair found on Mr. Bogle's jeans to the standards obtained from the victim and he determined that the unknown hair was similar to the victim's head hair, not her pubic hair as he testified. No one refuted the fact that Mr. Bogle and the victim were in the same vicinity on the night of the crime or that Mr. Bogle formerly lived with the victim and her sister and was in close contact with the victim's belongings. Therefore, the fact that the hair resembled the head hair and not the pubic hair is significant to Mr. Bogle's Brady/Giglio claim. However, the fact that the hair may be matched to the victim using mitochondrial DNA cannot change the fact that Mr. Bogle's jury heard false testimony which the prosecutor capitalized on in her closing argument to suggest the strength of the State's case.

is unconstitutional.[16]

The State misses the point of Statute § 925.11 and Rule 3.853. They establish that the **defendant** has an interest in the forensic evidence. The defendant has a burden; he must show that the requirements set forth in Rule 3.853 have been met.[17] The State claims it has no burden and no limitations.[18] However, the 14th Amendment carries burdens and limitations upon the power of the State to extinguish a protected right. This Court should either: 1) prohibit the State from conducting testing which may extinguish a capital defendant's due process right, or 2) require the State to meet the requirements set forth in the Rule for petitioners requesting post-conviction DNA testing. In this case, the State has been

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[16]In post-conviction, Mr. Bogle assumes the burden of proof and has none of the rights which would adhere if he were given a new trial, including his right to a speedy trial, his right to a trial by jury and his right to be presumed innocent.

[17]It is particularly disturbing for the State to announce that prosecutors in this State have been undertaking post-conviction DNA testing without obtaining a court order under Rule 3.853 or even providing notice to the defense. (Response at 15, fn. 5). This process is apparently being conducted without notice to the defense. Such conduct would seem to be violating due process (notice and opportunity to be heard before a right is extinguished), if not the Statute and Rule.

[18]Yet, the State recognized that if "testing of evidence equates with disposal," "the statute would limit the State's right to test evidence initially."

held to be exempt from showing cause for DNA testing. That was error. The circuit court's order must be vacated, and the State must directed to either conduct no testing or to file a petition in conformity with Rule 3.853.

WHEREFORE, Mr. Bogle respectfully requests that this Court vacate the order authorizing the State to extract blood from Mr. Bogle's body for purposes of DNA testing.

And, Mr. Bogle renews his request for oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply has been furnished by United States Mail, first class postage prepaid to Candance M. Sabella, Sr. Asst. Attorney General, 2002 N. Lois Ave., Ste. 700, Tampa, FL, 33607 on March __, 2002.

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