SC21-1467

In the Supreme Court of Florida

STATE OF FLORIDA,
Appellant,

v.

HENRY P. SIRECI,
Appellee.

On Appeal from the Circuit Court for the Ninth Judicial Circuit, in and for Orange County
L.T. No. 1976-CF-532

REPLY BRIEF ON THE MERITS

ASHLEY MOODY
Attorney General

SCOTT BROWNE (FBN802743)
Chief Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
(813) 287-7900
scott.browne@myfloridalegal.com

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
jenna.hodges@myfloridalegal.com

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Counsel for State of Florida

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INTRODUCTION

The Attorney General of Florida, elected in 2018 by more than 4.2 million Floridians, is the "chief state legal officer," Art. IV, § 4(b), Fla. Const., and the Legislature has made the Attorney General "co-counsel of record" with the State Attorney in "capital collateral proceedings." § 16.01(6), Fla. Stat. Yet Appellee insists—even after his seven independent confessions, numerous appeals and postconviction motions, one fruitless round of postconviction DNA testing, and a guilty plea in a separate murder case—that a State Attorney has the unilateral authority, over the Attorney General's express objection, to reopen his decades-old conviction for a capital murder by agreeing to yet another round of DNA testing.

Appellee's answer brief has little to say in defense of that curious proposition. He also makes no attempt to show that he satisfied the prerequisites for obtaining postconviction DNA testing established by Florida Rule of Criminal Procedure 3.853. Instead, Appellee seeks principally to steer the Court as far from the merits as possible, urging, for instance, that the Attorney General has somehow waived her arguments or is otherwise barred from asserting

her right to participate meaningfully in this postconviction DNA testing proceeding.

Appellee is wrong. Contrary to his suggestion, the Attorney General agrees—and agreed below—that the State can waive the requirements of Florida Rule of Criminal Procedure 3.853, which provides a procedure for a circuit court to order postconviction DNA testing. Nor, contrary to Appellee's insinuations, does the Attorney General have any quarrel with the idea that a State Attorney may enter into consent agreements waiving those requirements when appropriately authorized to do so. Indeed, the Attorney General fully supports postconviction DNA testing that, unlike the DNA testing that was unlawfully ordered below, has a reasonable prospect of exonerating the innocent.

What State Attorneys may *not* do, however, is waive the requirements of Rule 3.853 *over the objection* of their "co-counsel," § 16.01(6), Fla. Stat.—the Attorney General. The circuit court's order should be reversed.

ARGUMENT

This Court should reverse the order authorizing DNA testing.

A. The purported joint stipulation was invalid in light of the Attorney General's express objection.

When postconviction DNA testing is sought in a capital case, Section 16.01(6) makes the Attorney General "co-counsel of record." Together with the applicable State Attorney, then, the Attorney General is the "prosecuting authority" for purposes of litigating any DNA testing issues. Fla. R. Crim. P. 3.853(b)(6), (c)(2), (c)(3), & (c)(8). Over her objection, there could be no "joint stipulation" for postconviction DNA testing here, and Appellee could therefore obtain relief only if he satisfied the requirements of Rule 3.853. Appellee's attempts to show otherwise fail at every turn.

1. A joint stipulation for postconviction DNA testing in a capital case is invalid if the Attorney General expressly objects.

a. Appellee contends that Section 16.01(6) merely allows the Attorney General to "assist the State Attorney" in capital postconviction proceedings. Ans. Br. 48. That assertion fails to grapple with the statute's language, which makes the Attorney General not junior-varsity counsel, but "co-counsel" with the State

Attorney. *See* Init. Br. 21–22. And Appellee does not dispute that, under default principles of agency law, a co-agent has no power to bind a principal (in this instance, the State) over the objection of a co-agent. Init. Br. 23–24.

Appellee instead contends that the Florida Legislature overrode that default rule of agency law in Section 709.2111, Florida Statutes. Ans. Br. 42 & n.17. That statute does indeed provide that "[u]nless the power of attorney otherwise provides, each co-agent may exercise its authority independently." § 709.2111(1), Fla. Stat. But Appellee ignores that Section 709.2111 is inapplicable to agency relationships "created by a person *other than an individual*," § 709.2103(4), Fla. Stat. (emphasis added). Section 16.01(6) is a delegation of official authority to the Attorney General to act on behalf of the State. As a result, the Court should not apply Section 701.2111, but rather the "general rule" that a co-agency relationship "will be presumed to be joint." *Chapman v. St. Stephens Protestant Episcopal Church*, 136 So. 238, 242 (Fla. 1931); *see also* Restatement (Second) of Agency § 41 (1958).

Resorting to policy, Appellee argues that the Attorney General's

approach would cause "gridlock and confusion" by requiring trial courts to referee disputes between the Attorney General and State Attorney. Ans. Br. 48–49. But disagreements between those officials are rare and are typically resolved internally. R. 495. And even in the unusual event that the State Attorney and the Attorney General disagree—and are unable to resolve the conflict among themselves—the court should simply apply the rules of procedure as written. R. 496–98.

Common sense supports all of this. When the Legislature made the Attorney General "co-counsel of record in capital collateral proceedings," § 16.01(6), Fla. Stat., it is most unlikely that it anticipated that State Attorneys could bind the State over the objection of the "chief state legal officer," Art. IV, § 4(b), Fla. Const., especially in a matter as significant as whether to reopen a capital case involving a 45-year-old homicide.

b. Appellee next asserts that Section 16.01(6) is inapplicable because "a request that a court enter an agreed order for DNA testing is not a 'capital collateral proceeding.'" Ans. Br. 43. Appellee argues that a request for postconviction DNA testing does not seek a

"postconviction" remedy; and he further says that a joint request does not involve a "proceeding."

The first argument overlooks that Florida rules expressly assume that granting postconviction DNA testing is a form of postconviction relief: Rule 3.853 appears in a part of the criminal rules devoted to "Postconviction Relief." *See* Part XVII, Fla. R. Crim. P. And courts have understood the relief afforded by the rule to constitute a "kind of postconviction remedy." *Crow v. State*, 866 So. 2d 1257, 1261 (Fla. 1st DCA 2004) (Padovano, J.).

In his second argument, Appellee characterizes the circuit court's order for testing as "ministerial" and thus not involving a "proceeding." *E.g.*, Ans. Br. 25, 27. But even ministerial actions are conducted through judicial proceedings. And ordering DNA postconviction testing is hardly "ministerial": this order was necessary to permit testing because, by statute, the clerk of court "shall maintain" all evidence introduced in a criminal trial that might later be tested for DNA. § 925.11(4)(a), Fla. Stat. So at least for those items Appellee sought to test that are in the possession of the clerk, *see* R. 104 (noting that the evidence sought to be tested is held either

by the Orange County Clerk of Court or the Orange County Sheriff's Department), a court order was needed for their release. And the trial court almost certainly would have had the discretion to reject the proposed agreement and apply Rule 3.853's criteria.

In sum, the Attorney General's express objection vitiated any purported "joint stipulation" for postconviction DNA testing.

2. The Attorney General has not "waived" her appellate arguments or denied that agreements for DNA testing are possible.

Appellee contends that the Attorney General "waived" her arguments on appeal by "conceding" below that Rule 3.853 "is not the exclusive vehicle through which a convicted defendant may obtain DNA testing." Ans. Br. 22. Relatedly, Appellee contends that the Attorney General's arguments are somehow inconsistent with the idea that the State may in some circumstances waive the requirements of Rule 3.853 by agreeing to perform DNA testing. Ans. Br. 37–39.

Appellee misunderstands the Attorney General's position. The Attorney General agrees—and agreed below—that a court can order DNA testing if the State and the defendant validly waive the requirements of Rule 3.853, such as by entering into a consent

agreement so providing. *See* Init. Br. 20–21.[1]

The "concessions" Appellee cites (Ans. Br. 22–25) are therefore perfectly consonant with the Attorney General's position on appeal. The Attorney General's counsel was merely asserting below that the requirements of Rule 3.853 can—like most legal requirements—be validly waived by the State. Thus, in responding to the court's question about whether "3.853 is the only method by which a defendant could have evidence retested," counsel responded that "I'm not claiming that—that under no circumstances could a consent agreement be entered." Ans. Br. 23 (quoting R. 490–91). That is the same position the Attorney General takes on appeal.

Appellee also highlights what he calls the "standard practice" of State Attorneys entering uncontested joint stipulations for postconviction DNA testing. Ans. Br. 34 (citing R. 383–88, 421–24). But most of the examples he cites involve non-capital cases, in which

[1] Appellee, without record citation, contends that the 2010 agreement "did not include *any* notice to the Attorney General." Ans. Br. 38. It is the Attorney General's understanding that notice of the agreement was given to the Attorney General's Office by the State Attorney after that agreement was signed and the circuit court had ordered testing, and that the Attorney General did not object to the agreement after receiving notice.

Section 16.01(6) is inapplicable. As for the handful of capital cases, those prove little. Appellee does not contend that the Attorney General objected to the agreements in any of those cases. In some of those instances, the Attorney General may never have learned of an agreement and thus not had the opportunity to object. Other times, the Attorney General may have first been consulted by the State Attorney and authorized the State Attorney to speak for both offices. In still other scenarios, the Attorney General may ratify a stipulation having learned of it afterwards. It is unclear which categories Appellee's examples fall into. But they do not show that State Attorneys have unilateral authority to enter into capital post-conviction consent agreements over the express objection of the Attorney General.

B. Appellee has not even attempted to claim that he satisfied Rule 3.853.

Because the State has not validly waived the requirements of Rule 3.853, Appellee could obtain postconviction DNA testing only if he established, among other things, a "reasonable probability that [he] would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." Fla. R.

Crim. P. 3.853(c)(5)(C). But Appellee even now does not challenge the Attorney General's showing that he has not done so. *See* Init. Br. 26–32.

The Attorney General has not "withdr[awn]" this argument, as Appellee urges. Ans. Br. 53–55. At the hearing below, the Attorney General asked the circuit court to vacate its order enforcing the "joint stipulation" and to allow the parties the chance to litigate the issues under the framework in Rule 3.853. It was "premature," in the Attorney General's view, to discuss that framework at the hearing because Appellee had not filed a sworn motion purporting to satisfy the rule's requirements. R. 497–98, 500. In explaining to the circuit court the correct sequence of events for analyzing the testing issue, the Attorney General did not suggest that the court could grant DNA testing without following Rule 3.853 or securing a valid waiver of its requirements.

C. Appellee's remaining arguments lack merit.

Appellee also attempts to skirt the merits by arguing that the Court lacks jurisdiction, Ans. Br. 52–53, and that Attorney General's arguments on appeal are barred by contract or estoppel principles. *Id.* at 55–63. Those claims are wrong.

1. The Court has jurisdiction.

Appellee does not dispute that the Court may review orders granting or denying relief "under" Rule 3.853. *See* Fla. R. App. P. 9.140(c)(1)(J). Instead, Appellee claims that the Court lacks jurisdiction because the circuit court "did not grant relief 'under' Rule 3.853." Ans. Br. 52.

But in assessing whether an appellate court has jurisdiction, the court must look to the "legal effect" of the order on appeal, not to the order's "denominat[ion]." *State ex rel. Sebers v. McNulty*, 326 So. 2d 17, 18 (Fla. 1975). "Characterization when made," this Court has said, "is not as important as the legal effect at the time of ruling." *Id.* at 18 n.1; *see also Ramos v. State*, 505 So. 2d 418, 420–21 (Fla. 1987).

And even where the State waives some or all of the requirements of Rule 3.853, the circuit court is still ordering testing "under" that rule because that rule remains the source of the court's authority to do so. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 630 (2018) (explaining that a statute authorizing judicial review of the requirements "under" a provision usually means that the order in question is "pursuant to" or "by reason of the authority of" the

provision in question). After all, Rule 3.853 and the statute that it implements, Section 925.11, represent a comprehensive framework regulating postconviction DNA testing. *See* § 925.11(2), Fla. Stat. (setting out the "*[m]ethod* for seeking postentencing DNA testing") (emphasis added).[2] And the Legislature has dictated that "[a] person who is convicted and sentenced to death must pursue all possible collateral remedies in state court in accordance with the Florida Rules of Criminal Procedure." § 922.095, Fla. Stat. Appellee's request for DNA testing—a "possible collateral remed[y]"—necessarily traveled through Rule 3.853, or else not at all.

Moreover, Appellee's contrary interpretation would lead to the absurd result that the Court would lack jurisdiction over orders ordering postconviction DNA testing—even contested ones—simply because the circuit court flagrantly failed to satisfy the requirements

[2] Along those lines, courts in West Virginia and Nebraska have referred to their states' materially identical DNA-testing regimes as "comprehensive statutory framework[s]." *Nelson v. Sparks*, No. 2:09-cv-01316, 2010 WL 519826, at *3 (S.D. W. Va. Feb. 12, 2010) (citing W. Va. Code § 15-2B-14); *Clason v. McKenzie*, No. 8:02-cv-206, 2002 WL 1558268, at *3 (D. Neb. July 12, 2002) (citing Neb. Rev. Stat. § 29–4116 *et seq.*); *see also Whitfield v. State*, 430 S.W.3d 405, 423 (Tex. Ct. Crim. App. 2014) (Alcala, J., concurring).

of the rule or labeled its order something order than a grant of relief under Rule 3.853. Thus, the Court has jurisdiction under Rule 9.140(c)(1)(j). *See* St.'s Resp. to Mot. to Dismiss 10–18.

Even short of that, this Court has jurisdiction. As the State has explained, *see id.* at 19–23, this Court may issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(b)(7), Fla. Const. Interpreting that authority, the Court has taken "an expansive view of [its] supervisory jurisdiction over all proceedings in cases where a death sentence has been imposed." *State v. Okafor*, 306 So. 3d 930, 933 (Fla. 2020). The key question is whether the order being reviewed was entered in a case where the Court had "previously exercised jurisdiction over the appeal of [the defendant's] murder conviction and death sentence" and arose from a "type[] of collateral proceeding[.]" *Id.* That is true here. *See* St.'s Resp. to Mot. to Dismiss 19–20.

Alternatively, this Court may review by petition "nonfinal orders issued in postconviction proceedings following the imposition of the death penalty." Fla. R. App. P. 9.142(c)(1). This form of review mirrors common-law certiorari in that relief is available where "the order

departs from the essential requirements of law" and "cause[s] material injury for which there is no adequate remedy on appeal." Fla. R. App. P. 9.142(c)(4)(F); *see also Justice Admin. Comm'n v. Rudenstine*, Nos. SC15–842, SC15–1250, 2016 WL 2908408, at *1 (Fla. May 19, 2016). That type of jurisdiction likewise applies here. *See* St.'s Resp. to Mot. to Dismiss 20–23.

2. Contract law does not entitle Appellee to "specific performance" of the 2010 agreement.

Appellee also seeks to sidestep the merits by arguing that contract law "entitle[s] [him] to specific performance" of the 2010 agreement. Ans. Br. 55–56, 61–63. That theory turns on two assumptions about the nature of the 2010 agreement: (1) that the agreement guaranteed him a right to additional postconviction DNA testing (2) so long as the "*State Attorney*" later agreed. Ans. Br. 55 (emphasis added). Both are false.

First, the 2010 agreement does not purport to bestow any future contractual rights on Appellee. In exchange for Appellee's agreement not to pursue additional requests for postconviction DNA testing, the State—through the State Attorney—agreed to test various items for DNA. R. 277 ("In exchange for the State's agreement to allow the

above listed items to be tested, Mr. Sireci hereby waives his right to seek a court order for DNA testing in state or federal court of any items of biological evidence collected in connection with the investigation into Mr. Poteet's homicide."). In contract-law parlance, Appellee pledged as his consideration that he would forego future testing, while the State's consideration was its pledge to permit one round of postconviction DNA testing. *See Mangus v. Present*, 135 So. 2d 417, 419 (Fla. 1961) ("[T]o constitute a valid consideration [supporting a contract] there must be a benefit to the promisor or a detriment to the promisee.").

No other promises were made, and the language Appellee invokes (Ans. Br. 12–13) does not say otherwise. That language, which immediately follows the clause waiving Appellee's right to seek future testing, states: "However, nothing in this agreement shall preclude the parties from conducting DNA testing on additional items of evidence (whether by consent or court order) should the State agree at a future date that such testing would be appropriate." R. 277. That merely restates a truism: In securing Appellee's waiver of the right to seek future testing, the State was not forfeiting its ability to entertain

future negotiations.

Nowhere in that language did the State *guarantee* that it would do anything in the future.

This case is therefore nothing like *Santobello v. New York*, 404 U.S. 257 (1971), on which Appellee relies. Ans. Br. 61–62. There, prosecutors made the defendant a promise: if he pleaded guilty, they would refrain from making a sentencing recommendation. *Santobello*, 404 U.S. at 262. So it was error for prosecutors to later make an adverse sentencing recommendation. *Id.* at 262–63. Here, by contrast, the State made Appellee no promise other than to test the enumerated items in 2010. R. 276–77. It satisfied that obligation when the testing occurred.

Second, nothing in the agreement granted "the State Attorney for the Ninth Judicial Circuit" the power to unilaterally bind the State to future agreements. Ans. Br. 63; *see also id.* at 55. The only thing in the agreement speaking to the question allows "the *State*"—not the *State Attorney*—to negotiate future testing. R. 277 (emphasis added). And given Section 16.01(6), that must mean not just the State Attorney but also the Attorney General, acting in concert.

Even if the phrase "the State" in the 2010 agreement could be construed to refer exclusively to "the State Attorney," the provision would be unlawful, violating Section 16.01(6)'s legislative command that the Attorney General be "co-counsel" in capital collateral matters. The State Attorney could not aggrandize its power in contravention of that statute, and the Court should not lightly assume that the parties included an unlawful provision in their agreement. *See Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 25 (Fla. 1908).

3. Judicial estoppel is inapplicable.

Finally, Appellee claims that the State is "judicially estopped" from arguing that the 2010 agreement does not grant the State Attorney the unilateral authority to agree to testing. Ans. Br. 17; *see also id.* at 56–61. In support, he says that the Attorney General has "repeatedly invoked the 2010 agreement to [Appellee's] detriment." *Id.* at 56.

"Judicial estoppel," however, "is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial . . . proceedings," *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001), and the Attorney General has not

advanced "totally inconsistent positions." As noted, the State fulfilled its contractual obligations in 2010 when it followed through on its promise to allow testing of specified items. In opposing Appellee's subsequent postconviction motions, it would have been fair for the Attorney General to point out that Appellee had received the benefit of his earlier bargain and should be held to it.

At any rate, Appellee grossly overstates things in claiming that the Attorney General has employed the 2010 agreement to "defeat" his subsequent claims. Ans. Br. 60. At the case management conference Appellee discusses—which was unrelated to DNA testing and involved a newly discovered evidence challenge predicated on allegedly novel science about forensic hair testing, *see* R. 302–03—it was the *State Attorney* who discussed the 2010 agreement. *See* R. 299–302. DNA testing was similarly not at issue in the 2018 certiorari petition in the U.S. Supreme Court where the Attorney General simply noted the 2010 agreement when describing the procedural history of the case. *See* R. 360–61.

In the end, Appellee's sundry requests for relief failed throughout the years not because of the 2010 agreement, but

because those claims had no merit.

* * *

At bottom, Appellee's case illustrates the balance the Court and Legislature struck in adopting Florida's postconviction DNA testing regime. Appellee likens his case to that of Robert DuBoise, an apparent DNA success story in which agreed-upon testing revealed that semen found in the rape/murder victim belonged to the true perpetrator of the crimes, not DuBoise. Ans. Br. 35–36. Where DNA evidence has the potential to exonerate the innocent, the State may rightly conclude that reopening the case to permit testing outweighs finality interests.

But that is not this case. Given the mountain of evidence inculpating Appellee—including his seven, "consistent, detailed [confessions to] the murder"—this Court itself has twice observed that DNA testing stands no possibility of proving his innocence. *Sireci v. State*, 773 So. 2d 34, 42–43 (Fla. 2000); *see also Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005). Even in Appellee's best-case scenario where testing revealed the presence of another person's DNA on victim Howard Poteet's body, that would in no way cast doubt on the

veracity of his own conviction and sentence.[3]

All that additional testing would accomplish is further delay. And it would signal to the victim's survivors that somehow, some way, Appellee still manages to litigate the question of his guilt, depriving them of the finality so critical to any functioning justice system. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

[3] Appellee's attempt at a sympathetic self-portrayal leaves out numerous pertinent details. For example, while Appellee has had decades of representation by postconviction counsel, evidence of his innocence is so lacking that he resorts to citing a pro se letter to the judge after his trial. Ans. Br. 8–9. Elsewhere, Appellee mentions that he sought fingerprint analysis of another murder "scene with what appeared to be a similar modus operandi, but at which time, no fingerprints from Mr. Sireci had been found." Ans. Br. 11–12 n.5. Yet he fails to acknowledge that he *pled guilty to*, and received a life sentence for, that remarkably similar murder, in which the victim was stabbed "multiple times" and had his throat slit three days before Poteet was stabbed dozens of times and had his throat slit. *See* Resentencing Order, *State v. Sireci*, No. CR76-532, at 5 (May 4, 1990).

CONCLUSION

This Court should reverse the circuit court's order.

Dated: May 4, 2022

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Scott Browne
HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
jenna.hodges@myfloridalegal.com

SCOTT BROWNE (FBN802743)
Chief Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
(813) 287-7900
scott.browne@myfloridalegal.com

Counsel for State of Florida

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to the following on this **fourth** day of March 2022:

Julissa R. Fontán
Capital Collateral Regional
Counsel—Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600
fontan@ccmr.state.fl.us
support@ccmr.state.fl.us

Nina Morrison
Innocence Project
40 Worth St., Suite 701
New York, NY 10013
212-364-5340
nmorrison@innocenceproject.org

Counsel for Appellee

/s/ Scott Browne
Chief Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 3,873 words.

/s/ Scott Browne
Chief Assistant Attorney General