IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, *Appellant*, v. HENRY P. SIRECI, *Appellee*.	No. SC21-1467 L.T. No. 1976-CF-532 Death Penalty Case

STATE'S RESPONSE TO APPELLEE'S
MOTION TO DISMISS

After robbing and murdering Howard Poteet in 1976, Appellee Henry Sireci confessed to no fewer than seven people, including his girlfriend, brother, and brother-in-law. At his ensuing trial for capital first-degree murder, Appellee's attorney acknowledged that he killed Mr. Poteet but implored the jury to find him guilty of a lesser degree of murder. The jury convicted as charged, and Appellee was sentenced to death. He later pleaded guilty to the robbery and murder of another victim in a separate case.

Appellee has since repeatedly sought postconviction DNA testing. In 2005, for example, this Court affirmed an order denying relief under Florida Rule of Criminal Procedure 3.853, the rule governing postconviction DNA testing, because DNA testing would not cast doubt on Appellee's conviction "in light of the other evidence

of guilt." *Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005). And even after the State agreed in 2010 to waive the requirements of Rule 3.853, DNA testing revealed nothing that might exonerate Appellee.

The State now appeals an order dated October 15, 2021, authorizing the release of evidence from the clerk's office and the Orange County Sheriff's Office for additional DNA testing. The circuit court ordered the material released under a purported "Joint Stipulation" between the State Attorney's Office for the Ninth Judicial Circuit and attorneys representing Appellee. Its order did not claim to find that the requirements and safeguards of Rule 3.853 were met. And neither that order nor the "Joint Stipulation" was served on the Attorney General, who is by statute co-counsel for the State in this capital case. Upon learning from a newspaper article about these developments, the Attorney General immediately moved to stay the release of evidence and unsuccessfully asked the circuit court to reconsider its order and compel compliance with the statutory and rule-based framework for DNA testing.

Appellee has moved to dismiss this appeal on the ground that the circuit court's order is not appealable. He is incorrect. As explained below, Florida Rule of Appellate Procedure 9.140 expressly

authorizes the State to appeal from orders granting relief under Rule 3.853. Fla. R. App. P. 9.140(c)(1)(J). And though the circuit court claimed to grant relief pursuant to the "Joint Stipulation"—not Rule 3.853—any order permitting postconviction DNA testing by nature grants relief under Rule 3.853. It could hardly be otherwise, as no other procedural vehicle affords that type of relief.

This Court should therefore deny the motion to dismiss.

BACKGROUND

In 1976, Henry Perry Sireci was convicted of, and sentenced to death for, the first-degree murder of Howard Poteet. The evidence at trial reflected that Appellee went to a used-car lot and discussed buying a car with Mr. Poteet. *Sireci v. State*, 399 So. 2d 964, 966 (Fla. 1981). At some point a struggle broke out and Appellee stabbed Mr. Poteet 55 times and slit his throat. *Id.* at 967. Mr. Poteet's wounds caused massive external and internal hemorrhages which led to his death. *Id.*

After the incident, Appellee told his girlfriend, Barbara Perkins, that he was talking to Mr. Poteet about a car when he hit Mr. Poteet in the head with a wrench. *Id.* When Mr. Poteet refused to tell Appellee where he kept the money, Appellee began stabbing him. *Id.*

Appellee admitted to Ms. Perkins that he killed Mr. Poteet and stole his wallet. *Id*.

Ms. Perkins was not the only person to whom Appellee confessed: In all, he separately confessed to seven people. For example, Harvey Woodall, Appellee's cellmate when he was arrested in Illinois, testified that Appellee had described killing Mr. Poteet. *Id*. According to Woodall, Appellee hit Mr. Poteet with a wrench and stabbed the man over 60 times. *Id*. Appellee told Woodall that he was not going to leave any witnesses and that he knew Mr. Poteet was dead when he left. *Id*. Appellee told Woodall that he got around $150, plus credit cards. *Id*.

Appellee confessed in similarly graphic fashion to Bonnie Arnold, who relayed to jurors that Appellee admitted to striking Mr. Poteet with a tire tool, then stabbing him. *Id*. Appellee went to the dealership intending to steal some car keys and come back later to steal a car. *Id*.

Other witnesses to Appellee's confessions included his brother, Peter Sireci; his brother-in-law, David Wilson; another cellmate[1];and

[1] Donald Holtzinger was in jail serving a brief sentence for a probation violation when he shared a cell with Appellee. Appellee not

Detective Gary Arbisi. *Sireci v. State*, 773 So. 2d 34, 43 n.16 (Fla. 2000). This Court would later describe those confessions as "consistent, detailed accounts of the murder." *Id.* at 43.[2]

Partly on the strength of those many confessions, this Court in 2000 rejected Appellee's postconviction claim that DNA testing of hairs found in a motel room linked to the murder would provide newly discovered evidence. *Id.* at 43–44. Even assuming Appellee's claim could surpass several procedural hurdles, this Court found that it could not "determine that this evidence would 'probably produce an acquittal on retrial,'" the standard for a claim of newly discovered evidence. *Id.* at 44. Appellee's theory was that the hairs

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only admitted murdering a business owner in Orlando, he also solicited Holtzinger to murder his brother-in-law, David Wilson, who Appellee explained was one of the primary witnesses against him. 10/21/76 Tr. 284. Appellee gave Holtzinger Appellee's wife's phone number and asked him to go to Rockford, Illinois, where he could get in touch with Appellee's brother and kill Wilson in exchange for fifteen hundred dollars. *Id.* at 304.

[2] Appellee now insists that "he has always maintained" his innocence, Mot. 1, and that each of the witnesses either fabricated the alleged confessions or found them incredible. Mot. 4 n.2. Yet he offers no plausible reason to think that *every* witness to his confessions had an independent, concurrent reason to frame him for murder. Nor has he explained why the likely murder weapon was found in his parent's home, other than to speculate that his own brother-in-law planted the weapon there as part of a land grab. R. 240–41.

might have shown that Ms. Perkins visited the motel room and therefore had some involvement in the murder—a reason to fabricate Appellee's confession. *Id*. But, this Court explained, "[a]t trial, Perkins admitted to having picked up Sireci at the abandoned motel; thus, it is not difficult to imagine that she might have actually gone inside the room." *Id*. And in rejecting another postconviction claim, the Court stressed that "[a]n independent review of the record indicates that, in total, seven different people testified that appellant confessed to them that he had murdered Howard Poteet."[3] *Id*. at 42–43.

This Court would again reject Appellee's requests for DNA testing in 2005. As with his earlier claim, Appellee asserted that he was entitled to DNA testing of various items that, he hypothesized, would absolve him of the death penalty "by showing that even if he was involved in the death of the victim, [he] was a minor participant." *Sireci v. State*, 908 So. 2d 321, 324 (Fla. 2005). With respect to a hair found on Mr. Poteet's sock, however, DNA testing would not

[3] To support his claim of innocence, Appellee contends that he was upset with his attorney at the time of trial for failing to investigate an alibi defense. Mot. 4 n.2. But after decades of counseled postconviction litigation, he has never offered alibi evidence.

exonerate Appellee because even if DNA results "had shown that the hair . . . was not Sireci's," prosecutors simply "would not have introduced that hair into evidence at his trial," with no resulting impact on the verdict. *Id.* at 325. And in any event, this Court reasoned that "in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock." *Id.* After all, "seven witnesses testified that Sireci admitted to them that he killed Poteet." *Id.*[4]

Despite having no legal entitlement to postconviction DNA analysis, Appellee obtained testing in 2010. Postconviction DNA testing is governed by statute and rule, *see* §§ 925.11, Fla. Stat. & 925.12, Fla. Stat.; Fla. R. Crim. P. 3.853, which set out various safeguards and requirements before testing will be authorized. But in 2010, the State Attorney for the Ninth Judicial Circuit waived those requirements—without objection from the Attorney General—and agreed to test various items. As Appellee acknowledges, the

[4] Appellee also unsuccessfully raised a DNA claim in his federal habeas petition. *See Sireci v. Sec'y, Fla. Dept. of Corr.*, No. 6:02–cv–1160, 2009 WL 651140, at *29–31 (M.D. Fla. Mar. 12, 2009).

results of that testing were inconclusive and did not exonerate him. R. 133, 168, 299–300.

More than a decade later, in May 2021, the newly elected State Attorney for the Ninth Circuit purported to enter a "Joint Stipulation" to release evidence for DNA testing in Appellee's case. R. 103–06. The Attorney General was never notified about the proposed stipulation or served with a copy. R. 113.

The circuit court authorized the release of evidence on May 10, 2021. R. 103–06. Upon learning of that order from a local newspaper, R. 113, 494, the Attorney General immediately moved for reconsideration and insisted on compliance with Section 925.11 and Rule 3.853. R. 111–18. Among other reasons, the Attorney General observed that, despite serving as statutory "co-counsel in all capital postconviction matters," she was not served with notice of the proceedings. R. 113. The Attorney General also moved to stay the release of evidence pending a ruling on the motion for reconsideration. R. 108–09. A stay was granted. R. 119–20.

Appellee responded that he was not seeking DNA testing under Rule 3.853—in fact, he said, the "Joint Stipulation" was "*wholly outside* the procedures of Rule 3.853." R. 154. Because the State

Attorney had agreed to testing, Appellee believed Rule 3.853's requirements did not apply. R. 149–55.

At a hearing in October 2021, the Attorney General agreed that the State could waive Rule 3.853's procedural requirements in appropriate circumstances. R. 491. There had been no valid waiver here, however, because the Legislature has designated the Attorney General "co-counsel" in capital postconviction cases, and the Attorney General had not consented to the waiver. R. 491–96. The circuit court therefore had to "follow . . . the comprehensive set of criminal rules that apply to DNA testing." R. 496. And Appellee had made no effort to show that he could satisfy those requirements, including showing "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." Fla. R. Crim. P. 3.853(c)(5)(C).

The circuit court denied reconsideration but left its stay in place pending any appeal. R. 463–65. The State appealed.

ANALYSIS

I. Under Rule 9.140(c)(1)(J), the Court has mandatory appellate jurisdiction over this appeal of an order granting relief under Rule 3.853.

A. Appellee asks this Court to dismiss the State's notice of appeal as "clearly defective" because, in his view, this Court "does not have mandatory jurisdiction" to review the circuit court's order by appeal. Mot. 17. Rather, Appellee says, the State can pursue only discretionary review under the Court's all-writs jurisdiction. Mot. 19. But Appellee ignores that the order on appeal is expressly enumerated as appealable in Rule 9.140(c)(1)(J), and that this Court has exercised appellate jurisdiction over Rule 3.853 orders.

First, this order is appealable. Rule 9.140 authorizes the State to appeal orders "granting relief under Florida Rule[] of Criminal Procedure . . . 3.853." Fla. R. App. P. 9.140(c)(1)(J). Rule 3.853 "provides procedures for obtaining DNA . . . testing under sections 925.11 and 925.12." Fla. R. Crim. P. 3.853(a). Indeed, it is the *only* rule of criminal procedure that authorizes that type of relief. And, by the rule's own terms, an order granting or denying postconviction DNA testing is appealable. Fla. R. Crim. P. 3.853(f) ("An appeal may be taken by any adversely affected party within 30 days from the date

the order on the motion is rendered."); *see also* § 925.11(3)(a), Fla. Stat.

It is immaterial that the circuit court did not purport to grant relief under Rule 3.853. *See* R. 103–06, 463–65. As this Court held in *State ex rel. Sebers v. McNulty*, an appellate court assessing its jurisdiction to review an order must look to the "legal effect" of the order, not to its "denominat[ion]." 326 So. 2d 17, 18 (Fla. 1975). "Characterization when made," the Court wrote, "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) (holding that an order was cross-appealable, "regardless" what it was "called," because "although styled as a judgment of acquittal" the order on appeal was "better understood as a judgment of conviction of a lesser included offense pursuant to rule 3.620").[5]

Second, this Court is the proper venue for this appeal. The

[5] District court decisions provide additional support for that proposition. *See, e.g.*, *State v. Hankerson*, 482 So. 2d 1386, 1387 (Fla. 3d DCA 1986) ("[A]s is well established, the label a party gives to a motion does not control its legal effect or the appealability of an order disposing of the motion."); *State v. K.L.*, 626 So. 2d 1027, 1027 (Fla. 3d DCA 1993) (permitting appeal because "[t]he trial court's order, despite its label, was an order dismissing the charge in the petition for delinquency").

Court has appellate jurisdiction over "final judgments of trial courts imposing the death penalty," Art. V, § 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(i), and it has consistently understood that grant of jurisdiction to encompass orders entered during capital collateral challenges. *See, e.g., State v. Fourth Dist. Ct. of Appeal*, 697 So. 2d 70, 70 (Fla. 1997) ("[W]e have rejected challenges to our jurisdiction over collateral proceedings in death penalty cases.").

The "collateral" nature of Rule 3.853 proceedings follows from several considerations: (1) Rule 3.853 is housed in Part XVII of the Florida Rules of Criminal Procedure, a section of the rules devoted to "*Postconviction* Relief" (emphasis added); (2) Rule 3.853 authorizes a "[m]otion for [*p*]*ostconviction* DNA [t]esting," Fla. R. Crim. P. 3.853 (emphasis added); and (3) DNA testing in this circumstance is sought *after* the defendant has been convicted and sentenced, and thus arises in the postconviction posture.

Appellee nevertheless contends that the circuit court's order does not "constitute a collateral challenge to Mr. Sireci's conviction or death sentence[.]" Mot. 17. As he sees it, an order granting capital collateral relief is limited to one that "sets aside or challenges" a capital conviction or death sentence. Mot. 18. This Court's precedent

holds otherwise. Despite not directly attacking a conviction or sentence, Rule 3.853 orders are appealable to this Court "[b]ecause [they] *concern*[] *postconviction relief* from a capital conviction for which a sentence of death was imposed." *Gosciminski v. State*, 262 So. 3d 47, 49 (Fla. 2018) (emphasis added).

Appellee knows that well enough. In 2005, he appealed to this Court an order denying his motion for DNA testing. *Sireci v. State*, 908 So. 2d 321, 322 (Fla. 2005). Were Appellee now correct that Rule 3.853 orders are not appealable to this Court, his appeal should have been transferred to the Second District. Yet this Court held that it *did* have jurisdiction. *Id*. ("Henry P. Sireci seeks review of a circuit court order denying his motion requesting DNA testing of certain evidence under Florida Rule of Criminal Procedure 3.853. We have jurisdiction. *See* Art. V, § 3(b)(1), Fla. Const.").

B. In the circuit court, Appellee contended that the "Joint Stipulation" was a basis for authorizing DNA testing "*wholly outside*" of Rule 3.853, and that Rule 3.853 was not the basis for his testing request. R. 154. By that logic, Appellee might have argued here, though he has not, that the circuit court's order is unappealable

because so-called joint stipulations for DNA testing are not enumerated in Rule 9.140(c)(1)(J).

That would be incorrect. When Section 925.11 was first enacted, it was understood to "provide[] a method by which a person who has been tried and found guilty of a criminal offense may petition the court to order DNA (deoxyribonucleic acid) testing of physical evidence." Fla. Sen. Staff Analysis, S.B. 366 (Apr. 11, 2001); *see also id*. (observing that the bill "provides that a person who has been found guilty at trial of committing a criminal offense has the right to seek testing of physical evidence collected at the time of the crime which may contain DNA evidence that would exonerate him or her"). By enacting Section 925.11, the Legislature "*ma*[*d*]*e the test available* to inmates who meet the following criteria." *Id*. (emphasis added). That is, the Legislature authorized a procedure that had recently been adopted in other states, *id*., but was then unavailable in Florida.[6]

[6] Appellee's characterization of the circuit court's action as "ministerial" notwithstanding, Mot. 1; R. 509, 512, the order was necessary to permit the 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. That duty to preserve

To the extent DNA testing has since occasionally been done, both here and in other cases, through agreements between the State and defense, *see* R. 383–404, that does not mean that those courts ordered testing "wholly outside" the confines of Rule 3.853. It is hardly unusual for the parties to waive the requirements of a rule of procedure without altering the fundamental character of the action they ask the trial court to take. *See, e.g.*, *Reeves v. State*, 23 So. 3d 1263, 1264 (Fla. 4th DCA 2009) ("Since the State, the defendant and the court agreed at the time of the Change of Plea, Judgment and Sentence, that the defendant would be entitled to a mitigation of sentence hearing sixty-three days after the date sentence was imposed, we treat that as a stipulated motion and order, pursuant to Rule 3.050, Fla. R. Crim. P., to enlarge the sixty day time limit to file and hear a Rule 3.800(c) motion to mitigate sentence."); *D'Angelo v. D'Angelo*, 903 So. 2d 378, 378 (Fla. 2d DCA 2005) (holding that trial court could consider motion for attorneys' fees under Rule 1.525 because the motion was not untimely, as parties waived the rule's 30-day deadline for filing the motion and "rule 1.525 procedures can

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evidence suggests the clerk cannot release DNA materials without a court order.

be overridden by a stipulation between the parties"); *In re: Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1249 (11th Cir. 2020) ("The plain text of the rule suggests that a district court must find good cause to issue a protective order. But as we've recognized, district courts often issue stipulated protective orders without finding good cause.") (internal citation omitted); *Soliman v. State*, 241 So. 3d 908, 910–11 (Fla. 2d DCA 2018) (parties' stipulation to modify conditions of sex-offender probation would be "construed as a motion under rule 3.800(c)," which was jurisdictionally barred as untimely).

That the parties can waive various requirements of Rule 3.853—and thus allow the court to order testing without making the findings required by rule—must be true. Were the Joint Stipulation not "truly [a motion for DNA testing under Rule 3.853]," "there would be neither authority for its filing nor its granting." *See State v. Hankerson*, 482 So. 2d 1386, 1387 (Fla. 3d DCA 1986). "Florida Rule of Criminal Procedure 3.[853]," after all, "provides the sole authority for this [postconviction DNA testing] procedure." *See id.* In other words, Appellee and the State Attorney either sought and were granted relief under Rule 3.853 or otherwise sought relief through some non-

existent procedural mechanism and, for that reason, were not entitled to DNA testing.[7]

Indeed, Rule 3.853 and Section 925.11 represent a comprehensive framework for DNA testing.[8] The statute authorizes a convicted defendant to "petition th[e] court to order the examination of physical evidence," § 925.11(1)(a)1., Fla. Stat., and by its terms purports to set out *the* "[*m*]*ethod* for seeking postsentencing DNA testing." *Id*. § 925.11(2) (emphasis added). The statute spans 984

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[7] Below, Appellee labeled as a "concession" counsel for the Attorney General's recognition that "there are circumstances under which the State could simply agree to testing." R. 501 (referring to counsel's statements at R. 491). But counsel never conceded that a stipulation allowed the circuit court to grant relief "wholly outside" of Rule 3.853; he opined that there might be "circumstances" in which "a consent agreement [could] be entered," but that because the Attorney General had not consented here the court could not "just arbitrarily decide on your own that we're not going to apply the statute and the rule." R. 491. Counsel's comments are consistent with the unexceptional proposition that the rule might be waived by agreement of all appropriate counsel, as argued in this response.

[8] Courts in West Virginia, Nebraska, and Ohio have referred to those 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); *Hayden v. Kiddone*, No. 3:05cv348, 2008 WL 471689, at *1 (S.D. Ohio Feb. 15, 2008) (citing Ohio Rev. Code §§ 2953.71–81).

words and 32 sections and subsections, including various prerequisites and safeguards attendant to DNA testing. Rule 3.853 implements the right to DNA testing in similar fashion, with no indication that some other avenue for DNA testing exists.

Where the Legislature "has provided a comprehensive statutory scheme," this Court will "attempt to follow the requirements that it has set forth." *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009); *see also Hill v. Davis*, 70 So. 3d 572, 577 (Fla. 2011); *Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1232–33 (Fla. 2009). Thus, while statutory and rule-based requirements may be subject to waiver, that does not take a stipulated request "wholly outside" (R. 154) the confines of the statute or rule.

Even assuming, however, that stipulated agreements for DNA testing operate outside of Rule 3.853, that would only be true where the parties in fact consent to the testing. As the State will explain in the merits briefing, that was not true here: By statute, the Attorney General is "co-counsel of record in capital collateral proceedings," § 16.01(6), Fla. Stat., and did not agree to testing. Any order granting testing, then, was necessarily one entered under Rule 3.853. *See McNulty*, 326 So. 2d at 18.

II. Alternatively, the Court may treat the notice of appeal as a petition invoking this Court's all-writs or Rule 9.142(c) jurisdiction.

In any event, dismissal is inappropriate. Appellee asks this Court to dismiss the notice of appeal and allow the State to "file a petition for discretionary review" within seven days. Mot. 19, 21–22. But if this Court finds that the circuit court's order is not appealable under Rule 9.140(c)(1)(J), it need not dismiss the notice of appeal; the Court may simply treat the notice of appeal as seeking the correct form of relief. *See* Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; . . ."). Namely, the Court might deem the notice of appeal a petition for relief under either this Court's all-writs jurisdiction or Rule 9.142(c).

First, the Florida Constitution gives this Court the power to issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(b)(7), Fla. Const. Interpreting that provision, this Court "traditionally 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).

Thus, "[i]n addition" to the Court's "appellate jurisdiction over sentences of death," it has "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." *Id.* 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 test is met here. This Court has frequently exercised its appellate jurisdiction to review Appellee's many appeals, both via direct appeal and on appeal from various postconviction orders. And, as explained above, the process of seeking postconviction DNA testing in a capital case entails a "collateral proceeding[.]" *Supra* 12.

The Court may therefore review the DNA testing order under its all-writs jurisdiction.

Second, 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).

Should the case reach the merits, the State will explain in its initial brief why the circuit court's DNA testing order departs from the essential requirements of law. As for irreparable injury, the order harms the State in at least two ways. For one, the State, the public, and the victims of Appellee's crimes are entitled to finality, *cf. Sireci v. Florida*, No. 6:02–cv–1160, 2009 WL 651140, at *30–31 (M.D. Fla. Mar. 12, 2009) (contrasting the "minimal" "risk of an erroneous deprivation of [Appellee's] purported liberty interest," given the substantial evidence of guilt, with the State's need for "ensuring closure for victims and survivors"), and the circuit court's order frustrates that important principle. For another, by deviating from Rule 3.853's safeguards, the order below jeopardizes the integrity of forensic evidence in this case. Most notably, the order claims to authorize testing by forensics laboratories neither supervised nor approved by FDLE. That violates Rule 3.853's requirement that "DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee" unless the movant shows "good cause"

for why the testing should be done by another accredited laboratory. Fla. R. Crim. P. 3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat. (similar).

Critical policy concerns underly that requirement. When this Court was considering the implementation of Rule 3.853 in 2001, FDLE pointed out that its involvement in the testing process would prevent a defendant from engaging in "laboratory shopping" for a lab whose profit-motive may cloud its objectivity. *See* FDLE Resp., *In Re: Amended Emergency Petition to Create Rule 3.853*, No. SC01-363, at *8-9 (Aug. 14, 2001); *see also* R. 528–29 (acknowledging that requiring FDLE to conduct DNA testing ensures "that there will be confidence in the outcome"). And less capable and experienced lab technicians may mishandle DNA materials in any number of ways, corrupting the integrity of that evidence and impairing the State's ability to win a conviction on retrial or unnecessarily calling lawful convictions into doubt.

Finally, if Appellee is correct that the circuit court's order "merely permits discovery," that order fits squarely within the sorts of interlocutory rulings this Court typically reviews. *See, e.g.*, *Trepal v. State*, 754 So. 2d 702, 706–07 (Fla. 2000) ("[T]his Court in fact reviews interlocutory discovery orders in capital collateral

proceedings."); *State v. Kokal*, 562 So. 2d 324, 325 (Fla. 1990) (entertaining State's appeal from an order requiring disclosure of the prosecutor's file under the Public Records Act); *LeCroy v. State*, 641 So. 2d 853, 853 (Fla. 1994) ("We have before us an interlocutory appeal of a disclosure order in a post-conviction capital proceeding under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.").

* * *

Whether it views this case as an appeal or a request for an extraordinary writ, the Court has jurisdiction.

CONCLUSION

The circuit court's order is appealable under Rule 9.140(c)(1)(J), but in any event is reviewable under the Court's all-writs or Rule 9.142(c) jurisdiction. This Court should deny the motion to dismiss.

Dated: November 24, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the e-Filing Portal to the following on this **twenty-fourth** day of November 2021:

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