

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-2214**

ANTHONY WASHINGTON

Appellant,

v.

STATE OF FLORIDA

Appellee,

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

RICHARD E. KILEY

Fla. Bar No. 0558893

STAFF ATTORNEY

JAMES VIGGIANO, JR.

Fla. Bar No. 0715336

CAPITALCOLLATERAL

REGIONAL

COUNSEL

MIDDLE REGION

3801 Corporex Park Drive, Suite 210

Tampa, Florida 33619

Counsel for Appellant

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Preliminary Statement 1

Request for Oral Argument 1

Procedural History 1

Relevant Motion Facts 4

Summary of Argument 6

ARGUMENT I

**MR. WASHINGTON MADE A SUFFICIENT SHOWING FOR POST
CONVICTION DNA TESTING UNDER FLORIDA RULE OF
CRIMINAL PROCEDURE 3.853(b)(3) and (b)(4) AND SECTION 925.11,
FLORIDA STATUTES THEREFORE THE LOWER COURT ERRED IN
DENYING MR. WASHINGTON’S MOTION. 7**

The Lower Court’s Ruling 7

ARGUMENT II

**THE CIRCUIT COURT’S DENIAL OF MR. WASHINGTON’S MOTION
FOR POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO
HABEAS CORPUS RELIEF UNDER BOTH THE FLORIDA AND U.S.
CONSTITUTIONS 19**

The Standard of Review 7,19

Conclusion and Relief Sought 21

Certificate of Service 22

Certificate of Compliance 23

TABLE OF AUTHORITIES

Brim v. State,
695 So.2d 268 (Fla. 1997) 10

Council v. State,
515 S.E.2d 508 (S.C. 1999) 12

Huff v. State,
622 So.2d 982 (Fla. 1992) 5

Huffman v. State,
837 So.2d 1147 (Fla 2nd DCA 2003) 16

King v. State,
808 So.2d 1237 (Fla. 2002) 4

Knighten v. State,
829 So.2d 249 (Fla. 2nd DCA 2002) 17

Magaletti v. State,
847 So.2d 523 (Fla. 2nd DCA 2003) 13

Manual v. State,
855 So.2d 97 (Fla.2nd DCA 2003)..... 15

Ramirez v. State,
651 So.2d 1164 (Fla. 1995) 10

Sireci v. State,
908 So.2d 321 (Fla. 2005) 14

Stephens v. State,
748 So.2d 1028 (Fla. 1999) 6

Vargas v. State,
640 So.2d 1139 (Fla. 1st DCA 1994) 10

Washington v. Florida,
116 S.Ct. 387 (1995) 2

Washington v. State,
653 So.2d 362 (Fla. 1995) 2

Other cites:

Fla. R. Crim. Pro. 3.853 and Fla. Stat.§925.11 1

Florida Rule of Criminal Procedure 3.853 (b)(3) and (b)(4) 6

PRELIMINARY STATEMENT

This is an appeal from the Circuit Court of Pinellas County's denial of Anthony Washington's DEFENDANT'S MOTION TO RELEASE EVIDENCE FOR DNA TESTING (Pursuant to Fla. R. Crim. Pro. 3.853 and Fla. Stat. §925.11). The record on appeal is comprised of two volumes successively paginated beginning with page one. References to the record include a page number and are of the form, e.g. (M Vol. I p.1). References to the trial itself and record on appeal are of the form (FSC ROA Vol. I p.1)

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action may determine whether Mr. Washington lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Washington, through counsel, respectfully requests that this Court permit oral argument.

I. PROCEDURAL HISTORY

On April 12, 1990, a Pinellas County grand jury returned a three count indictment against Mr. Washington for first degree murder, burglary of a dwelling, and sexual battery.

After a jury trial on July 14-16 1992, before the Honorable Susan F. Schaeffer, Mr. Washington was found guilty, by a predominantly white jury, on all counts.

At Mr. Washington's penalty phase, July 17, 1992, the jury recommended that Mr. Washington be sentenced to life imprisonment.

On the burglary and sexual battery counts, the Court sentenced Mr. Washington as a habitual violent felony offender and sentenced him to consecutive life sentences, with a 15-year minimum. As to Mr. Washington's murder conviction, the Court overrode the jury's life recommendation and sentenced Mr. Washington to death.

On direct appeal, the Florida Supreme Court affirmed Mr. Washington's convictions and sentences. On April 25, 1995, the Florida Supreme Court revised its opinion and affirmed Mr. Washington's convictions and sentences. Washington v. State, 653 So.2d 362 (Fla. 1995). The United States Supreme Court denied certiorari on October 30, 1995. Washington v. Florida, 116 S.Ct. 387 (1995).

On March 1, 1999, pursuant to Fla. R. Cr. P. 3.850, Mr. Washington filed his amended Motion to Vacate Judgements of Conviction and Sentence. A hearing was held on August 12, 1999, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). On October 5, 1999, the circuit court issued an order granting an

evidentiary hearing on claims I(c), I(D), and I(g), as they pertained to the penalty phase of the trial. The remainder of the claims were summarily denied. An evidentiary hearing was held on November 18-19, 1999. The trial court entered an order on June 5, 2000, denying all claims of Appellant's 3.850 motion. Timely notice of appeal was filed on July 5, 2000. Mr. Washington was denied relief on November 14, 2002. A motion for rehearing was filed on December 2, 200, and was denied on January 10, 2003.

On February 19, 2003, Mr. Washington through his counsel, Capital Collateral Regional Counsel - Middle, filed an Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. The trial court denied said motion on November 18, 2003. Mr. Washington appealed to this Court, and was denied relief on May 12, 2005.

Mr. Washington's petition for a writ of certiorari was denied by the Supreme Court of the United States on December 5, 2005.

On September 26, 2003, pursuant to Fla. R. Crim. P. 3.853 Mr. Washington filed his "Motion to Release Evidence for DNA Testing". On August 18, 2005, the State was ordered to show cause why Defendant's motion should not be granted. The State responded on September 14, 2005. The Circuit Court denied relief on October 10, 2005. This appeal follows.

II. RELEVANT MOTION FACTS.

On August 18, 1989, one Sgt. Hempel and detective Mike Darroch attended the autopsy of Alice Berdat. Pubic hairs were found on and about the victim during crime scene processing. Also at the autopsy, more possible pubic hairs were found (one in particular was protruding from the victim's vagina) (M Vol I p.19). The hairs from the crime scene and from the autopsy were collected and pursuant to Pinellas Park Police Department procedure were stored at P.C.S.O. (Case Agent Sgt. Darroch). (M Vol. p.21-22).

Samples of hair from Mr. Washington were obtained and together with the unknown samples, were sent for examination by one Marianne Hildreth, an analyst with FDLE. Hildreth opined that a questioned hair sample collected from under the vaginal area of the victim was found to display the same microscopic exhibits as the known pubic hair sample of Anthony Washington. She found similarities and also some dissimilarities. Her conclusion was that Anthony Washington could not be eliminated as a possible suspect. She did not say that the sample conclusively matched Anthony Washington. She could not say that the hair originated from Mr. Washington and no other person. (M Vol. I p.24-59)

In King v. State, 808 So.2d 1237 (Fla. 2002), the Florida Supreme Court affirmed the very same trial court's denial of Mr. King's Amended Motion to

release Evidence for Additional DNA Testing. In *King*, defense counsel sought the testing of three hairs obtained from the pubic hair combings of the murder victim and a hair fragment found on the nightgown of the murder victim. The distinction between the two cases is that in *King*, microscopic analysis of the pubic combings appeared to be hairs of a Caucasian, probably the victim. This Court denied testing of the hair fragment found on Ms. Brady's nightgown based on the evidence introduced at trial that the body of the victim had been moved several times by different people. In Mr. Washington's case, the hair samples around the vaginal area were recovered by Dr. Joan Wood, medical examiner, at the scene of the crime before the body was moved by unauthorized personnel. The pubic hair combings were performed at the autopsy and it is highly unlikely that the pubic hair found to be protruding from the vaginal of Ms. Berdat was tampered with in any way.

Furthermore, the hair evidence in *King* was not used against him at trial, the testimony of Marianne Hildreth was used against Mr. Washington at his trial. CCRC-M counsel contends that it is necessary and proper to order DNA testing on the above mentioned evidence. Mr. Washington has always asserted his innocence of this crime. This test will establish his innocence or in the very least, will

establish the identity of an unindicted co-defendant and thus establish statutory mitigation.

SUMMARY OF ARGUMENT

Argument I

Mr. Washington, through his motion and exhibits attached, analyzed in conjunction with his 1992 trial transcripts, made a sufficient showing under Florida Rule of Criminal Procedure 3.853 (b)(3) and (b)(4) that he should be allowed to conduct DNA testing on the evidence available. Mr. Washington asserted that he is innocent of the murder of Alice Berdat. This is a jury override case where the trial court imposed a sentence of death. There exists a reasonable probability that DNA testing would exonerate Mr. Washington and that his identification as the murderer is in dispute. Every requirement of the rule has been met.

Argument II

Mr. Washington is entitled to DNA testing as part of his right to habeas Corpus which is specifically guaranteed by both the United States and Florida Constitution.

ARGUMENT I

MR. WASHINGTON MADE A SUFFICIENT SHOWING FOR POST CONVICTION DNA TESTING UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.853(b)(3) and (b)(4) AND SECTION 925.11, FLORIDA STATUTES THEREFORE THE LOWER COURT ERRED IN DENYING MR. WASHINGTON'S MOTION

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S RULING

The lower court in its order stated:

It is the law of this case that DNA testing was previously done, the results were admissible in court, and said testing proved that Defendant's semen was in the victim's vagina. It is also the law of this case that further testing of the semen is impossible, because the original testing consumed the entire sample tested. (*See Exhibit A, Order of April 23 2001*). Thus, Defendant's request for DNA testing of the semen is impossible.

This court is familiar with the facts of this case from both the trial and numerous postconviction proceedings. Having reviewed the motion, the response, and the law, and in light of the evidence and testimony given at trial, this court finds:

A. The only DNA evidence that exists that can be tested is that found in the Negroid hairs found in and on the victim.

B. It appears that DNA testing of these hairs would be admissible at trial, and there exists reliable proof to establish that the tested DNA would be authentic and admissible at a further hearing, including a trial.

C. There is no reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence if DNA evidence regarding the hairs had been admitted at trial, no matter what the outcome of new DNA testing might show. (M Vol. II p.250)

Subsection C is error. The consumed semen sample of DNA was unreliable, as it was improperly admitted into evidence at trial.

At trial, Dr. Joan Wood, a medical examiner, testified that she took vaginal swabs and anal swabs and found male sperm cells to be present.

At trial, one Dwight Adams, a special agent with the FBI testified as to the DNA analysis. (FSC ROA Vol. XIV- 2456-2523). Adams opined that using the three probe results that he was able to make an interpretation on and comparing that to the “black population database” which has since been modified, classified into sub populations and generally expanded to include people who are required to submit blood samples upon conviction for enumerated felonies, he determined that the likelihood of finding another unrelated individual chosen at random from that population would be approximately 1 in 195,000 individuals. (FSC ROA Vol. XIV-2509).

Adams did not actually remove the DNA from the samples provided to the FBI lab. Adams reviewed the notes of a technician assistant who did the actual work. The trial court and the guilt phase jury had no way of knowing if this technician was qualified to do the extraction procedure, if it was done correctly, if the samples were contaminated, if the technician had failed any previous proficiency tests, if the technician had been working on other cases, etc. The technician who did the DNA work for Mr. Washington's case was one Anne Baumstark. Ms. Baumstark did not testify at trial and was not subject to cross examination. On cross examination, defense counsel highlighted the defects in calling Adams to testify about the DNA tests in the following manner:

Q. You cannot tell this jury, can you, without doing all the –using enough probes to test all the potential different loci that exist, that if you had continued to test this that you would not have come up with a probe that didn't match Anthony Washington, correct?

A. I couldn't say anything about that unless I actually did the testing. (FSC ROA Vol.-2516).

During cross examination, defense counsel brought out the defects in the statistical probability work that is done by the FBI is the subject of some criticism by some others in the statistical probability field. Also subsequent to March 22nd 1990, when the report was done, changes and modifications to the database had been made. (FSC ROA Vol. XIV-2517-21).

The FBI database was never subjected to a *Frye* inquiry. Mr. Washington contends that this is in conflict with the holding in Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994), Brim v. State, 695 So.2d 268 (Fla. 1997) and Ramirez v. State, 651 So.2d 1164 (Fla. 1995).

The trial court was well aware of the importance of this FBI examination in the State's case when it advised the State during the trial:

THE COURT: Don't rush a case that depends on these conclusions. I would presume, because it's running late at night, we will go as long as it takes to complete this witness and as long as it takes for cross-examination. Just because it's five o'clock, don't assume that I will be rash with you if you don't finish up in five minutes. *This is your so called identification of Mr. Washington as the perpetrator of this offense. (Emphasis added)* (FSC ROA Vol. XIV-2497)

Candidly, counsel concedes that the issue of Adams' "hearsay testimony" regarding Baumstark's findings had been litigated on direct appeal and that the issue of the DNA testing and statistical evaluation done in Mr. Washington's case has been litigated in Defendant's petition for writ of Habeas Corpus by previous post conviction counsel.

On October 22, 1999, previous post conviction counsel filed a motion styled DEFENDANT'S MOTION DIRECTING THE STATE TO RELEASE CERTAIN PHYSICAL EVIDENCE. (M Vol. I91-93). The motion asked that

blood, vaginal swabs, semen stained items, be inspected by one Dr. Edward Blake, 3053 Research Drive, Richmond, California 94806. No mention was made of the Negroid hairs. The motion was heard on October 26, 1999, and the postconviction court granted the motion provided there was something left to test. (M Vol. I-95-97). See also (M Vol. I -99-103). On May 23, 2000 the State responded after diligent search, that the semen samples had been consumed in testing by the FBI lab. (M Vol. I-105-07).

The validity of DNA tests done at the FBI labs has been studied and the results were shocking. On November 25, 1997 the Department of Justice released the results of an investigation conducted by the Office of Inspector General which detailed numerous examples of questionable practices in the DNA unit. (M Vol. I-65-67). The testimony of Adams prevented the defense at trial from exploring the issues discovered in the study. It was impossible to determine Baumstark's qualifications and practices because she did not testify. The results of proficiency tests were destroyed. Had trial counsel been aware of the unprofessional practices of the FBI, the *only evidence identifying Mr. Washington as the perpetrator of this crime* would have been vitiated.

On May 26, 2003 further evidence of misconduct on behalf of the FBI labs regarding DNA testing came to light. (M Vol. I-69-75). Dwight Adams is

mentioned by name as the overall supervisor where samples were entirely consumed, preventing further review, exculpatory information being suppressed, and proficiency oversights were being neglected.

The postconviction court was prevented from having the semen sample tested by an impartial evaluator because of the FBI policy of total consumption of the sample. Had the abuses of the FBI lab been exposed prior to trial, this evidence could have been and probably would have been successfully rebutted.

Mitochondrial DNA

The postconviction court found in its order, that the only evidence that exists that can be tested is that found in the Negroid hairs found in and on the victim. Furthermore it appears that DNA testing of these hairs would be admissible at trial, and there exists reliable proof to establish that the tested DNA would be authentic and admissible at a further hearing, including a trial.

Mitochondrial DNA (mtDNA) is admissible. In Counsil v. State, 515 S.E.2d 508 (S.C. 1999) the court held:

This evidence assists the jury in determining whether appellant committed the crimes because it provides an objective confirmation of the subjective microscopical comparison performed on the hairs. Mitochondrial DNA analysis has been subjected to peer review and many articles have been published about this technology. The F.B.I. laboratory validated the process and determined its

rate of error. Its underlying science has been generally accepted in the scientific community. Further, while forensic application of mtDNA analysis is fairly new, the technology has been used in other contexts for several years. Id. At 518.

This case was decided in 1999, the same year previous postconviction counsel sought and was granted a retesting of the semen sample. However, *Frye* had not been applied in Florida.

In Magaletti v. State, 847 So.2d 523 (Fla. 2nd DCA 2003) the court held:

mtDNA analysis has two primary advantages over ucDNA: mtDNA requires smaller samples than are necessary for nucDNA analysis, and small amounts of mtDNA sufficient for analysis may be recovered from highly degraded samples which are old or have been exposed to extreme conditions, e.g. heat or cold. Because nucDNA is not present in the human hair shaft, only in the follicle, mtDNA analysis is the method used in cases such as this where there is no root or follicle tissue attached to the subject hair. *Id.* Ms. Clement testified that mtDNA analysis is widely used in forensics and has been accepted as reliable by the Federal Bureau of Investigation (FBI), the Armed Forces Institute of Pathology, and medical examiners' labs in New York and Illinois. Internationally, mtDNA analysis is being used in Sweden, Germany, and the United Kingdom. Ms Clement further testified that a uniform process of mtDNA analysis has been validated for use in Labcorp facilities. This testimony, which was corroborated by Holland and Parsons' article, established general use of mtDNA analysis in the area of forensic science. Id. At 527.

Regarding the database issue properly preserved in Washington's petition

for Writ. The Magaletti court further held:

Unlike the method of statistical calculation challenged in *Brim*, the State established that the counting method is the *only* method of reporting used by analysts in the United States. As the supreme court noted in *Brim*, "general acceptance" under the *Frye* standard can be established if use of a technique is supported by a clear majority of the community. 695 So.2d at 272. Having established that the counting method is used exclusively in this country, the State amply satisfied its burden of proving general acceptance by a preponderance of the evidence. Furthermore, in view of Ms. Clement's testimony and Holland and Parsons' commentary on the method used to calculate an exclusionary rate, the State also established general acceptance of the statistical methodology used in this case.

For the foregoing reasons, we find that the trial court properly admitted evidence of mtDNA analysis in this case. Id. At 528.

In Sireci v. State, 908 So.2d 321 (Fla. 2005), the Court held:

Finally, we conclude 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. As we have noted, seven witnesses testified that Sireci admitted to them that he killed Poteet. We find no error in this regard. Id. At 325.

As previously cited above, the trial court in Mr. Washington's case, clearly stated that the only evidence which linked Mr. Washington to the crime was the

destroyed semen sample. Mr. Washington has steadfastly maintained his innocence of this crime, there were no other witnesses called by the State to place Mr. Washington inside Ms. Berdat's residence. The pubic hairs found protruding from the vagina of Ms. Berdat can only belong to the murderer. The hair comparisons done by Marianne Hildreth merely identified the hairs as Negroid in nature. The technology now exists to test the only evidence which will exonerate Mr. Washington. The trial court concedes that this evidence will be admissible at any further proceeding. The mtDNA testing should be done in the interest of justice.

In Manual v. State, 855 So.2d 97 (Fla.2nd DCA 2003), the court held:

“Cases addressing this issue have uniformly held that DNA testing will not be permitted if the requested DNA testing would shed no light on the defendant's guilt or innocence.” *Id.* At 1063. Here as in *Zollman*, Manual alleges that DNA testing of the evidence in this case would show whether he was the perpetrator of the sexual battery. It appears from the record that the only other evidence of Manual's guilt was a serology test on the green washcloth. This test indicated that the sample on the washcloth could have come from Manual or 37% of the general population. There is, therefore, a reasonable probability that Manual would have been acquitted had the DNA evidence demonstrated that the semen found on the washcloth was inconsistent with his DNA. *See Huffman*, 837 So2d at 1149. Therefore, we reverse and remand for further proceedings consistent with this opinion and the requirements of rule 3.853. *Id.* At 98.

The pubic hairs found around and protruding from the victim in Mr. Washington's case showed that they were Negroid hairs and the victim was Caucasian. The testing of the hairs using mtDNA technology is now possible and there would be a reasonable probability that Washington would be acquitted if the mtDNA evidence was inconsistent with his DNA.

In Huffman v. State, 837 So.2d 1147 (Fla 2nd DCA 2003) the court reversed and held:

There was significant circumstantial evidence of Huffman's guilt presented at trial, including:(1) a fingerprint that matched Huffman's fingerprints; (2) phone calls traced to Huffman's house that were made to the victim's house after the attack; and (3) the victim's in-court identification of Huffman's voice as the voice of her assailant. However, identity remained an issue at trial. This court has noted that "the fact that the victim identified [the defendant] as her assailant at trial does not mean that identity was not genuinely disputed at trial for purposes of postconviction DNA testing." Id. At 1148.

None of the "significant circumstantial evidence" in Huffman was presented in Mr. Washington's case. As cited by the trial court, (FSC ROA Vol. XIV-2497). The identification of Mr. Washington as the perpetrator was based on the semen DNA testing. Presumably, the post conviction court was unaware of the problems concerning the FBI's DNA lab when it granted previous post conviction counsel's motion for the testing of the semen only because the first study (M Vol. I-65-67)

was not included as an exhibit, yet the court was more than willing to have the missing sample tested by an independent evaluator. The court was also unaware that tests were routinely manipulated against African Americans to prove guilt. The direct appeal Court could not have known about the abuses “Inside the DNA Labs” (M Vol. I -69-75), which mentions Dwight Adams by name and called into question whether he was indeed supervising anyone properly.

In Knigheten v. State, 829 So.2d 249 (Fla. 2nd DCA 2002).the court

held:

Whether Knigheten has adequately alleged how the DNA testing will exonerate him is a more difficult question. It is unclear exactly what standard must be applied here. The rule states only that the movant must allege how the DNA will “exonerate”him. It does not define “exonerate” or provide a standard to be applied. Once a motion has met this threshold requirement, the rule then requires the trial court to determine “whether there is a reasonable probability that the movant would have been acquitted ...if the DNA evidence had been admitted at trial.”

We conclude that in order for the rule (and statute) to be internally consistent the same standard must be applied at both steps of the procedure. Therefore we hold that a claim is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that this reading of the rule and statute is consistent with their purpose which, as we recently noted, “is to provide defendants with a means by which to challenge convictions when there is ‘credible concern that an injustice may have occurred and DNA testing may resolve the issue.’ “ *Zollman*, 820 So.2d 1059 (quoting *In re Amendment to Fla. Rules of*

Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So.2d 633, 636 (Fla. 2001) (Anstead, J., concurring)). We further conclude that Knighten has made a sufficient showing as to this issue. Given the significant problems with the victim's testimony and the State's reliance on the hair at trial, we conclude that there is a reasonable probability that Knighten would have been acquitted had DNA evidence demonstrated that the hair was not his. We therefore reverse and remand for further proceedings consistent with this opinion and the requirements of the rule. Id. At 251-52.

Given the significant problems with the destroyed semen sample, the lack of testing standards of the FBI lab, the willful manipulation of results and the incompetence of the State's chief witness regarding identification, (Dwight Adams), none of which was known when the "law of the case" was determined, there is a reasonable probability that Washington would have been acquitted had DNA evidence demonstrated that the hair was not his.

The lower court's contention that "It is the law of this case that DNA testing was previously done, the results were admissible in court, and said testing proved that Defendant's semen was in the victim's vagina." and the inference that no matter what the outcome of the mtDNA test might show violates the spirit of rule 3.853. The rule was adopted to make sure innocent people are not convicted. The semen sample was destroyed; whether by incompetence or malfeasance we can never know. Newly discovered evidence (the studies regarding the FBI

labs)demonstrates that the law of the case was based in error. Justice requires the mtDNA testing of the hairs to exonerate Mr. Washington. Should the testing of the hairs indicate that the hairs do not belong to Mr. Washington, this Court can do one of two things. It can free Anthony Washington or it can, in light of the newly discovered evidence, order a retrial. Upon retrial, defense counsel, in light of the newly discovered evidence and the newly updated databases, should then be allowed to cross examine Dwight Adams. In the interest of justice, the trial court would fully explore the conditions of the FBI labs when the destroyed sample was tested. Armed with the mtDNA testing of the Negroid hairs, and the evidence of incompetence/malfeasance, Washington would be acquitted by a jury of his peers. Relief is proper.

ARGUMENT II

THE CIRCUIT COURT'S DENIAL OF MR. WASHINGTON'S MOTION FOR POSTCONVICTION DNA TESTING VIOLATED HIS RIGHTS TO HABEAS CORPUS RELIEF UNDER BOTH THE FLORIDA AND U.S. CONSTITUTIONS

THE STANDARD OF REVIEW

Because this issue involves questions of law this Court should apply a standard of de novo review.

DENIAL OF DUE PROCESS

The Florida Constitution and U.S. Constitution provide a right to access evidence for the purposes of DNA testing if that DNA testing could be used to prove one's innocence or to appeal for executive clemency. See Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So.2d 633 (Fla. 2001), Anstead, j. (concurring in part and dissenting in part) (Stating " At its core, access to DNA testing is simply a unique means of establishing a claim... under the constitutional writ of habeas corpus... Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution... The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred.") 807 So.2d at 636-37. See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.) When DNA testing could prove a man innocent, denying him

such tests and executing his would deny Due Process, Equal Protection and access to the courts under the Fifth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION AND RELIEF SOUGHT

No harm can come to the State if this Court reverses the lower court's denial of DNA testing. Mr. Washington filed a properly pled motion following the law of this State and demonstrated a reasonable probability of acquittal . A jury of Mr. Washington's peers had already voted to spare his life. Accordingly he should be allowed to test the evidence against him and asks this Court to vacate the circuit court's order and remand for mtDNA testing.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 8th day of March, 2006.

RICHARD E. KILEY
Florida Bar No. 0558893

STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
CAPITAL COLLATERAL
REGIONAL COUNSEL -
MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
Counsel for Appellant

Copies to:

Honorable Susan F. Schaeffer
Circuit Court Judge
545 1st Avenue North, Room 417
St. Petersburg, Florida 33701

Robert J. Landry
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013

C. Marie King
Assistant State Attorney
Office of the State Attorney
14250 49th Street North
Clearwater, Florida 33762-2800

Anthony Washington
DOC #075465; P5119S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

RICHARD E. KILEY
Florida Bar No. 0558893

STAFF ATTORNEY
JAMES VIGGIANO, JR.
Fla. Bar No. 0715336
CAPITAL COLLATERAL
REGIONAL
COUNSEL - MIDDLE
REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
Counsel for Appellant