IN THE SUPREME COURT OF FLORIDA

Case No. SC07-

KRIS EDWARD HELTON,

Petitioner,

versus

STATE OF FLORIDA

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal initially *reversed* Helton's conviction for first-degree murder - *with directions to discharge him* - because the purely circumstantial evidence adduced at trial did *not* preclude the possibility that Marcella Gunderson - *not Helton* - had committed the crime "hours earlier" than alleged by the prosecution. *Helton v. State*, 18 Fla.L.Weekly D1215, D1215-16 (Fla. 3rd DCA May 11, 1993).

Fourteen months later, though, the Third District granted rehearing, withdrew its original opinion, and affirmed Helton's conviction based a new analysis of the circumstantial evidence. *Helton v. State*, 641 So.2d 146, 149-54 (Fla. 3rd DCA 1994).

Judge Joseph Nesbitt dissented because he believed that Helton's "inexperienced" assistant public defender was ineffective for failing to use exculpatory gastric contents evidence to show jurors that the victim was murdered shortly after he ate his "light dinner" of chicken, rice, and strawberry yogurt at 6:30 p.m. - or *before* Helton arrived home at around 9:30 p.m. *Helton*, 641 So.2d at 154-56.

Judge Nesbitt added that counsel's deficiency was "specific" and "substantial" and that "[t]here can be no doubt that this [exculpatory gastric contents] evidence might have affected the verdict rendered" because the

circumstantial evidence upon which Helton was convicted was "meager." *Helton*, 641 So.2d at 156.

Helton then unsuccessfully sought post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 based on the ineffectiveness of his "inexperienced" assistant public defender. Thus, Helton had to file a petition for writ of *habeas corpus* under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida, Key West Division.

Senior United States District Judge Norman C. Roettger, Jr. *granted* Helton's *habeas corpus* petition - *on the merits* - because his "inexperienced" assistant public defender was ineffective for failing to investigate and present the exculpatory gastric contents evidence that proved that Helton was *not* home when the victim was murdered. *Helton v. Singletary*, 85 F.Supp.2d 1323, 1325-34 (S.D.Fla. *1999).*

Indeed, Judge Roettger found that the victim should have digested his "light meal" of chicken, rice, and strawberry yogurt within one or two hours of being fed at 6:30 p.m. - or *at least* one hour *before* Helton arrived home at around 9:30 p.m. *Helton*, 85 F.Supp.2d at 1329. Judge Roettger also found that "there is sound, scientific authority support the time of death evidence," that "[i]n a case such as this, proof that [Helton] was *not* at the scene at the time of the murder is inviolable proof of [his] innocence," and

that "[a] jury could be convinced, if not outright, then at least to the extent interposes a reasonable doubt." *Helton*, 85 F.Supp.2d at 1332-33.

The State appealed Judge Roettger's decision, but the Eleventh Circuit unanimously affirmed the grant of *habeas corpus* relief - *on the merits* - after similarly finding that Helton's "inexperienced" assistant pubic defender was ineffective because he failed to investigate and present jurors with "persuasive" proof of Helton's innocence. *Helton*, 233 F.3d at 1327.

Nevertheless, the Eleventh Circuit later granted rehearing, vacated its original decision, and issued a revised opinion reversing the grant of *habeas corpus* relief on a purely procedural technicality unrelated to the merits of Helton's ineffective assistance of counsel claim. *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1315 (11th Cir. 2001).

Helton then filed a motion for post-conviction DNA testing pursuant to Florida Rule of Criminal Procedure 3.853 and showed in great detail how he would have acquitted at trial if the results of DNA testing were coupled with what the Federal courts found was "inviolable" and "persuasive" proof of his innocence.

Notwithstanding, the trial court summarily denied Helton's Rule 3.853 motion *without* considering the "inviolable" and "persuasive" proof of his innocence, and the Third District affirmed the trial court's decision

without considering that "inviolable" and "persuasive" of Helton's innocence. *Helton v. State,* 31 Fla.L.Weekly D2944, 2944-45 (Fla. 3rd DCA November 22, 2006).

SUMMARY OF THE ARGUMENT

Third District's decision in *Helton* is in express and direct conflict with the Second District Court of Appeal's decisions in *Zollman v. State,* 820 So.2d 1059 (Fla. 2nd DCA 2002); *Knighten v. State,* 829 So.2d 249 (Fla. 2nd DCA 2002); *Huffman v. State,* 837 So.2d 1147 (Fla. 2nd DCA 2003); *Riley v. State,* 851 So.2d 811 (Fla. 2nd DCA 2003); *Manual v. State, 855* So.2d 97 (Fla. 2nd DCA 2003); and *Schofield v. State,* 861 So.2d 1244 (Fla. 2nd DCA 2003), because it refused to consider "inviolable" and "persuasive" proof of Helton's innocence and because he would have been acquitted if the results of DNA testing under Rule 3.853 were coupled with that "inviolable" and "persuasive" proof of his innocence.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same points of law. Art. V, § 3 (b)(3), *Fla.Const.* (1980); *Fla.R.App.P.* 9 .03 0(a)(2)(A)(iv) (2007).

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN *ZOLLMAN V. STATE,* 820 SO.2D 1059 (FLA. 2ND DCA 2002); *KNIGHTEN V STATE,* 829 SO.2D 249 (FLA. 2ND DCA 2002); *HUFFMAN V. STATE,* 837 SO.2D 1147 (FLA. 2ND 2003); *RILEY V STATE,* 851 SO.2D 811 (FLA. 2ND DCA 2003); *MANUAL V STATE, 855* SO.2D 97 (FLA. 2ND DCA 2003); AND *SCHOFIELD V. STATE,* 861 SO.2D 1244 (FLA. 2ND DCA 2003).

"Inviolable" and "Persuasive" Proof of Innocence;

On one hand, while deciding whether the post-conviction DNA testing under Rule 3.853 would exonerate Helton, the Third District Court of Appeal considered the facts of the crime itself, *Helton v. State,* 31 Fla.L.Weekly D2944, D2944-45 (Fla. 3rd DCA November 22, 2006), yet it refused to take into account the other available evidence, *Helton*, 31 Fla.L.Weekly at D2944-45, i.e., what the Federal courts found was "inviolable" and "persuasive" proof of Helton's innocence. *Helton v. Singletary,* 85 F.Supp.2d 1323, 1332 (S.D.FIa. 1999); *Helton v. Secretary for the Department of Corrections,* 233 F.3d 1322, 1327 (11`h Cir. 2000).

One the other hand, in deciding "whether the requested DNA testing [under Rule 3.853] will exonerate the defendant," the Second District Court

of Appeal has conversely held that "the determination of whether the defendant's allegations are facially sufficient requires consideration of the facts of crime itself *and the other available evidence." Zollman v. State, 820* So.2d 1059, 1062-63 [4] (Fla. 2nd DCA 2002).

Reasonable Probability ofAcquittal;

The Third District found that post-conviction DNA testing under Rule *3.853* could in no way shed light on Helton's guilt or innocence - *even though the purely circumstantial evidence upon which he was convicted was "meager " and despite the fact that he would have been acquitted if the results of DNA testing were coupled with the "inviolable" and "persuasive " proof of his innocence. Helton,* 31 Fla.L.Weekly at *D2945.*

This is in sharp contrast to a number of other seemingly rock-solid cases in which post-conviction DNA testing was granted under Rule *3.853.* For example, in *Zollman,* the Second District found that there *was a* reasonable probability that the defendant would have been acquitted of kidnapping, sexual battery, and robbery if DNA testing showed that the contents of a rape kit did not match his DNA - *even though a fingerprint l e d from outside the victim's car matched the defendant, a hair found inside her car was "consistent" with his hair, and the victim positively identified him at trial. Zollman,* 820 So.2d at 1060-63 [3].

In *Knighten v. State,* 829 So.2d 249 (Fla. 2nd DCA 2002), the Second District Court found that there *was* a reasonable probability that the defendant would have been acquitted of burglary and two counts of sexual battery if DNA testing established that pubic hair recovered from the crime scene did not match him - *even though the hair was consistent with his and both victims positively identified him at trial. Knighten,* 829 So.2d at 250-52 [2].

In *Huffman v. State,* 837 So.2d 1147 (Fla. 2nd DCA 2003), the Second District found that there *was* a reasonable probability that the defendant would have been acquitted of sexual battery with a deadly weapon and armed burglary if DNA testing demonstrated that the contents of a rape kit were just "inconsistent" with his DNA - *even though there was "signif cant circumstantial evidence" of his guilt adduced at trial, including a fingerprint that matched him, telephone calls traced back to his home shortly after the attack, and the victim 's in-court identification of his voice.*

Huffman, 837 So.2d at 1148-49.

In *Riley v. State,* 851 So.2d 811 (Fla. 2nd DCA 2003), the Second District found that there *was* a reasonable probability that the defendant would have been acquitted of first-degree murder if DNA testing confirmed that the victims' DNA was not on his shirt and that the DNA found at the

crime scene did not match either him or the victims - *even though there was "ample incriminating evidence" adduced at trial, including the defendant being picked out of line up and several eye-witnesses having observed him with the murder weapon and trying to break into the wrong apartment with that weapon. Riley,* 851 So.2d at 812-13 [2].

In *Manual v. State, 855* So.2d 97 (Fla. 2nd DCA 2003), the Second District found that there *was* a reasonable probability that the defendant would have been acquitted of sexual battery, armed robbery, and grand theft if DNA testing verified that the DNA found on a wash cloth was merely "inconsistent" with his DNA - *even though the victim positively identified him at trial and a serology test indicated that the DNA sample could have come from him. Manual, 855* So.2d at 98-99.

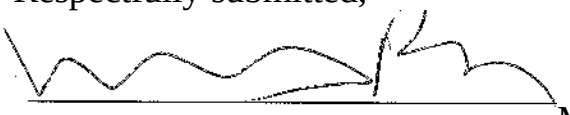
In *Schofield v. State,* 861 So.2d 1244 (Fla. 2nd DCA 2003), the Second District found that there *was* a reasonable probability that the defendant would have been acquitted of first-degree murder had DNA testing showed that fingernail scrapings from the victim and hair found on her body and in her car did not match him - *even though the results would not have been "conclusive," where "he was convicted based on circumstantial evidence alone." Schofield,* 861 So.2d at 1245 [1].

CONCLUSION

The Third District's decision in *Helton is* in express and direct conflict with the Second District's decisions in *Zollman, Knighten, Huffman, Riley, Manual,* and *Schofield,* because it refused to consider "inviolable" and "persuasive" proof of Helton's innocence and because he would have been acquitted if the results of DNA testing under Rule 3.853 were coupled with that "inviolable" and "persuasive" proof of his innocence. Thus, Helton respectfully submits that this Court should exercise its discretionary jurisdiction to consider the merits of his arguments.

To be sure, the very function of Rule 3.853 is to provide a defendant with the means by which to challenge his or her conviction when, like here, there is "credible concern" that an injustice may have occurred and DNA testing may help resolve the issue. *Amend. to Fla.R. Crim.P. Creating Rule 3.853 (DNA Testing),* 807 So.2d 633, 636 (Fla. 2001) (Anstead, J., concurring); *Zollman,* 820 So.2d at 1062 [2]; *Knighten,* 826 So.2d at 252.

Respectfully submitted,



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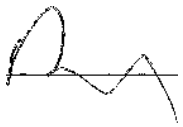
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was served by first-class mail on Richard L. Polin, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, FL 33131, on this _____day of March, 2007.



MEL BLACK

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it is submitted in Times New Roman 14-point font.

MEL BLACK

IN THE SUPREME COURT OF FLORIDA

Case No. SC07-

KRIS EDWARD HELTON,

Petitioner,

versus

STATE OF FLORIDA

Respondent.

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITIONER'S APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2006

KRIS EDWARD HELTON, Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

** CASE NO. 3D04-1133

** LOWER TRIBUNAL NO. 91-1331

Opinion filed November 22, 2006.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Monroe County, Richard C. Payne, Judge.

Mel Black, for appellant.

Charles J. Crist, Attorney General, and Erin Kinney and Jennifer Moore, Assistant Attorneys General for appellee.

Before COPE, C.J., and GERSTEN, and WELLS, JJ.

WELLS, Judge.

Kris Edward Helton appeals from denial of his rule 3.853 motion for postconviction DNA testing. We affirm.

Helton was convicted in 1992 for the murder of twenty-two month old Marshall Gunderson. At the time of Marshall's death, Helton was living with Marshall's mother, Marcella Gunderson and her three sons, Michael, age four, Matthew, age six, and Marshall.

On the evening of Marshall's death, Helton arrived home around 9:30 p.m. Marshall, who had an ear infection, had already been fed a light dinner, and, along with his four year old brother, had been put to bed. Helton had already consumed two beers before arriving home. He drank five more before going to bed.

Sometime around 11:00 p.m., Gunderson checked on her children, then she and Helton went to bed. Gunderson dozed off around 11:15 p.m., but awakened around 1:30 a.m. to find Helton awake in bed and smoking a cigarette. She noticed that he had a worried look on his face. After speaking briefly to Helton, Gunderson went to check on the children and discovered that Marshall was not in his crib.

She and Helton then searched the interior o f the house, and found a large pitcher, its contents of Kool-Aid spilled, lying on the kitchen floor. When she noticed that the front door was open, Gunderson stepped outside and found Marshall lying face down at the bottom of the front steps on a concrete slab adjacent to a graveled area. According to a statement given to

the police by Helton, Gunderson scooped Marshall up, brushed some gravel off him, and took him into the house where she and Helton performed CPR on him until fire rescue arrived. Despite these efforts, Marshall was pronounced dead on arrival at a local hospital.[1]

An autopsy performed on Marshall determined that he died from skull fractures caused by blows from a blunt instrument. The fractures were so severe that Marshall's brain had protruded between breaks in his skull.

Helton ultimately was charged with the first degree murder of Marshall Gunderson. At trial, he asserted a number of defenses, claiming alternatively that the child died from an accidental fall from the porch steps or that the child was killed by an intruder or Gunderson. Medical evidence ruled out accidental death, and there was no evidence of forced entry into the fenced and gated yard or the home. Based on circumstantial evidence, Helton was convicted. That conviction, although initially reversed,[2] was affirmed in Helton v. State, 641 So. 2d 146 (Fla. 3d DCA 1994). Helton's 92-page post conviction 3.850 motion alleging ineffective counsel, and his 43-page motion for

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1 The facts surrounding this tragedy are more fully explicated in Helton v. State, 641 So. 2d 146 (Fla. 3d DCA 1994).

2 See Helton v. State, 18 Fla. L. Weekly D1215 (Fla. 3d DCA May 11, 1993).

rehearing of the order denying that motion, were denied. The order denying his 3.850 motion was affirmed by this court.

Helton now claims that he is innocent, that Gunderson killed her child, and that DNA testing of a number of items found on the child's body,[3] inside the home,[4] and outside the home near where the child was found[5] will exonerate him.

Rule 3.853 authorizes DNA testing only where a movant states *"how* the DNA testing requested by the motion will exonerate the movant of the crime." Fla. R. Crim. P. 3.53(b)(3)

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[3] These items consist of a hair found on the child's body, the pajamas that he was wearing at the time of his death, and fingernail scrapings.

[4] These items consist of: (1) the main entrance door to the house; (2) the crib, mattress, and sheet from the child's bed; (3) Helton's white lace up shoes thought by detectives to have been used to stomp on Marshall's head; (4) a pair of pants, shirt, and socks which Helton supposedly wore when he allegedly removed Marshall from his crib and killed him; (5) a blue towel thought to have been used to wipe off blood, sweat, and/or saliva after the murder; (6) an orange plastic pitcher that had contained the Kool-Aid found spilled on the kitchen floor; (7) a trash can with five empty Budweiser beer cans and various cigarette butts found in the master bedroom where Helton and Gunderson slept; (8) a bolt from the victim's crib which was suspected of being cut with a pair of blue-handled cutters; and (9) a spring and length of black plastic coated wire used to hold up the fallen side of Marshall's crib.

[5] These items consist of: (1) a white paper towel with a small allegedly blood stained white rock; (2) nine pieces of allegedly blood stained pea gravel; (3) a large white coral rock which the prosecutor argued might have been used to inflict the fatal blows; (4) various bags of rocks found where the victim was discovered; and (5) a cinderblock brick thought by the detectives to have been used to inflict the fatal blows.

(emphasis added). Thus, "[u]nder rule 3.853, a motion for postconviction DNA testing must include, among other things, `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.'" Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004) (quoting Fla. R.Crim. P. 3.853(b)(3)). "[Tin pleading the requirements of rule 3.853, [the movant] must lay out with specificity *how* the DNA testing of ***each item*** requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on ***each*** piece of evidence and the issues in the case."

Id. _ (emphasis added).

"On the issue of whether the requested DNA testing will exonerate the defendant, the determination of whether the defendant's allegations are facially sufficient requires consideration of the facts of the crime itself and the other available evidence. 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."

Zollman v. State, 820 So. 2d 1059, 1062-63 (Fla. 2d DCA 2002).

Here, as the trial court found, DNA testing of the items identified by Helton in the hopes of finding Gunderson's DNA could in no way shed light on Helton's guilt or innocence. Gunderson lived with Marshall and Helton in the home where all of these items were found. Thus, Gunderson's DNA on any or all of these items, in the home or in the yard, is to be expected. See Hitchcock, 866 So. 2d at 25-28.

Helton's allegations that two of these items, the pieces of pea gravel and a rock wrapped in a paper towel, may have blood on them, does not change this result. People garden outside their homes, people walk barefoot outside their homes, people cut themselves and occasionally bleed outside their homes. Helton cannot satisfy his burden regarding these two items simply by claiming that they were found near where the child was discovered; that they may have blood on them; and that neither he nor the child bled at the time of the child's death. The identification of Gunderson's DNA on these items would do no more than show that at some time Gunderson had bled outside the home.

Especially unpersuasive is Helton's claim with regard to the nine pieces of pea gravel which he alleges were "found where the victim was discovered." An attachment to Helton's motion regarding this evidence shows that the gravel was not found where this child was discovered, but was actually "found" in the

child's throat by the medical examiner during autopsy. Helton told the police in a statement that is part of the record that he saw Gunderson wipe dirt and pea rock from Marshall's face after she picked him up to take him into the house and that both he and Gunderson administered CPR to the child. Given these facts, it would not be at all surprising to find Gunderson's DNA on the pea gravel and it would certainly in no way "give rise to a reasonable probability of acquittal."

Nor did Helton sustain his burden as to the rock wrapped in the paper towel. Helton has repeatedly conceded that there is no evidence that Gunderson had any scrapes or cuts on her hands or body at the time of Marshall's death. And nowhere in his motion does he allege that evidence exists that Gunderson's blood or DNA could only have gotten on this rock and paper towel at the time of Marshall's death as opposed to any time before or after the child was discovered. By Helton's own account, Gunderson's hands came into contact with some pea rock or gravel when she picked the child up. That in and of itself could cause abrasions on the hands. Given these circumstance, Helton simply could not and did not demonstrate how this piece of evidence would exonerate him. Thus, as to both the pea gravel and the rock in the paper towel, we believe that the trial court got it exactly right when it concluded:

> As to item 1, the white paper towel with the small, bloodstained rock. Nothing in the record makes these items relevant to the crime. Even if DNA was found on the rock and it was not that of the Defendant or of Ms. Gunderson - or even if it were Ms. Gunderson's - there would be no way to demonstrate that the DNA belonged to a wounded murderer or that it was deposited at the time of the crime. The results of DNA testing would not exonerate the Defendant.
>
> As to item 2, nine pieces of pea rock gravel. Nothing in the record makes these items relevant to the crime. Even if the Defendant's suspicion that there may be blood on the gravel is borne out and the DNA was not that of the Defendant or of Ms. Gunderson - or even if it was Ms. Gunderson's - there would be no way to demonstrate that the DNA belonged to a wounded murderer or that it was deposited at the time of the crime. The results of DNA testing would not exonerate the defendant.

Because the record in this case conclusively shows that Helton is entitled to no relief, the order under review is affirmed. See Fla. R. App. P. 9.141; Zollman, 820 So. at 1063 (observing that "after considering the State's response, the trial court may either enter an order on the merits of the motion or set the motion for hearing. See Fla. R.Crim. P. 3.853(c)(3)").