IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant, CASE NUMBER NO. 84,066

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

Dennis H. Tracey, III
John Houston Pope
Davis, Scott, Weber & Edwards, P.C.
100 Park Avenue
New York, New York 10017
Telephone: (212) 685-8000

Attorneys for the Appellant.

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Preliminary Statement	1
Statement of Case	3
Procedural History	3
Statement of Facts	7
The Murders	7
The Sentencing	8
The Motion to Pursue DNA Typing of Evidence	11
Summary of Argument	14
Argument	16
I. THE CIRCUIT COURT ERRED IN DENYING THE MOTION FOR RELEASE OF EVIDENCE AND APPOINTMENT OF EXPERT TO ANALYZE PHYSICAL EVIDENCE BY APPROPRIATE METHODS OF DNA TYPING TESTS	16
A. Principles of Due Process Require that the State Permit the Discovery of Crucial Scientific Evidence that May Exonerate an Inmate Sentenced to Death	17
B. The Request for Court Approval to Examine Evidence Utilizing DNA Typing Tests Is Not Untimely	21
C. Any Procedural Bar Is Excused Under the Doctrine Applicable to Successive Motions for Post-Conviction Relief	27
II. THE CIRCUIT COURT ERRED IN DENYING GROUNDS III, VI, VII AND IX AS CLAIMS THAT WERE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL	28
A. Neither Ground III nor Ground VII Was Available Before this Court	

Decided the Appeal of Appellant's Resentencing 29

B. Ground VI Raises A Question of the Validity of Precedent Which Always is Cognizable 30

C. Ground IX Relies on New Decisional Law That Has Been Retroactively Applied By This Court 31

III. THE CIRCUIT COURT ERRED IN DENYING GROUNDS IV, V, X AND XI AS GROUNDS THAT WERE NOT APPROPRIATELY RAISED BY A MOTION PURSUANT TO FLA. R. CRIM. P. 3.850 32

IV. THE CIRCUIT COURT ERRED IN ISSUING AN ADVISORY RULING THAT IT WOULD NOT ENTERTAIN ANY FUTURE RULE 3.850 MOTION SPECIFYING INEFFECTIVE ASSISTANCE OF COUNSEL IN THE RESENTENCING PROCEEDINGS AS A GROUND FOR RELIEF 35

Conclusion 37

TABLE OF AUTHORITIES

CASES

Adams v. State, 380 So. 2d 421 (Fla. 1980) 35

Allen v. State, 636 So. 2d 494 (Fla. 1994) 32

Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988) 12, 17, 21, 24, 25

Arave v. Creech, 113 S. Ct. 1534 (1993) 30

Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578 (1994) 31

Breedlove v. State, 595 So. 2d 8 (Fla. 1992) 35, 37

Brown v. State, 596 So. 2d 1026 (Fla. 1992) 16

Callins v. Collins, 114 S. Ct. 1127 (1994) 33

Card v. Dugger, 512 So. 2d 829 (Fla. 1987) 27

Commonwealth v. Brison, 618 A.2d 420 (Pa. Super. 1992) 19

Dixon v. State, 293 So. 2d 1 (Fla. 1973) 31

Dobbs v. Vergari, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. Westchester Co. 1990) 18

Dougan v. Singletary, 19 F.L.W. S 439 (Fla. Sept. 8, 1994) 31

Ellis v. Florida, 622 So. 2d 991 (Fla. 1993) 30

Espinoza v. Florida, 112 S. Ct. 2926 (1992) 31

Fishbeck v. People, 851 P.2d 884 (Colo. 1993) 26

Flanagan v. State, 625 So. 2d 827 (Fla. 1993) 25

Haag v. State, 591 So. 2d 614 (Fla. 1992) 30, 34

Herrera v. Collins, 113 S. Ct. 853 (1993) 18

Hitchcock v. Dugger, 481 U.S. 393 (1987) 4

Huff v. State, 622 So. 2d 982 (Fla. 1993) 6

James v. State, 615 So. 2d 668 (Fla. 1993) 31

Jones v. State, 569 So. 2d 1234 (Fla. 1990) 22

Kramer v. State, 619 So. 2d 274 (Fla. 1993) 32

McCleskey v. Zant, 499 U.S. 467 (1991) 27, 28

Parker v. Dugger, 481 U.S. 308 (1991) 32

People v. Chalmers, N.Y.L.J., May 13, 1994, at 37 (Westchester Co. Ct. 1994) 12, 24, 25

People v. Callace, 573 N.Y.S.2d 137 (N.Y. Suffolk Co. Ct. 1991) 19

People v. Wallace, 17 Cal. Rptr.2d 721, 725 (Cal. App. 1993) 23

People v. Wardell, 595 N.E.2d 1148 (Ill. App. 1992) 26

People v. Wesley, 611 N.Y.S.2d 97 (Ct. App. 1994) 26

Proffitt v. Florida, 428 U.S. 246 (1976) 31

Reed v. State, 640 So. 2d 1094 (Fla. 1994) 33

Roberts v. State, 568 So. 2d 1255 (Fla. 1990) 16

Robinson v. State, 610 So. 2d 1288 (Fla. 1992), cert. denied, 114 S. Ct. 1205 (1994) 22

Sewell v. State, 592 N.E.2d 705 (Ind. App. 1992) 18

State v. Bible, 858 P.2d 1152 (Ariz. 1993), cert. denied, 114 S. Ct. 1578 (1994) 23, 26

State v. Bolyea, 520 So. 2d 562 (Fla. 1988) 27, 34

State v. Hammond, 604 A.2d 793 (Conn. 1992) 19

State v. Lyons, 863 P. 2d 1303 (Ore App. 1993), rev. granted, 879 P.2d 1284 (Ore. 1994) 25

State v. Sivri, 646 A.2d 169 (Conn. 1994) 23

State v. Thomas, 570 So. 2d 1023 (Fla. 3d DCA 1990), app. dism'd, 577 So. 2d 1330 (Fla. 1991) 22

State v. Thomas, 586 A.2d 250 (N.J. Super. A.D. 1991) 19

State v. Vandebogart, 616 A.2d 483 (N.H. 1992) 23

State v. Zeigler, 494 So. 2d 957 (Fla. 1986) 3

Stokes v. State, 548 So. 2d 188 (Fla. 1989) 25

Tillman v. State, 591 So. 2d 167 (Fla. 1991) 32, 33

Trimboli v. State, 817 S.W.2d 785 (Tex. App.), aff'd, 826 S.W.2d 953 (Tex. Crim. App. 1992) 24

Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992) 30

Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994) 12, 23

Vining v. State, 637 So. 2d 921 (Fla. 1994) 34

Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988) 3

Zeigler v. State, 402 So. 2d 365 (Fla. 1981), cert. denied, 456 U.S. 1035 (1982) 3

Zeigler v. State, 452 So. 2d 537 (Fla. 1984) 3

Zeigler v. State, 473 So. 2d 203 (Fla. 1985) 3

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Zeigler v. State, 632 So. 2d 48 (Fla. 1993), cert. denied 3

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STATUTES

Fla. Stat. §921.141(5)(b) 9, 10

Violent Crime Control and Law Enforcement Act of 1994, Tit. XXI, Subtit. C, §§ 210301-06, 1994 U.S.C.C.A.N. (108 Stat.) 1796, 2065-71 23

LEGISLATIVE REPORTS AND HEARINGS

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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant, CASE NUMBER NO. 84,066

vs.

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Appellee.

PRELIMINARY STATEMENT

This appeal is from an order of the Circuit Court denying without evidentiary hearing all of the claims raised in appellant's Motion to Vacate Sentence filed pursuant to Fla. R. Crim. P. 3.850 ("the 3.850 Motion"), and denying appellant's Motion for Release of Evidence and Appointment of Expert. The Court has jurisdiction of this appeal pursuant to Art. V, § 3(b)(1) and (9), Fla. Const.

It is important to note that this appeal involves two motions decided by the Circuit Court. In addition to the denial of a Rule 3.850 petition, the Court also denied a motion to test physical evidence by means of DNA typing, a scientific testing procedure that has evolved only recently into an accepted scientific method for evaluating physical evidence.

The Circuit Court denied appellant permission to conduct such tests on the blood specimens placed into evidence in his trial despite the fact that:

- the State's evidence at trial was purely circumstantial, and was based in large measure on the very blood samples now sought to be tested;

- the blood samples were not tested for DNA typing at the time of trial because such testing methods were unknown at that time;

- because of limitations on the testing that was performed at the time of trial, and because of the ambiguity of the results of the general blood typing conducted at that time, DNA typing could well be the only way to obtain evidence that appellant did not commit the crimes of which he has been convicted.

The Circuit Court's refusal to permit appellant to conduct such tests -- potentially consigning him to death when evidence of his innocence lies in the exhibit room in the Circuit Courthouse -- is repugnant to any basic notion of due process. The Circuit Court's rationale that appellant's motion is a "tactic" for delay cannot be accepted. Had the testing been permitted (as due process requires) it could easily have been completed by this time, and no delay would have ensued.

Appellant implores this Court to grant him a basic, undeniable right: the right of access to the evidence that resulted in his conviction and the right to apply such tests as are reasonably available. Today, this Court would not, it is respectfully submitted, consider affirming even a conviction

resulting in a prison term if a defendant were denied the right to conduct DNA testing. It certainly should not permit an individual to be executed without the same right to prove his innocence.

STATEMENT OF THE CASE

Procedural History

Appellant is a prisoner under the sentence of death based upon his convictions for the first-degree murders of Eunice Zeigler, his wife, and Charlie Mays, a friend, and under two life sentences for the second degree murders of his in-laws, Perry and Virginia Edwards. As a result of, among other issues, a number of highly irregular events at appellant's trial, he has been before this Court on several occasions since his convictions in 1976. Zeigler v. State, 632 So. 2d 48 (Fla. 1993), cert. denied, Dkt. No. 93-9002 (Oct. 4, 1994) (affirming denial of relief on Rule 3.850 motion); Zeigler v. State, 580 So. 2d 127 (Fla.), cert. denied, 112 S. Ct. 390 (1991) (affirming death sentence imposed on resentencing); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988) (vacating previous sentence of death and ordering resentencing hearing); State v. Zeigler, 494 So. 2d 957 (Fla. 1986) (reversing grant of evidentiary hearing on sentencing claim raised in Rule 3.850 motion); Zeigler v. State, 473 So. 2d 203 (Fla. 1985) (affirming denial of relief after evidentiary hearing on claim of judicial bias); Zeigler v. State, 452 So. 2d 537 (Fla. 1984) (affirming denial of relief on eighteen claims raised in Rule 3.850 motion and remanding for evidentiary hearing on one claim); Zeigler v. State, 402 So. 2d 365 (Fla. 1981), cert. denied, 456 U.S. 1035

(1982) (affirming convictions and sentence on direct appeal). Since this Court is well acquainted with the history of appellant's case and this appeal solely concerns issues arising from the resentencing of Mr. Zeigler in 1989, the ensuing summary is limited to events pertinent to the resentencing and the claims raised in the 3.850 Motion. The relevant proceedings for the purpose of this appeal span the record in three previous appeals and the present one. To distinguish the various records, citations to the original trial transcript with be denoted "TT."; citations to the record on appeal from the resentencing will be denoted "R-89."; citations to the record on appeal from the denial of appellant's immediate past 3.850 motion will be denoted "R-92."; and citations to the record on appeal for this appeal will be denoted "R-94.".

On November 18, 1987, Mr. Zeigler presented to this Court a successful petition for a new sentencing hearing based on Hitchcock v. Dugger, 481 U.S. 393 (1987). This Court vacated the death sentence on April 7, 1988, and remanded the case to the Circuit Court for resentencing. The Circuit Court held a sentencing hearing on August 14-16, 1989 and resentenced Mr. Zeigler to death. This Court affirmed the sentence.

During the pendency of the resentencing proceedings appellant lodged a revised Motion to Vacate Judgment and Sentence concerning guilt-innocence issues (R-92.331-451) and an Amended Motion to Vacate Judgment and Sentence (R-92.452-603). The Circuit Court held the motion(s) in abeyance until the appeal of the resentencing was final. On November 7, 1991, three days after the

denial of certiorari on the resentencing, the State filed a Motion for Final Disposition of Motion to Vacate Judgment and Sentence and Amended Motion to Vacate Judgment and Sentence. (R-92.604-612.) Appellant opposed the motion because he needed an opportunity to develop his claims regarding the resentencing proceedings, which included efforts to locate conflict-free counsel, since current counsel represented appellant in the resentencing hearing, and could not represent him in post-conviction proceedings concerning the sentence if a claim of ineffective assistance of counsel were to be raised. (R-92.618-622.) After a hearing, the Circuit Court directed that adjudication of guilt-innocence claims proceed immediately. Appellant did not waive any claims that otherwise would be available to him under Fla. R. Crim. P. 3.850 but were not asserted because of the Circuit Court's order. In particular, appellant fully reserved all claims concerning his resentencing. A Second Amended Motion was filed on March 5, 1992. On March 26, 1992, the Circuit Court rendered its Order partially denying Defendant's Motion to Vacate Judgment and Sentence, Amended Motion to Vacate Judgment and Sentence, and Second Amended Motion to Vacate Judgment and Sentence. The Court set one of the claims for an evidentiary hearing. The Circuit Court held an evidentiary hearing on May 27, 1992, and denied all relief. This Court affirmed.

While the appeal of the denial of postconviction relief in 1992 was pending appellant sought and received an extension of time in which to submit the present 3.850 Motion until sixty days after the mandate issued in the then-pending appeal. (R-94.95.) That mandate issued on January 5, 1994. (R-94.93.) The Motion to Vacate Sentence ("the 3.850 Motion") was timely filed on March 7, 1994, raising eleven grounds for relief and requesting oral argument on the authority of Huff v. State, 622 So. 2d 982 (Fla. 1993). The tenth ground for relief rested on appellant's contention of actual innocence of the crimes for which he is sentenced to death and it requested testing of physical evidence by DNA typing techniques, stating that appellant intended to submit a motion at or before the Huff hearing formally detailing appellant's proposal. (R-94.89.) The State did not respond to the 3.850 Motion or object to the proposed method of handling the DNA evidence request until the day of the Huff hearing, at which time a written response was presented.[1] (R-94.106-122.) Immediately prior to the hearing appellant served a short Motion for Release of Evidence and Appointment of Expert on the State and submitted it to the Circuit Court at the hearing. (R-94.96-105.)

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[1] The State, of course, did not have an obligation to respond to the merits of the motion unless the Court directed a response. In this instance, however, the State sent a response to the Court approximately two hours before the hearing and served appellant's counsel with the response outside the door of the courtroom. Counsel asked the Court for an opportunity to submit a written reply to the many procedural objections made by the State and the Court denied the request. (R-94.3-4.)

In the course of the oral argument appellant stated that he sought an evidentiary hearing on only two of the claims (Grounds I and X) and the remainder were submitted as questions of law. The Circuit Court took the motions under advisement and on June 24, 1994, issued an order denying both motions without an evidentiary hearing. (R94-125-130.) Appellant timely noticed this appeal.

STATEMENT OF THE FACTS

The Murders

On December 24, 1975, four persons were killed in the Zeigler family furniture store in Winter Garden. Eunice Zeigler, appellant's wife, and her parents were shot to death, and Mr. Charles Mays was bludgeoned to death and shot. Mr. Zeigler also was shot, nearly fatally, through the abdomen. He telephoned for help and was found by the Police Chiefs of Winter Garden and neighboring Oakland. Mr. Zeigler was arrested for the murders on December 29, 1975, while hospitalized.

The prosecution's theory of the case was that Mr. Zeigler had killed his wife to collect the proceeds of insurance policies on her life, had killed his in-laws because they were inadvertently present, had killed Mays as part of a scheme to make the other murders appear to be the products of a robbery gone haywire, and had then shot himself in a desperate effort to avoid suspicion when his plan to create a false robbery scene went awry. Under the State's theory, Mr. Zeigler murdered his wife and her parents, then drove around with Mays and Felton Thomas, then bludgeoned Mays to

death before picking up Edward Williams, although neither Thomas nor Williams ever testified that there was anything unusual about Mr. Zeigler's appearance that night, much less that he was soaked with blood.

The defense theory was that three or four men, probably including Mays, Thomas and Williams, had attempted to rob the furniture store and that the deaths and the wounding of Mr. Zeigler occurred in the ensuing shoot-out and struggle. Mr. Zeigler was the principal fact witness in his own behalf, flatly denying the crucial testimony of Williams against him and that he was the unnamed white man who had taken Thomas and Mays to an orange grove to fire guns and had then tried to get them to break into the furniture store. Circumstantial evidence corroborating the defense theory included the complete lack of fingerprints on the murder weapons, despite the State's contention that Zeigler had gone to great lengths to have Thomas and Mays handle the weapons; the money in Mays's pockets; a tooth that was not accounted for; and testimony by the F.B.I. expert that the bloody footprint could not be identified as Zeigler's.

The Sentencing

The sentencing hearing began before Honorable Gary L. Formet, Circuit Judge, on August 14, 1989, and concluded with his sentencing order of August 17th. In addition to the evidence presented at the hearing, Judge Formet reported that he had read the entire transcript of the original trial, including the penalty phase. (R-89.564-565)

Prior to the sentencing hearing, Judge Formet entered an order, at the state's request, barring defendant from challenging the convictions through evidence contradicting the guilt verdicts or through a theory of residual doubt supporting the life recommendation of the jury. (R-89.1133)

Defendant presented three expert witnesses, who testified that he is not a threat to others; eight witnesses to his character, reputation and conduct; three witnesses to his adjustment to life on death row and his character and behavior there; and one witness whose testimony concerned the reasonableness of Defendant's purchase of life insurance policies on his wife prior to her murder. The State presented two witnesses, whose testimony is not referred to in the sentencing order at all, and relied primarily on the circumstances of the four murders of which Zeigler had been convicted for its evidence of aggravating factors.

The resentencing judge found four aggravating circumstances:

(1) Previous conviction of another capital felony because, "Contemporaneously, the defendant was found guilty of two first degree murders and two second degree murders in this case." (R-89.1212) Fla. Stat. § 921.141(5)(b).[2]

(2) The murder of Charles Mays was for the purpose of avoiding lawful arrest by making it appear that the

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[2] The trial judge did not find this aggravating circumstance to exist, although he had referred to it in instructing the jury. (TT at 2816)

other murders resulted from a robbery attempt. (R-89.1213) Fla. Stat. § 921.141(5)(e).

(3) Eunice Zeigler and Charles Mays were murdered for pecuniary gain: she, in an attempt to collect $500,000 in insurance on her life; he, in furtherance of that plot, as part of a cover-up scheme. (R-89.1213-14) Fla. Stat. § 921.141 (5)(f).

(4) The murder of Charles Mays was especially heinous, atrocious or cruel. (R-89.1214) Fla. Stat. § 921.141(5)(h). Although the trial judge had applied this aggravating circumstance to the murder of Eunice Zeigler as well, the resentencing judge concluded otherwise, because, "the evidence indicates she was killed with a single unexpected gunshot and under the law as it has evolved today this killing would not qualify for this aggravating circumstance." (R89.1214)

The resentencing judge rejected as "not sustained by the evidence under the current case law" the previously found aggravating circumstance of "risk of death to many persons." (R-89.1215) Fla. Stat. § 921.141(5)(c).

On the other side of the scale, the resentencing judge concluded that the evidence established the statutory mitigating circumstance of no significant history of prior criminal activity, (R-89.1214) (Fla. Stat. § 921.141(6)(a)), and he then reviewed the defense evidence of nonstatutory mitigating circumstances with which the hearing had been primarily concerned:

(1) He dismissed the character evidence as "uncorroborated hearsay" presented by "several friends of the defendant." (R-89.1214)

(2) Evidence of Defendant's community and church participation was discounted as not unusual. (R-89.1214)

(3) Defendant was found to have a good prison record. "He appears to have adapted well to prison life and is an asset as an inmate." (R-89.1215)

(4) The expert testimony showed that Defendant does not have a propensity for spontaneous violence, but failed to show he "would not engage in the cold and calculated violent conduct evidenced by the murders of which he stands convicted." (R-89.1215)

Finally, the resentencing judge concluded "that no reasonable person could conclude that the mitigating circumstances outweigh the proven aggravating circumstances and therefore the jury's recommendation of life imprisonment is rejected and a sentence of death as to both convictions is imposed." (R-89.1216)

The Motion to Pursue DNA Evidence

Appellant foreshadowed his Motion for Release of Evidence and Appointment of Expert in the Rule 3.850 Motion and presented it to the Circuit Court on June 6, 1994. The motion relies on a premise that does not seem to be in dispute: DNA typing techniques have evolved into a reliable method for developing exculpatory evidence from older and possibly degraded evidentiary samples of DNA material. Appellant's request preceded the national attention

given to DNA technologies because of the O. J. Simpson trial, so the Circuit Court did not have the benefit of the many laudatory remarks conferred by prosecutors, including the State Attorney responsible for this case.[3]

The basic principle of DNA comparison testing is a technique called restriction fragment length polymorphisms, or RFLP, analysis. See Vargas v. State, 640 So. 2d 1139, 1144 (Fla. 1st DCA 1994). This technique has been in use for many years and involves a process of treating samples of human tissue to permit a comparison of DNA strands. See, e.g., Andrews v. State, 533 So. 2d 841, 847-48 (Fla. 5th DCA 1988); National Academy of Sciences, National Research Council, DNA Technology in Forensic Science, 36-40 (1992). For older, degraded or smaller samples, the typing process amplifies the DNA, using a process known as polymerase chain reaction (PCR), which is much newer than RFLP. See, e.g., People v. Chalmers, N.Y.L.J., May 13, 1994, at 37 (Westchester Co. Ct. 1994) (copy attached to DNA motion, R94.102); NAS/NRC Report at 40-44. It seems likely that appellant will need to rely on PCR tests to analyze the evidence in this case.

Because the evidence that convicted appellant at trial was admittedly circumstantial, appellant believes that DNA typing may shed light on his innocence that was previously unavailable.

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[3] Lawson Lamar, the State Attorney for Orange and Osceola counties, reportedly told the Southern Association of Forensic Scientists, "The jury needs to understand that DNA does not give you bad results. It matches or it doesn't. There's very little room on a good DNA test for misinterpretation." DNA Role in Solving of Crimes Stressed, Orlando Sentinel, Sept. 11, 1994, at B-1.

Bloodstain evidence, for example, formed a significant part of the State's case, but it had a tremendous potential to mislead the jury because the four homicide victims and Zeigler shared only two major bloodtypes. Charles Mays' clothing tested for type "A" blood. That was his blood type, but it also was the blood type for Eunice Zeigler and Perry Edwards. More precise testing methods available today may allow identification of blood stains on Mr. Mays that actually originated with Mrs. Zeigler or Mr. Edwards, supporting defendant's contention that Mr. Mays was not the victim of defendant, but a perpetrator of the crime who was murdered by other members of the group who committed these crimes. Likewise, closer examination of Mr. Zeigler's clothing, which was stained with type "A" and "O" blood, may reveal that the type "A" stains did not originate from a struggle with Mr. Mays or Mr. Edwards, as the State hypothesized at trial.

Greater information might have been available in 1976 if the State had collected the evidence in a manner that permitted subtyping of blood, but it did not. (See R-94.101.) Mr. Zeigler has moved now to obtain access to the evidence in order to pursue test methods unavailable in 1976 that may rectify what the State's mishandling of the evidence caused. A more precise testing of certain evidence can vindicate Zeigler's long-standing claim of innocence.

SUMMARY OF ARGUMENT

Point I. The Circuit Court erred in denying the motion for Release of Evidence and Appointment of Expert for several reasons. First, the most fundamental principles of due process are violated by denying a criminal defendant access to evidence in order to test it by an advancement in technology that will reveal potentially exculpatory information that was not obtainable at the time of trial. Due process is particularly implicated here where the physical evidence was not tested as thoroughly as possible with the techniques that were available in 1976 because of the State's handling of the evidence.

Second, to the extent that any timeliness or successive motion rules apply to the DNA motion, the Circuit Court erroneously fixed the date such testing was available as 1988, without obtaining testimony concerning what tests would be performed and when they were available to a defendant to make a postconviction motion. Further, an examination of the cases and other legal authorities demonstrates that appellant acted reasonably in waiting for the techniques to evolve and the controversy over DNA typing to settle before asking for permission to test the evidence in his case. The point of reference selected by the Circuit Court, the decision of the Fifth District Court of Appeals in Andrews, is wrong because Andrews used the wrong standard to measure the admissibility of DNA typing and it was several more years before the scientific acceptability of the relevant techniques was established for purposes of the correct standard.

Last, appellant's request satisfies the formulation applicable to determining whether an alleged "abuse of the writ" should be excused, if it must be measured by such standards.

Point II. The Circuit Court erred in denying Grounds III, VI, VII and X as claims that were or should have been raised on direct appeal for three distinct reasons. Grounds III and VII arise solely because this Court created them by virtue of its rulings on direct appeal. Ground VI asks for this Court to reconsider its prior precedents, a claim that inherently is not barred. Ground IX relies on decisional law, Espinoza v. Florida, that was decided after appellant's direct appeal and which this Court has already applied retroactively on postconviction review.

Point III. The Circuit Court erred in denying Grounds IV, V, X and XI as claims that were not appropriately raised by a motion pursuant to Fla. R. Crim. P. 3.850 because Rule 3.850 codifies the writ of habeas corpus. Moreover, the stated grounds fit squarely within the description of Rule 3.850. If appellant is in error, however, the claims should be treated as if they are now presented to this Court for habeas review.

Point IV. The Circuit Court erred in issuing an advisory ruling that it would not entertain any future Rule 3.850 motion specifying ineffective assistance of counsel in the resentencing proceedings as a ground for relief because this Court has unambiguously ruled that counsel who represented a defendant in a proceeding ethically are prohibited from challenging their own effectiveness at that proceeding in a subsequent postconviction

proceeding. Volunteer counsel currently representing appellant also represented him at the resentencing and they have been unable to locate replacement counsel after a diligent search. The Circuit Court did not conduct any evidentiary inquiry into the circumstances of the continuing representations and therefore did not have a record adequate to issue its ruling.

ARGUMENT

Preliminarily to all of the argument points, appellant reminds the Court that since this is an appeal from the summary denial of postconviction relief sought pursuant to Fla. R. Crim. P. 3.850, the motion and the record must conclusively show that the defendant is entitled to no relief or the court below must be reversed. See, e.g., Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992); Roberts v. State, 568 So. 2d 1255, 1256 (Fla. 1990).

POINT I

THE CIRCUIT COURT ERRED IN DENYING THE MOTION FOR RELEASE OF EVIDENCE AND APPOINTMENT OF EXPERT TO ANALYZE PHYSICAL EVIDENCE BY APPROPRIATE METHODS OF DNA TYPING TESTS

The Circuit Court erroneously denied appellant's motion to obtain testing of certain physical evidence. Appellant proposed that the controversial physical evidence used at trial be subjected to the new techniques in DNA typing testing. Certain bloodstain evidence was not subjected in a timely fashion to adequate testing (such as subtyping) -- a matter of which even the State's Attorney

complained -- and the forensic technology of 1976 did not permit more precise tests by the time the error had come to the attention of defense counsel.

The Circuit Court stated that the request was untimely because DNA typing evidence was first admitted by a court in Florida in 1987, with appellate approval of the evidence conferred in 1988 (Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988)). This ruling should be reversed as erroneous because the denial of the inherent right to conduct discovery through new scientific methods is itself a violation of fundamental due process. Further, to the extent that appellant must justify the timing of the discovery motion, it is warranted by the state of the relevant science and law. Last, appellant also satisfies the classical analysis necessary to overcome an allegation of "abuse of the writ."

A. Principles of Due Process Require that the State Permit the Discovery of Crucial Scientific Evidence that May Exonerate an Inmate Sentenced to Death

There can be little doubt that the execution of a person who is actually innocent of the crimes upon which the death sentence is based offends every notion of decency and justice embodied in the Federal and State constitutional protections. For purposes of deciding whether to permit scientific discovery about guilt and innocence, it is unnecessary and misleading to focus on the available avenues of judicial relief or the potential procedural hurdles to the rendering of judicial relief. The issue simply is whether the State possesses evidence that could be

exculpatory to a convicted person and whether there is some chance that scientific testing can unlock that exculpatory information. Once the evidence is analyzed and conclusions can be drawn, then consideration can be given to what purpose the evidence may be put. Procedural rules barring the use of such evidence to obtain judicial relief pass muster under the due process clause only when alternatives such as clemency are available to avert miscarriages of justice. Herrera v. Collins, 113 S. Ct. 853, 866-69 (1993). The refusal to authorize the testing of evidence, then, denies appellant of due process because he loses the judicial and nonjudicial means to vindicate his innocence.[4]

"Advances in technology may yield potential for exculpation where none previously existed." Sewell v. State, 592 N.E.2d 705, 708 (Ind. App. 1992). Due process "is flexible and calls for such procedural protections as the particular situation demands. Clearly an advance in technology may constitute such a change in circumstance." Dobbs v. Vergari, 570 N.Y.S.2d 765, 768 (N.Y. Sup. Ct. Westchester Co. 1990). Under this principle, "where evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction." Id.

The courts in many states have authorized -- without regard for any procedural bar rules -- the post-conviction testing of physical evidence by DNA typing methods when the technology was

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[4] For due process purposes, this case has the additional compelling feature that DNA typing can reveal more information than tests conducted in 1976, in part because the State mishandled the evidence in 1976 and limited the information available therefrom.

not available to the defendant at trial. E.g., State v. Hammond, 604 A.2d 793, 806-08 (Conn. 1992); State v. Thomas, 586 A.2d 250, 252-54 (N.J. Super. A.D. 1991); People v. Callace, 573 N.Y.S.2d 137, 139-40 (N.Y. Suffolk Co. Ct. 1991); see also Commonwealth v. Brison, 618 A.2d 420, 423-25 (Pa. Super. 1992) (same result in direct appeal). Such testing is warranted if there is a possibility that the tests can put to rest the question of the defendant's guilt. See Thomas, 586 A.2d at 254. Moreover, the question of whether the samples are testable, and by what means, are properly deferred to the process of testing itself. See Callace, 573 N.Y.S.2d at 139.

The question posed by appellant's request asks about the very character of the system of criminal justice. The creation of procedural barriers to exculpatory evidence with the potential power of DNA typing technology perpetrates a gamesmanship view of justice where certain rules are given more importance than substantive outcomes. This is wrong.

> A criminal trial is not a lottery, a spin of the roulette wheel or a throw of the dice. The orderly processing of cases through the court is an important value, but it is not the end in itself. It is only the method by which we attempt to achieve the ultimate purpose of the criminal justice system -- the fair conviction of the guilty and the protection of the innocent. . . . Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed.

Thomas, 586 A.2d at 253-54. It goes almost without saying that the failure is much greater when the innocent are executed. The very moral foundation of capital punishment is the proposition that the

State's act of killing the convicted person is justified by that person's wrongful acts. The killing of a person who is actually innocent lacks this justification and cannot hide from what it is -- murder -- simply because a conviction was obtained years ago based on evidence that current methods of science can dispute.

No doubt the court below was motivated at least in part by its concern, stated rather bluntly, that it thought appellant is seeking only to delay the inevitable. Setting aside the factual inaccuracy of this unsupported accusation,[5] appellant's request rests on probably one of the few postconviction grounds for relief that cannot wear the mantle of mere delay.

> DNA evidence, almost uniquely, can provide definite evidence of innocence. Moreover, the tests can be performed on samples . . . that are over a decade old. No one can credibly argue that a DNA exclusion is a trumped-up claim of innocence raised to delay the imposition of the death penalty.

Neufeld, Have You No Sense of Decency?, 84 J. Crim. L. & Crim. 189, 202 (1993) (emphasis added).

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[5] The procedural posture of this case in June, when the request was made, made it unlikely that a brief recess of proceedings to test physical evidence would have incurred in any delay in the State's relentless pursuit of appellant's execution. No death warrant is pending. A petition for certiorari was pending before the United States Supreme Court on appellant's previous appeal. (It was denied October 3, 1994.) And appellant has yet to be heard in Federal Court. The time consumed by testing physical evidence is a mere bump on this road; the impact of an exculpatory test result, however, would erect an urgently needed roadblock to a wrongful execution.

B. The Request for Court Approval to Examine Evidence Utilizing DNA Typing Tests Is Not Untimely

The Circuit Court alternatively phrased its holding as a ruling on the proposed DNA typing evidence as a claim regarding newly discovered evidence. The Circuit Court stated:

> Defendant avers that DNA typing is relatively new and was unavailable to him either at trial or before the deadline to file challenges to the conviction. Yet, he failed to amend his earlier postconviction motion which was pending in 1991. DNA typing was recognized a valid scientific test in 1988. Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988), review denied, 542 So. 2d 1332 (Fla. 1989). There is no reason this issue could not have been raised in the earlier motion and this tactic is simply an unjustified attempt to delay the proceedings.

R-94.129. Notably, the Circuit Court conceded the two most important points raised by appellant: DNA typing evidence was not available to appellant at trial and DNA typing evidence was not available to appellant on or before January 1, 1987, the deadline imposed by this Court for filing challenges to appellant's convictions. Accordingly, it is undisputed that this claim is not barred by the timeliness standard of Rule 3.850 or by the availability standard of Rule 3.600.

The Circuit Court's ruling that the claim should have been asserted in an earlier motion cannot be supported by the record or the motion. The Circuit Court did not conduct any factual inquiry into the reasons for asserting the motion in 1994, rather than earlier. There is no record to show what tests appellant intends to perform, when the technology for those tests

became reasonably available, and whether the results of those tests would justify ignoring any otherwise applicable procedural barriers. In fact, the answers to all these questions inherently depend on performing the tests and then evaluating their utility for postconviction proceedings. In the absence of these facts, however, the denial by the Circuit Court does not survive scrutiny under Rule 3.850.

Even without a full record it is apparent the Circuit Court wrongly concluded that the matter could have been pursued in a earlier motion. The fundamental error in the Circuit Court's ruling is its assumption that simply because the admissibility of DNA evidence was approved in Andrews that the technique became available as a ground for postconviction relief.[6] In fact, DNA testing is an evolving science, the admissibility of which in criminal proceedings was the subject of wide debates at least until its cautious but authoritative endorsement in a report by the National Research Council of the National Academy of Sciences in

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[6] A computer search performed on Westlaw using the search "(postconviction or habeas or 3.850) & DNA" yielded only one Florida citation: State v. Thomas, 570 So. 2d 1023 (Fla. 3d DCA 1990), app. dism'd, 577 So. 2d 1330 (Fla. 1991). The Thomas Court reversed the grant of a new trial based on DNA evidence presented in a 3.850 motion, hardly an encouraging ruling.

Appellant also notes that Andrews was not a decision of this Court, the source of operative law for capital proceedings. The first instance in which a case in this Court conferred anything resembling approval on DNA typing tests was in 1992. See Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992), cert. denied, 114 S. Ct. 1205 (1994); see also Jones v. State, 569 So. 2d 1234, 1237-38 (Fla. 1990) (Court resolved challenge to admission of DNA evidence on harmless error basis only, based on assumption that admission was error). This Court still has not squarely faced the admissibility issues.

1992. See National Research Council, DNA Technology in Forensic Science (1992) (hereinafter "NAS/NRC Report"); see also DNA Fingerprinting: Academy Reports, 256 Science 300 (Apr. 17, 1992). The NAS/NRC Report has carried significant weight with appellate courts, leading several to reject DNA typing evidence when the proof has not conformed to the Report's recommendations. See, e.g., Vargas v. State, 640 So. 2d 1139, 1151 (Fla. 1st DCA 1994)[7]; State v. Sivri, 646 A.2d 169, 187-92 (Conn. 1994); State v. Bible, 858 P.2d 1152, 1179-90 (Ariz. 1993), cert. denied, 114 S. Ct. 1578 (1994); People v. Wallace, 17 Cal. Rptr.2d 721, 725 (Cal. App. 1993); State v. Vandebogart, 616 A.2d 483, 493-94 (N.H. 1992). In fact, the evolving nature of DNA science and the significance of the NAS/NRC Report is reflected in the fact that last month Congress passed and the President signed the DNA Identification Act of 1994, the first federal law establishing standards for DNA testing of evidence and for proficiency testing of DNA typing labs. See Violent Crime Control and Law Enforcement Act of 1994, Tit. XXI, Subtit. C, §§ 210301-06, 1994 U.S.C.C.A.N. (108 Stat.) 1796, 2065-71; House Comm. on the Judiciary, DNA Identification Act of 1993, H. Rpt. No. 45, 103d Cong., 1st Sess. 4-5 (1993) (legislative history for 1994 DNA Identification Act). It accordingly was reasonable for appellant to have waited until the NAS/NRC Report gave sanction to the evidence and set forth standards by which to

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[7] Vargas was decided on the Wednesday prior to the oral argument in the trial court and appellant's counsel was unaware of the case until it was subsequently published in Florida Law Weekly.

measure its admissibility. This fact alone should be enough to find error in the Circuit Court's ruling.

Moreover, the Andrews rulings did not even consider or discuss the type of DNA testing that likely would be performed here -- since the current technology had not yet been considered by the courts. DNA testing is not a singular concept; several kinds of tests are used depending on the properties of the sample that is tested. See NAS/NRC Report at 51 ("'DNA typing' is a catch-all term for a wide range of methods for studying genetic variations. Each method has its own advantages and limitations, and each is at a different state of technical development."); Thompson & Ford, DNA Typing: Acceptance & Weight of the New Genetic Identification Tests, 75 Va. L. Rev. 45 (1989) (concluding that various DNA tests differ in their degree of scientific acceptability and therefore also in their admissibility under the Frye[8] test). Andrews ruled on the admissibility of the RFLP test method. See 533 So. 2d at 847-48. Another technique, the PCR method, is a much newer technology, having come into common use in research laboratories at about the time Andrews was decided. See NAS/NRC Report at 63. The PCR method is the preferred method where the forensic DNA sample is either very small or very degraded. People v. Chalmers, N.Y.L.J., May 13, 1994, at 37, col. 1 (Westchester Co. Ct. 1994) (copy submitted to Circuit Court, R94.102-03); Trimboli v. State, 817 S.W.2d 785, 787 (Tex. App.), aff'd 826 S.W.2d 953 (Tex. Crim. App. 1992). Case law approving the admissibility of PCR method DNA

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[8] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

typing evidence is of more recent vintage. Chalmers, supra; State v. Lyons, 863 P. 2d 1303 (Ore App. 1993), rev. granted, 879 P.2d 1284 (Ore. 1994). Because the samples to be tested in this case are nearly 19 years old, the PCR method is likely to be the appropriate testing technique. If this is the case, the Circuit Court's ruling based on Andrews is plainly inapplicable. Accordingly, this Court should reverse that ruling, approve testing of the evidence, and leave any consideration of the timeliness of the claim to be determined after the method of testing is determined and the evidence presented.

Further, the Andrews decision was called into question by subsequent developments. The Andrews opinion discussed at length the standard for admissibility and ultimately relied on the relevance test for the admission of novel scientific evidence. See 533 So. 2d at 843-47. This Court thereafter clearly rejected the relevance approach in favor the more stringent Frye test for the admissibility of such evidence. E.g., Stokes v. State, 548 So. 2d 188 (Fla. 1989); see also Flanagan v. State, 625 So. 2d 827 (Fla. 1993). The technology of DNA typing was conceded by even its strongest advocates to be in its infancy at the time of Andrews,[9]

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[9] See, e.g., DNA: Report of New York State Forensic DNA Analysis Panel at 23 (Sept. 6, 1989), reprinted in Forensic DNA Analysis, Joint Hearing Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary and the Subcomm on the Constitution of the Senate Comm. on the Judiciary, 102nd Cong., 1st Sess. 203, 231 (1991); DNA Identification, Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 79 (1989) (testimony of Jeffrey Ashton, Assistant State Attorney, State of Florida). Mr. Ashton argued the State's opposition to appellant's DNA testing motion in the court below.

and it was widely believed that DNA test result would not satisfy the Frye standard between 1988 and 1991. For example, a Justice Department publication released in 1991 opined, in its comments about Andrews, that a stringent application of the Frye test could result in the exclusion of DNA typing evidence at that point in time.[10] See Bureau of Justice Statistics, U.S. Department of Justice, Forensic DNA Analysis: Issues, at 17 (June 1991); accord People v. Wesley, 611 N.Y.S.2d 97, 112-13 (Ct. App. 1994) (Kaye, C.J., concurring) (DNA forensic analysis did not pass Frye test in 1988 but does today); Bible, 858 P.2d at 1186-89 (distinguishing early cases, such as Andrews, and describing scientific controversy that arose in 1991); Fishbeck v. People, 851 P.2d 884, 894 (Colo. 1993) (scientific acceptability of RFLP test in 1989 opened to question by subsequent controversy). In this particular area of uncertainty, the Andrews decision could not be considered authoritative and appellant acted reasonably to make his request at a time when the law and science because more certain. Compare People v. Wardell, 595 N.E.2d 1148, 1153-54 & n.2 (Ill. App. 1992) (affirming denial of defendant's request for DNA testing in early 1988 under Frye analysis). It would be fundamentally unfair to penalize petitioner -- with the penalty of death -- simply because the Circuit Court concluded in hindsight that the significant

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[10] In fact, early after Andrews some prosecutors hesitated to press rapidly on introducing DNA evidence out of the fear that it would be rejected -- prejudicing its future use -- if pressed to soon. See, e.g., Thompson & Ford, supra, 75 Va. L. Rev. at 46; Comment, DNA Identification Tests and the Courts, 63 Wash. L. Rev. 903, 905-06 & n.6 (1988).

uncertainty surrounding such testing was resolved earlier than did petitioner's counsel.

C. Any Procedural Bar Is Excused Under the Doctrine Applicable to Successive Motions for Post-Conviction Relief

If the issue is alternatively framed as a question whether the claim is "successive" because it was not raised in the 3.850 motion adjudicated in 1991-92, the Circuit Court still should be reversed. A 3.850 motion containing new or different grounds is successive only if "the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules." Fla. R. Crim. P. 3.850(f). Because Rule 3.850 has its roots in an adaptation of the federal habeas statute, State v. Bolyea, 520 So. 2d 562, 563 (Fla. 1988), Florida has borrowed federal standards for "abuse of the writ." E.g., Card v. Dugger, 512 So. 2d 829, 831 (Fla. 1987). Under the most recent -- and stringent -- pronouncement in the federal courts, McCleskey v. Zant, 499 U.S. 467 (1991), appellant would be required to show cause and prejudice or a fundamental miscarriage of justice. The analysis already presented demonstrates that these requirements would be satisfied.

POINT II

THE CIRCUIT COURT ERRED IN DENYING GROUNDS III, VI, VII AND IX AS CLAIMS THAT WERE OR SHOULD HAVE BEEN RAISED ON DIRECT APPEAL

Four of the appellant's grounds for relief were denied by the Circuit Court on the rationale that they were or should have been raised on direct appeal.

Ground III seeks relief on the basis that the jury override in this case was unconstitutional. the Circuit Court found it procedurally barred because it was raised on direct appeal. (R-94.127-28.)

Ground VI seeks to invalidate the aggravating circumstance that appellant was previously convicted of a violent felony due to his contemporaneous convictions and Ground VII seeks to invalidate the aggravating circumstance that Charles Mays' murder was committed to avoid lawful arrest. The Circuit Court ruled that these two circumstances were challenged on direct appeal and any new arguments are barred because they should have been raised at that time. (Id. at 128.)

Ground IX seeks to invalidate the aggravating circumstance that Charles Mays' murder was committed in a heinous, atrocious and cruel manner. The Circuit Court also ruled that this challenge was barred because the contentions were raised on direct appeal. (Id.)

The Circuit Court erred in all four instances. Grounds III and VII were not available until after the appeal was decided because they arise out of the law of the case decided by the

appeal. Ground IV presents an argument to reconsider precedent of this Court, which is inherently available and never procedurally barred. Ground IX relies on decisional law decided after the appeal by the United States Supreme Court that this Court has found to apply retroactively.

A. Neither Ground III nor Ground VII Was Available Before this Court Decided the Appeal of Appellant's Resentencing

Ground III proceeds on the principle that the judicial override of a jury's recommendation of life imprisonment cannot rest on the sentencing judge's personal evaluation of the mitigating evidence if a reasonable jury could give that evidence more weight. While this is a valid point to raise on direct appeal -- and it was made -- when this Court failed to exercise its independent power of review to reevaluate the record, the claim arose anew. If this Court determines that the issue is more appropriately addressed in a petition for writ of habeas corpus,[11] it should be so treated (and it has been so raised in a contemporaneously filed petition).

Ground VII disputes the applicability of the Court's new construction of the "avoiding lawful arrest" aggravating circumstance. As this Court noted when it expanded the definition of that circumstance, the application was unprecedented. The claim accordingly could not arise until the new parameters of the new construction of the aggravating circumstance were established.

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[11] But see infra Point III, setting forth arguments why Rule 3.850 motions embrace all grounds available in habeas corpus review.

Since neither Ground II nor Ground VII are procedurally barred, this Court should either remand the 3.850 Motion to the Circuit Court for a determination on its merits or exercise its discretion to decide the merits on appellant's briefing before the Circuit Court and the State's opposition (if any) to the merits submitted to the Circuit Court.

B. Ground VI Raises A Question of the Validity of Precedent Which Always is Cognizable

Ground VI sets forth a critique of the contemporaneous conviction doctrine applied under the "previous conviction of violent felony" aggravating circumstance. Although appellant raised a similar argument on appeal, this Court has acknowledged its responsibility to reconsider its precedents when circumstances warrant. See, e.g., Haag v. State, 591 So. 2d 614 (Fla. 1992); cf. Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992) (entertaining a similar claim on habeas review). Justice Kogan encouraged a challenge such as the one mounted here in his concurring opinion in Ellis v. Florida, 622 So. 2d 991, 1002 (Fla. 1993). The timing is particularly appropriate because in Arave v. Creech, 113 S. Ct. 1534 (1993), the United States Supreme Court outlined a method for evaluating the constitutional validity of changing constructions of an aggravating circumstance. The previous conviction aggravating circumstance is peculiarly suited to such evaluation because of the changes in construction documented in the 3.850 Motion. (R-94.72-78.) Accordingly, this Court should reverse the finding of a procedural bar to this claim and either remand to the Circuit Court

for further proceedings or undertake to decide the issue based on the presentation in the 3.850 Motion.

C. Ground IX Relies on New Decisional Law That Has Been Retroactively Applied By This Court

Ground IX is a challenge to the "heinous, atrocious and cruel" aggravating circumstance based on the holding of Espinoza v. Florida, 112 S. Ct. 2926 (1992). In Espinoza the United States Supreme Court invalidated a standard jury instruction on the aggravating circumstance because it used a construction of the circumstance from Dixon v. State, 293 So. 2d 1 (Fla. 1973), that was unconstitutionally vague in lieu of the portion of Dixon that was approved in Proffitt v. Florida, 428 U.S. 246 (1976). Ground IX uses Espinoza to challenge the application of the aggravating circumstance in this case because the Circuit Court's and this Court's approval of the circumstance relies on precedent that follows the portion of Dixon upon which relief was granted by the United States Supreme Court in Espinoza.

Espinoza has been applied to grant postconviction relief where the sentence was final before Espinoza was decided. See, e.g., James v. State, 615 So. 2d 668 (Fla. 1993). The predicates for obtaining relief are a contemporaneous objection and presentation of the argument on direct appeal. See, e.g., Dougan v. Singletary, 19 F.L.W. S 439 (Fla. Sept. 8, 1994); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578 (1994). Appellant has satisfied those requirements and is entitled to have his claim heard collaterally. Whether this Court exercises its discretion to hear the matter in this 3.850 Motion appeal or on

the Petition for Writ of Habeas Corpus makes no difference. In either case appellant is entitled to have the previous judgment affirming application of the aggravating circumstance set aside, and a new determination of its applicability made. On the record before this Court that must lead to an invalidation of the aggravating circumstance in this case, with a reweighing of the aggravating and mitigating circumstances in light of the jury's recommendation of life, culminating in an order vacating the death sentence.

POINT III

THE CIRCUIT COURT ERRED IN DENYING GROUNDS IV, V, X AND XI AS GROUNDS THAT WERE NOT APPROPRIATELY RAISED BY A MOTION PURSUANT TO FLA. R. CRIM. P. 3.850

The Circuit Court summarily denied four grounds in the 3.850 Motion on the basis that they were not appropriately or properly raised in a 3.850 proceeding. Ground IV states that this Court failed to give meaningful appellate review on direct appeal of the resentencing, in violation of Parker v. Dugger, 481 U.S. 308 (1991). Ground V criticizes the lack of proportionality review and seeks relief under the authority of Kramer v. State, 619 So. 2d 274 (Fla. 1993), and Tillman v. State, 591 So. 2d 167 (Fla. 1991). Ground X raises appellant's actual innocence to the crimes for which he is sentenced to death, relying on the clear majority consensus on this issue set forth in Herrara v. Collins, 113 S. Ct. (1993), and the Florida constitutional guarantee against cruel or unusual punishment. Cf. Allen v. State, 636 So. 2d 494, 497 (Fla.

1994) (death penalty is prohibited by article I, sec. 17 of Florida Constitution if it is either cruel or unusual); Tillman v. State, 591 So. 2d 167, 169, n.2 (Fla. 1991). Ground XI directs the court to the insightful criticism by Justice Blackmun of the inherent contradictions in the constitutional commands attached to capital sentencing, Callins v. Collins, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of cert.), and urges that the Florida sentencing system be declared unconstitutional on the bases set forth by Justice Blackmun.

It is unclear why the Circuit Court viewed these grounds as "inappropriate" or "improper" in a 3.850 motion. A survey of the published opinions of this Court will reveal any number of cases in which analogous claims have been entertained in 3.850 motions and reviewed on appeal. E.g., Reed v. State, 640 So. 2d 1094, 1095-96 (Fla. 1994) (reviewing merits of claim made in 3.850 motion that Florida Supreme Court erred by striking two aggravating circumstances without considering effect on jury). The claims fall squarely within the description of the grounds for filing a motion under Rule 3.850, that is, there are claims of "the right to be released on the ground that . . . the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida . . . ." Fla. R. Crim. P. 3.850(a).

If the Circuit Court meant that the claims should have been raised by a petition for writ of habeas corpus, it also

erred.[12] Rule 3.850 simply formalizes the procedure to obtain the remedy previously available by writ of habeas corpus. It was copied nearly word-for-word from the federal habeas corpus statute and was intended to create a remedy exactly commensurate with that which had previously been available by habeas corpus. Bolyea, 520 So. 2d at 563. Construction of the Rule is bounded by the state constitutional provision guaranteeing habeas review. Haag, 591 So. 2d at 616. Thus if the ground may be raised by habeas corpus it may be raised in a 3.850 motion. If the Circuit Court felt that the decision was beyond its appropriate jurisdiction, it should have deferred judgment to this Court rather than denying the claim.

Further, Ground X appears quintessentially one designed for postconviction review, given the Court's view of the scope of the sentencing hearing. The Circuit Court previously ruled that it would not hear any evidence concerning guilt or innocence in the resentencing hearing. (R-89.618, 1133.) When, then, is such a claim ever to be heard?

In any event, Ground XI was appropriate for decision by the Circuit Court because a court is always obligated to determine a constitutional challenge to a movant's sentence, even where it is framed as a system-wide indictment, because the plain wording of Rule 3.850 creates that obligation. The Circuit Court made an alternative ruling on the merits, citing Vining v. State, 637 So. 2d 921 (Fla. 1994). While Vining was decided after Callins, there

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[12] In an abundance of caution, Grounds IV and V have been incorporated into the first basis for relief in appellant's contemporaneously submitted Petition for Writ of Habeas Corpus.

is no indication that this Court has considered Justice Blackmun's analysis and accordingly appellant respectfully submits that the Court should do so now and adopt its persuasive logic.

POINT IV

THE CIRCUIT COURT ERRED IN ISSUING AN ADVISORY RULING THAT IT WOULD NOT ENTERTAIN ANY FUTURE RULE 3.850 MOTION SPECIFYING INEFFECTIVE ASSISTANCE OF COUNSEL IN THE RESENTENCING PROCEEDINGS AS A GROUND FOR RELIEF

Appellant set forth a statement in a footnote of the 3.850 Motion explaining the reason he was not raising any claim regarding ineffective assistance of counsel during the resentencing proceedings and stating that appellant did not intend to surrender any such potential claim. (R-94.52 n.2.) Appellant has not asserted any such claim because he is represented in this proceeding by the same counsel that represented him at the resentencing proceedings. Under the unambiguous precedent of this Court, present counsel cannot challenge their own effectiveness in prior proceedings. See, e.g., Breedlove v. State, 595 So. 2d 8, 11 (Fla. 1992); Adams v. State, 380 So. 2d 421, 422 (Fla. 1980). This continued course of representation is by necessity; appellant's counsel has diligently searched for substitute counsel without success.

The State raised an objection to appellant's mere footnote reference and urged the Court to rule preemptively against any potential ineffectiveness claim. (R-94.106.) During the course of oral argument on the 3.850 Motion, one of the State's

counsel mentioned that he was aware of at least one law firm that had reviewed the court file. (Id. at 29.) Appellant's counsel replied that several firms had been solicited, but none were willing to accept the case. (Id. at 29-30.) The Court inquired about the possibility of representation by the Office of Capital Collateral Representative ("CCR") (id. at 27), and appellant's counsel explained that a previous period of representation by CCR had been terminated on grounds that made new representation untenable.[13] (Id. at 27-28.)

The Circuit Court accepted the State's invitation, calling the footnote statement in the 3.850 Motion "improper" and distinguishing Breedlove as turning on the peculiar facts of that case. (R-94.126-27 & n.2.) The Circuit Court did not hold an evidentiary hearing to determine if present counsel were serving by necessity, nor did the Circuit Court make any finding about the propriety of present counsel's continued representation.

Under the foregoing circumstances, the Circuit Court ruling was premature and lacking in factual foundation. Breedlove is not so peculiar in comparison to this case. The determinative facts described by this Court in Breedlove were the representation of Breedlove by the public defender's office at trial and the

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[13] CCR was counsel in a federal proceeding which was dismissed when CCR did not timely file an amended pleaded and from which CCR did not timely file a notice of appeal. Present counsel entered the case and obtained relief for appellant from CCR's errors. See Zeigler v. Wainwright, 805 F.2d 1422, 1424-25 (11th Cir. 1986). Appellant accused CCR of ineffective assistance of counsel in connection with those events, id., and it therefore seems inappropriate to have that agency take over representation of the case today.

representation by that same office on the first 3.850 motion. See 595 So. 2d at 11. Likewise, appellant was represented at his resentencing hearing by the same counsel who have brought the 3.850 motion upon which this appeal is based. No "strategic" reason for this continued representation can be deduced from the record before this Court; to the contrary, the record -- what little there is in the absence of a hearing -- provides a valid explanation for the current state of the case. Accordingly, the record does not conclusively show that appellant is not entitled to relief on any future claim of ineffective assistance of counsel at resentencing (if such a claim is ever raised by counsel who are capable of asserting it) and the Circuit Court ruling must be reversed under the terms of Rule 3.850(d).

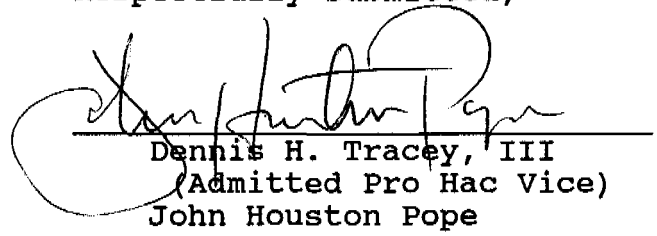
CONCLUSION

Based upon the foregoing, appellant respectfully requests that the decision and order of the Circuit Court denying the Motion to Vacate Sentence and the Motion for Release of Evidence and Appointment of Expert be reversed, and that this Court remand this case with instructions to entertain the claims raised herein on their merits, to authorize the testing of physical evidence by DNA typing methods, and to conduct an evidentiary hearing on the evidence created from such tests. Alternatively, regarding those purely legal issues raised in the 3.850 Motion, appellant respectfully requests that this Court find that the Circuit Court erred in holding those issues were procedurally barred and that

this Court proceed to resolve those claims based on the briefing presented to the Circuit Court and such other briefing as this Court may determine is helpful.

Dated: October 17, 1994

Respectfully submitted,

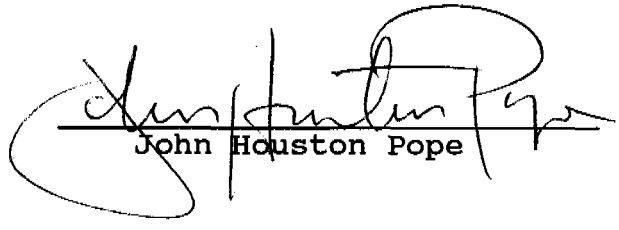


Dennis H. Tracey, III
(Admitted Pro Hac Vice)
John Houston Pope
(Fla. Bar No. 968595)

DAVIS, SCOTT, WEBER & EDWARDS, P.C.
100 Park Avenue
New York, New York 10017
(212) 685-8000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished by United States Mail to Jeff Ashton, Esq., Assistant State Attorney, 250 North Orange Avenue - 7th Floor, Orlando, FL 32801 and Margene Roper, Esq., Assistant Attorney General, 210 N. Palmetto, Suite 447, Daytona Beach, FL 32115, this 17th day of October, 1994.



John Houston Pope