

IN THE SUPREME COURT OF FLORIDA

NATHANIEL POOLE, JR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_)

CASE NO. SC01-2094

**ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL**

**PETITIONER’S MERIT BRIEF**

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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**STATEMENT OF CASE AND FACTS**

On July 26, 1981, Nathaniel Poole, Jr., petitioner, was convicted of kidnaping, sexual battery, robbery, and aggravated assault. He was sentenced to forty years on the kidnaping and sexual battery counts, fifteen years on the robbery count and five years on the aggravated assault count, all running concurrently.

Poole directly appealed from that conviction and the Fifth District Court of Appeal affirmed without opinion. Poole v. State, 413 So.2d 898 (Fla. 5<sup>th</sup> DCA 1982).

In 1993, petitioner filed a Rule 3.850 motion for post -conviction relief . (R 24-37) Appellant contended in his post-conviction motion that DNA testing would exonerate him. The trial court denied petitioner’s motion on July 28, 1994. (R 35-

38) On direct appeal, the Fifth District affirmed without written opinion. Poole v. State, 644 So.2d 327 (Fla. 5<sup>th</sup> DCA 1994).

On July 19, 2000, petitioner filed a petition for writ of coram nobis.

Petitioner asserted that none of his post conviction claims had ever been addressed on the merits due to conflicting case numbers. (R 2) Petitioner also specifically alleged that appropriate DNA analysis and comparison would exonerate him.

Petitioner was convicted at trial based on the discovery of type O blood at the crime scene. (R 3) Petitioner asserted that the technological advances in DNA typing constituted newly discovered evidence which would prove his innocence.

(R 1-19)

The trial court found that petitioner's petition for write of coram nobis was timely filed pursuant to Woods v. State, 750 So. 2d 592 (Fla. 1999). However, the trial court concluded that Petitioner had not satisfied the "due diligence" standard by showing that he could not have known of this claim earlier. Additionally, the trial court found that petitioner had not alleged "newly discovered facts" that would probably produce a reversal of his conviction. Additionally, the trial court concluded that the claim in petitioner's petition was previously addressed and denied by the trial court in petitioner's earlier 3.850 motion. (R 22)

Petitioner filed a timely notice of appeal to the Fifth District Court of Appeal. The majority concluded that petitioner's petition was untimely and successive and affirmed. Poole v. State, 791 So.2d 1232 (Fla. 5<sup>th</sup> DCA 2001). The Fifth District Court of Appeal also termed petitioner's claims "an abuse of process." Accordingly, the Court prohibited petitioner from filing any further pro se pleadings with the Fifth District Court of Appeal concerning his 1981 conviction and sentence. Id.

On September 13, 2001, petitioner filed a notice to invoke discretionary jurisdiction. Petitioner asserted that the Fifth District Court of Appeal opinion conflicted with Hall v. State, 752 So.2d 575 (Fla. 2000) and Martin v. State, 747 So.2d 386 (Fla. 2000). Petitioner also contended that the opinion conflicted with the intent of the legislative authority of Florida in enacting section 925.11, Florida Statutes (2001). On April 30, 2002 this Court rendered an order accepting jurisdiction, dispensing with oral argument, and appointing the Office of the Public Defender as counsel. This brief follows.

## SUMMARY OF ARGUMENT

Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes (2001) provide the petitioner, Nathaniel Poole, with a substantive right. This right was created by the legislature and was made effective October 1, 2001. By prohibiting petitioner from filing any further pro se pleadings relating to his 1981 conviction, the Fifth District Court of Appeal has effectively terminated petitioner's appellate rights guaranteed by the rule and the statute. Any additional pro se pleadings filed by petitioner attacking his 1981 conviction under Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes (2001) would clearly not be frivolous. The legislature has provided a new substantive right which petitioner has until October 1, 2003, to avail himself. Such pleadings would never be termed frivolous by any stretch of the imagination. Therefore, the Fifth District Court's premature action in labeling petitioner's most recent claim as an abuse of process, is completely inappropriate and will result in a denial of petitioner's constitutional right to due process of law under both the state and federal constitutions.

## ARGUMENT

THE DECISION BY THE FIFTH DISTRICT COURT OF APPEAL PREVENTS APPELLANT FROM OBTAINING DNA TESTING WHICH APPELLANT IS CLEARLY ENTITLED TO UNDER SECTION 925.11, FLORIDA STATUTES (2001) AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.853.

Florida Rule of Criminal Procedure 3.853 provides, in pertinent part:

- (a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under section 925.11, Florida Statutes.
- (b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:
  - (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
  - (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
  - (3) 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, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
  - (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an



issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;  
(5) a statement of any other facts relevant to the motion; and  
(6) a certificate that a copy of the motion has been served on the prosecuting authority.

The rule provides that a motion for post conviction DNA testing must be filed by October 1, 2003, at the latest. Fla.R.Crim.P. 3.853 (d)(1)(A). Any adversely affected party may take an appeal within thirty days from the date the order on the motion is rendered. Fla.R.Crim.P. 3.853 (f). Section 925.11, Florida Statutes (2001) provides the statutory authority for the procedure set forth in the rule.

The Fifth District Court of Appeal decided petitioner's case on August 17, 2001. Florida Rule of Criminal Procedure 3.853 became effective on October 1, 2001. The rule and Section 925.11, Florida Statutes (2001) clearly provide the appellant, Nathaniel Poole, with a substantive right. By prohibiting petitioner from filing any further pro se pleadings with the Fifth District Court of Appeal concerning his 1981 conviction and sentence, the court has effectively denied appellant of his fundamental right to appeal the disposition of any future motion filed pursuant to the rule and/or the statute. Indeed, Judge Sharp in her opinion concurring in part and dissenting in part, recognized this potential injustice. Judge Sharp wrote:

Poole appeals from a denial of his petition for a writ of error coram nobis, seeking exoneration from his 1981 case in which he was found guilty of kidnaping, sexual battery, robbery and aggravated assault. He has served his sentences in that case, and has sought collateral relief from his convictions in the past, while in prison. He claims his case was not reviewed on the merits and points to the trial court's latest order dismissing without prejudice his petition for writ of error coram nobis, dated February 14, 2000. Thus I conclude Poole's petition here is not successive.

Poole claims in his petition that he was convicted based on inaccurate eyewitness testimony and evidence that blood type "O" was discovered at the crime scene, and that he has type "O" blood. No other scientific tests were performed on the evidence, which consisted of pubic hairs, blood, semen, and oral swabs. He further alleges that if the currently available DNA tests were performed on the crime samples, he would be excluded as a perpetrator. Such tests were not available at the time of his trial in 1981. In this petition, he categorizes his claim as one based on newly discovered evidence. We have held that it is not, and have strictly applied the two-year limitations rule found in Florida Rule of Criminal Procedure 3.850 in cases raising this issue.

This year, however, the Florida Legislature created a statutory remedy for persons in the position of Poole, seeking exoneration from convictions or mitigation from sentencing, based on the examination of DNA evidence collected at the time the crimes were investigated. *See* Ch. 2001-97, Laws of Fla. Part of the statute took effect July 1, 2001 and part takes effect October 1, 2001. This statute also contains time limitation periods, but it allows a two- year window from its effective date, at the least, in which to apply

for a remedy. Although Poole's petition in this case does not track the requirements of the statute, it is not clear from this record that he could not meet its essential requirements. Thus, there is no reason why this court should, in affirming this case, bar Poole from seeking a remedy under the DNA statute, which the courts in their wisdom have denied him. If we must affirm, it should be without prejudice to seek a remedy under Ch. 2001-97.  
Fla.App. 5 Dist.,2001.

Poole v. State, 791 So.2d 1232, 1234 (Fla.App. 5 Dist.,2001) (Footnote omitted.)

Although Judge Sharp asserts that petitioner does not track the requirements of the new statute, closer scrutiny reveals that petitioner actually does meet the minimum requirements relating to the contents of the motion. Fla.R.Crim.P.3.853 (b). Specifically, petitioner provides a factual background (R 4-5); a description of the physical evidence containing DNA to be tested [specifically alleged semen found on the vaginal swab, panties, hair samples, and blood] (R 6); a statement that the evidence was not tested previously for DNA (R 6-9); a statement that the movant is innocent (R 17); a statement that the identification of the movant is a generally disputed issue (R 16); as well as a statement of any other facts relevant to the motion. As such, this Court can find that the motion previously filed in the trial court is facially sufficient under Florida Rule of Criminal Procedure 3.853 and remand for a full blown evidentiary hearing. In the alternative, this Court should

quash the decision of the Fifth District Court of Appeal wherein the court prohibits any future pro se filings in that court attacking petitioner's 1981 conviction.

## CONCLUSION

Based upon the authorities cited and the argument presented, petitioner asks this Honorable Court to remand to the trial court for an evidentiary hearing on his DNA claim pursuant to Florida Rule of Criminal Procedure 3.853. In the alternative, petitioner asks this Court to quash that portion of the opinion rendered by the Fifth District Court of Appeal prohibiting any future pro se filings in attacking his 1981 conviction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Nathaniel Poole, Jr., DC#078941, Hamilton Correctional Institution, Main Unit, 10650 S.W. 46<sup>th</sup> St., Jasper, FL 32052 this 29th day of July, 2002.

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CHRISTOPHER S. QUARLES  
ASSISTANT PUBLIC DEFENDER

**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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