IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-781
Lower Tribunal Case No. 78-0041-CFA

ROBERT ANTHONY PRESTON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of Robert Anthony Preston, Jr. in reply to the Answer Brief of the appellee, the State of Florida. The record on appeal concerning the 1981 trial proceedings shall be referred to as "R ___" followed by the appropriate volume and page numbers. The current post-conviction record on appeal will be referred to as "PC2-R or Supp.R. ____" followed by the appropriate volume and page numbers. The appellant's Initial Brief will be referred to as "IB. ___" followed by the appropriate page number and the Answer Brief of the appellee, the State of Florida, will be referred to as "AB. ___" followed by the appropriate page number. Any other references will be self-explanatory or otherwise explained. The appellant will rely upon the arguments in his Initial Brief on the claims identified as Arguments II, IV, V, VI and VIII.

STATEMENT OF THE CASE AND FACTS

In the Answer Brief, the appellee provided a list of the post-Huff[1] status hearings which were held by the postconviction court. (AB. 10).[2] Because that list is incomplete, the appellant notes the record also reflects that the postconviction court held the following additional post-Huff status hearings: November 21, 2000 (PC2-Supp.R. Vol. IX 1446); April 5, 2001 (PC2-Supp.R. Vol. IX 1495); June 26, 2001 (PC2-Supp.R. Vol. IX 1519); August 13, 2002 (PC2-Supp.R. Vol. X 1737); October 16, 2002 (PC2-Supp.R. Vol. X 1739); January 16, 2003 (PC2-Supp.R. Vol. X 1745); September 11, 2003 (PC2-Supp.R. Vol. XI 1793); and November 12, 2003 (PC2-Supp.R. Vol. XI 1794).

On another matter, the appellant disagrees with the appellee's statement regarding the appellant's pre-hearing request to test items for PCP usage. The appellee is correct that the appellee withdrew his motion to test certain trial evidence for PCP. However, the appellee is incorrect in stating that this issue was never developed and is not the subject of this appeal. (AB. 11, fn.4). In fact, the appellant's decision not to seek PCP testing was a result of the agreement with the

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[1]Huff v. State, 622 So.2d 982 (Fla. 1993)Huff v. State, 622 So.2d 982 (Fla. 1993).

[2]The listed status hearing for October 21, 2001 (AB. 10), actually took place on October 26, 2001. (PC2-R. Vol. I 122).

State to file two stipulations regarding the issue.[3] Further, the failure of re-sentencing counsel to pursue laboratory testing to corroborate PCP usage, despite counsel's knowledge of such testing, was addressed to the court below in closing argument (PC-2 Supp. R. Vol. XIII 2057-58) and in appellant's brief for Argument II. (IB. 45; 46-48).

[3]The July 16, 2001, Stipulation Regarding Use of PCP (PC2-Supp.R. Vol. IX 1581) and the December 29, 2003, Stipulation Regarding Use of Expert's Deposition in Lieu of Testimony at Evidentiary Hearing. (PC2-Supp.R. Vol. XI

ARGUMENT I

THE LOWER COURT ERRED IN DENYING THE NEWLY DISCOVERED DNA EVIDENCE CLAIM

When the appellee refers to the prosecutor's closing argument statements that the hairs in evidence "... are independently significant ... [e]ither one of those could have cleared or served to exculpate Defendant ...," (R. Vol. IX 1790-91), the appellee indicates that appellant "disregards the fact that closing argument is not evidence." (AB. 25). Appellant respectfully suggests that this is a misreading of the argument.

The appellant recognizes that the prosecutor's closing argument is not evidence. Nixon v. State, Nos. SC92-006, SC93-192 & SC01-2486 (Fla. April 20, 2006). Yet, the appellant also recognizes that the appellee used defense counsel's closing argument, and nothing else, to argue that the hair analyst's testimony was "effectively discredited" by the defense. (AB. 27).

There is no doubt that closing argument is a critical component of a trial. As Professor Steven Lubet noted in Modern Trial Advocacy: Analysis and Practice:

> Final argument is the advocate's only opportunity to tell the story of the case in its entirety, without interruption, free from most constraining formalities. Unlike witness examinations, the final argument is delivered in counsel's own words and without the need intermittently to cede the stage to the opposition; unlike the opening statement, it is not bound by strict rules governing proper and

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1802).

improper content. In other words, final argument is the moment for pure advocacy, when all of the lawyer's organizational, analytic, interpretive, and forensic skills are brought to bear on the task of persuading the trier of fact.

... [A]t final argument the attorney can [then] nail down the image [that counsel has created during the trial] by pointing out the crucial details, weaving together with witnesses' accounts, and explaining the significant connections. All three aspects of the trial – opening, witness examinations, and closing – should combine to evoke a single conception of events. [p. 443]

While final argument can and should be the capstone of a well-tried case, it is unlikely to be the saving grace of a poor one. [p. 444]

The knowledge of the individual witnesses, not to mention trial strategy and luck, may result in the scattering of such details throughout the trial. It is during final argument that the attorney can reassemble the details so that they lead to the desired result. [p. 454]

Final argument is the only time when the attorney may confront directly the character of witnesses and explain why some should be believed and others discounted. [p. 459]

Final argument provides the attorney an occasion to apply the law to the facts of the case. Discussion of law is extremely limited during the opening statement and all but forbidden during witness examinations, but it is the staple of the final argument. In most jurisdictions counsel may read from the jury instructions and explain exactly how the relevant law dictates a verdict for her client. [p. 463]

The structure of the final argument must be developed for maximum persuasive weight. The central thrust of the final argument must always be to provide reasons – logical, moral, legal, emotional – for the entry of a verdict in your client's favor. Every aspect of the final argument should contribute in some way to the completion of the sentence, "We win because...." In the broadest sense, of course, the desired conclusion should simply follow from the facts and law of the case. [p. 471]

> Final argument is the time for gathering details. Although the particulars may have occurred at widely different times and have been testified to by several witnesses, they can and should be aggregated to make a single point in final argument. [p. 479]
>
> It is essential, therefore, that every closing argument address the subject of common sense. Explain why your theory is realistic, using examples and analogies from everyday life. [p. 484]
>
> Some part of every final argument should be devoted to the court's forthcoming jury instructions as well as to the elements of the claims and defenses in the case. Jury instructions can be extremely important in the way that the jurors decide the case, and it is to counsel's advantage to invoke some of the instructions during argument. [p. 489]
>
> Final argument is generally regarded as the advocate's finest hour. It is the time when all the skills – no, the arts – of persuasion are marshaled on behalf of the client's cause. While a polished delivery will not rescue a lost cause, a forceful presentation can certainly reinforce the merits of your case. [p. 491]
>
> Steven Lubet, Modern Trial Advocacy: Analysis and Practice, (National Institute for Trial Advocacy 1997).

Florida courts have similarly discussed the importance and nature of closing argument:

> "The purpose of closing argument is to help the jury understand the issues presented in a case by applying the evidence to the applicable law. See Murphy v. Int'l. Robotic Systems, Inc., 766 So.2d 1010, 1028 (Fla. 2000)(quoting Hill v. State, 515 So.2d 176, 178 (Fla. 1987).
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> In Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the United States Supreme Court explained the purpose of closing argument as follows:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. Herring, 422 U.S. at 862, 95 S.Ct. 2550 (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)."
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> Goodrich v. State, 854 So.2d 663, 664-65 (Fla. 3rd DCA 2003).

See, also, Hunter v. Moore, 304 F.3d 1066, 1070 (11th Cir. 2002)("Based on the Supreme Court's citation of Herring [v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)] in the [United States v.] Cronic [466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)] opinion, it is clear that closing argument is a 'critical stage" of a trial...').

Constitutional deficiencies in closing argument have long been matters for review by appellate and postconviction courts. See, e.g., Nixon v. State, Nos. SC92-006, SC93-192 & SC01-2486 (Fla. April 20, 2006)(regarding ineffective assistance of counsel claim for concession of guilt); Chambers v. State, 31 Fla.L.Weekly D1016 (Fla. 2d DCA April 7, 2006)(conviction reversed and remanded due to improper prosecutorial closing argument); Garron v. State, 528 So.2d 353 (Fla. 1988)(issues regarding improper prosecutorial closing argument

considered on direct appeal); and Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987)(issues regarding improper prosecutorial closing argument considered in habeas review).

It is clear that the value given by the prosecutor to the hair evidence in closing argument should be considered by the courts in the evaluation required by Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998), cert. denied, 523 U.S. 1040, 118 S.Ct. 1350, 140 L.Ed.2d 499 (1998). This Court, in fact, recently considered the prosecutor's closing argument in order to identify the State's theory of the case in approving the denial of a DNA motion under Rule 3.853. Van Poyck v. State, 908 So.2d 326, 329 (Fla. 2005). Therefore, that the prosecutor told the jury that the hair evidence was significant and could have cleared the appellant is something the jury had to consider and which the courts should now weigh.

The appellant does agree with the appellee that Jones also requires the court to determine "whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence ... and should further consider the materiality and relevance of the evidence..." Jones, 709 So.2d at 521 (quoted at AB. 21). The appellant notes that the content of the postconviction court's ruling fails to show any such detailed considerations ("Finally, in regards to the DNA sub-issue, because the belt buckle hair was not the only item in this case that tied the Defendant to the victim, it should be dismissed. The blood and the fingerprints are

sufficient evidence. Post-conviction relief should be denied as to this claim.") (PC2-Supp.R. Vol. XIII 2133).

However, the appellee is wrong when it states that the newly discovered evidence would be nothing more than impeachment evidence. (AB. 27). There is nothing about impeachment related to the hair evidence. Impeachment evidence is "evidence used to undermine a witness's credibility." Black's Law Dictionary 597 (8th ed. 2004). Here, the facts show otherwise and the jury was told by the prosecutor that "[t]he hair, to a certain extent, is direct and positive to the extent that it comes off clothing associated with the Defendant. It's circumstantial in the sense that it is not absolutely iron clad conclusive, but it's just, in no way distinguishable, and don't you think if there was any question in their mind as to whether or not it was in any way distinguishable, that they wouldn't have an expert in here much as they did with the doctor?" (R. Vol. X 1814-15). The postconviction court did not determine that the hair evidence was impeachment evidence and the appellee should not suggest that this was part of the ruling.

The appellee is similarly wrong when it suggests that the trial court considered all the evidence in finding that postconviction relief should be denied. (AB. 23). Again, the court's ruling only considered three items of circumstantial evidence brought against the appellee: "... the belt buckle hair was not the only item in this case that tied the Defendant to the victim ... [t]he blood and the

fingerprints are sufficient evidence." (PC2-Supp.R. Vol. XIII 2133).

In dismissing the impact of the DNA test on the belt buckle hair, the court below ignored the prosecutor's own presentation and theory regarding the weight of this evidence. The court's cumulative analysis was not conducted so that the trial court had a "total picture" of the case. Lightbourne v. State, 742 So.2d 238, 247-48 (Fla. 1999). The prosecutor's closing statements that the hair evidence was significant and could have cleared the appellant are not even remotely considered or analyzed in the ruling below or in the appellee's brief. The prosecutor, himself, told the jury that the evidence would probably produce a different result on retrial. He also asked the jury, before knowing about DNA testing, "[d]on't you think if there was any question in their mind as to whether or not it was in any way distinguishable, that they wouldn't have an expert in here much as they did with the doctor?" (R. Vol. X 1814-15). The appellant has now answered that question with an affirmative response and the DNA testing and results discussed here. By either the new evidence standard or the chipping away of circumstantial evidence standard (IB 41-44), the DNA tests show that the results of Mr. Preston's trial are unreliable and unfair. Consequently, this Court, while giving deference to the lower court's findings of fact, should not find that they were supported by competent and substantial evidence. Melendez v. State, 718 So.2d 746, 747 (Fla. 1998); Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998), cert. denied, 523 U.S.

1040, 118 S.Ct. 1350, 140 L.Ed.2d 499 (1998); Peek v. State, 395 So.2d 492, 495 (Fla. 1981). The lower court should be reversed and this case remanded for a new trial.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT FLORIDA'S RULE PROHIBITING APPELLANT'S COUNSEL FROM INTERVIEWING JURORS VIOLATES EQUAL PROTECTION AND DUE PROCESS RIGHTS, AND THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The appellant acknowledges the status of Florida law regarding juror interviews. The inability to conduct "fishing expeditions," Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000), is part of the "catch-22" referenced in appellant's initial brief. (IB. 52). Yet, when the appellee refers to the "insufficiently pled" motion for its failure to allege juror misconduct, (AB. 37), the appellee, as did the postconviction court, fails to acknowledge the dilemma in which defense counsel are placed in Florida. The appellee, as did the postconviction court, fails to acknowledge that academic researchers, journalists and lawyers not associated with a case, but not the appellant, could interview the appellant's jury panels. The appellee, as did the postconviction court, fails to acknowledge that academic researchers, journalists and lawyers not associated with a case, but not the appellant, could thereby determine whether legal grounds exist to pursue a jury

challenge. The appellee, therefore, as did the postconviction court, fails to acknowledge that academic researchers, journalists and lawyers not associated with a case are thereby treated differently under the law compared to the appellant. Because determining the number of fish in a pond, as the equivalent of learning whether legal grounds exist for a challenge, can be done by academic researchers, journalists and lawyers not associated with a case, but not by defendants, the appellee's rights to due process and equal protection are thereby violated. Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY TRIAL COUNSEL'S FAILURE TO CHALLENGE THE COMPETENCY OF THE MEDICAL EXAMINER

The appellee refers to Florida law in stating that Claim 41 of the Rule 3.850 motion contained mere conclusory allegations. (AB. 52). However, even though the appellee quotes the amended claim in full (AB. 49-50), the appellee, without any analysis, specifics or references, merely concludes that the claim was deficient.

Despite the failure of the trial court and appellee to discuss the issue, the appellant notes that the appellant's amended claim was filed with the court on August 13, 2002, well after the 2001 rule amendments. As a claim filed after

October 1, 2001, Rule 3.851(f)(5)(A)(i) should have required an evidentiary hearing because it was certainly presented as a claim requiring a factual determination. Mungin v. State, 31 Fla.L.Weekly S215 (Fla. April 6, 2006). The appellant also notes that neither of the court's two rulings on claim 41 included relevant record excerpts that would have refuted the specific allegations in the claim. (PC2-Supp.R. Vol. X 1759-60; Vol. XIII 2133-34). Anderson v. State, 627 So.2d 1170 (Fla. 1993). There likewise is no indication that the court had read or reviewed the deposition transcript of the defense expert before ruling on the claim as was requested by the parties. (Transcript of January 16, 2003, status hearing; pp. 6, 11-12). Consequently, this Court should remand the case for an evidentiary hearing on claim 41.

CONCLUSION AND RELIEF SOUGHT

The lower court improperly denied Rule 3.850 relief to Robert Anthony Preston, Jr. This Court is respectfully urged to order that his convictions and sentences be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this _____ day of _____, 2006.

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I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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