IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 12-773

ETHERIA V. JACKSON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's summary denial of Mr. Jackson's motion for post conviction DNA testing brought pursuant to Florida Rule of Criminal Procedure 3.853.

Citations shall be as follows: The record on appeal from Mr. Jackson's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post conviction DNA record on appeal shall be referred to as "ROA" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Etheria Jackson has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Etheria Jackson, through counsel, respectfully requests this Court grant oral argument.

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Mr. Jackson has always maintained that he is not guilty of the murder of Linton Moody. Mr. Jackson has always said that Linda Riley killed Mr. Moody. Mr. Jackson only helped Ms. Riley dispose of the body after the murder. The courts have never granted Mr. Jackson an evidentiary hearing after his conviction and sentence to death, even thought he alleged significant violations of his constitutional rights and the jury recommended death by a mere 7-5 majority.

Mr. Jackson was tried, convicted, and sentenced to death in Jacksonville, Florida. The court entered judgment and sentence August 8, 1986. Despite the presentation of unrebutted mitigating evidence, the trial judge found no mitigating circumstances. The judge found five aggravating circumstances. This Court affirmed Mr. Jackson's sentence, despite holding that one of the aggravating circumstances was unsupported by the evidence. Jackson v. State, 530 So.2d 269 (Fla. 1988). The United States Supreme Court denied certiorari. Jackson v. Florida, 488 U.S. 1050 (1989).

Governor Martinez included Mr. Jackson's death warrant among five signed March 29, 1990, a year when at least 38 warrants were signed. The Capital Collateral Representative was responsible for most of the cases in which warrants were signed, and was overwhelmed. Counsel responsible for Mr. Jackson's post-

conviction pleadings at that time overlooked ineffective assistance of counsel claims due to the untenable case load imposed by the Governor's actions. The claims which were raised in Mr. Jackson's Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief were summarily denied without an evidentiary hearing. This Court denied Mr. Jackson's appeal and also denied state habeas corpus relief. Jackson v. State, 633 So.2d 1051 (Fla. 1993). Mr. Jackson timely filed a Petition for Writ of Habeas Corpus in the Federal District Court, Northern District of Florida. The Federal District Court and the Eleventh Circuit Court of Appeals denied relief. Jackson v. Crosby, 437 F.3d 1290 (11th Cir. 2006).

Mr. Jackson filed a *pro se* successive motion for post conviction relief in the circuit court July 8, 2003. Capital Collateral Regional Counsel - Middle (CCRC-M) filed a notice adopting the *pro se* motion August 18, 2003. The claims made did not require an evidentiary hearing, and the parties filed closing arguments. The post conviction court denied the motion June 23, 2005. This Court affirmed, Jackson v. State, 952 So.2d 1190 (Fla. 2006)(unpublished order).

On April 24, 2007, Mr. Jackson filed a successive 3.851 motion based on the newly discovered evidence of Angel Diaz' botched execution. That motion was summarily denied by the state circuit court January 27, 2009 and a Motion for Rehearing was denied on February 19, 2009. Mr. Jackson timely appealed that summary denial to this Court under case number SC09-828, which was affirmed in

part. This Court rejected Mr. Jackson's lethal injection claim, but reversed the denial of Mr. Jackson's challenge to the constitutionality of Fl. Stat. 27.702. This Court granted relief on that claim "only to the extent that chapter 27 permits CCRC attorneys to represent capital defendants in method-of-execution challenges raised under section 1983." Jackson v. State, 50 So.3d 1137 (Fla. 2010) (unpublished order).

On April 28, 2010, while Mr. Jackson's lethal injection appeal was pending, he filed a Motion for Post Conviction DNA Testing in the state circuit court pursuant to Florida Rule of Criminal Procedure 3.853. In the motion, Mr. Jackson notified the court that four of the five items he was seeking to test could not be located at either the Clerk's Office or the Sheriff's Office. Because the evidence could not be located, Mr. Jackson asked for an evidentiary hearing to determine the location of the evidence. ROA Vol. I, p. 12. Mr. Jackson also argued that denying him access to the evidence for DNA testing would violate his due process and equal protection rights under the Federal and Florida Constitutions. Id. at 12-13.

Without requiring a response by the State, on December 15, 2011, the state circuit court issued an order denying Mr. Jackson's motion. The Order did not contain any legal analysis or any factual findings supporting the denial of the motion. Mr. Jackson filed a motion for rehearing on December 30th, 2011 alleging that the state circuit court failed to follow the procedures set forth in Fl. R. Crim.

Pro. 3.853 (c)(2). On January 6, 2012, the state circuit court entered its Order granting rehearing and directing the State to file a response to Mr. Jackson's 3.853 motion. The State filed its response on or about February 6, 2012, conceding that four of the five items were missing. Less than three weeks later, on February 24, 2012, the state circuit court denied Mr. Jackson's Motion for DNA testing. The circuit court failed to hold any type of hearing to determine the location of the evidence or address Mr. Jackson's arguments. This timely appeal follows.

STATEMENT OF FACTS

At the time of the murder, Linda Riley, Mr. Jackson's girlfriend, lived with her two children at 1770 Payne Street in Jacksonville. TR Vol. XVI, p. 567. Mr. Jackson, who sometimes stayed at the apartment, was the father of the youngest child, Letheria. Id. Ms. Riley had purchased a washing machine from the victim Mr. Moody and was making monthly payments of $39.95. Id. at 568. Ms. Riley would pay Mr. Moody out of her $240 monthly AFDC check. Id. at 569. Ms. Riley testified that Mr. Moody would come by at the beginning of every month, carrying large amounts of cash. He would cash her AFDC check for her and take out his payment. Id. This went on for seven to eight months before the murder. Id.

Between 8:30 and 9:00 a.m. on December 3, 1985, Mr. Moody came to the apartment to collect his money. Id. at 571. Ms. Riley testified as to what

happened after Mr. Moody arrived at the apartment that morning. Ms. Riley was the State's only purported eyewitness to the murder. According to Ms. Riley, after Mr. Moody arrived, she went to the mailbox to get her AFDC check and when she came back, Mr. Jackson had come downstairs and was talking to Mr. Moody. Id. at 573. Ms. Riley claimed after Mr. Moody cashed her check, Mr. Jackson walked behind Mr. Moody, put a knife to his neck, and then forced him to the floor. Id. at 574. Ms. Riley testified that she tied Mr. Moody's hands and went through his pockets, but only at the direction of Mr. Jackson. Id. at 575-577. Ms. Riley testified that Mr. Jackson also went through Mr. Moody's pockets and took out money. Id. at 576. Ms. Riley testified that at some point her daughter came downstairs and Ms. Riley carried her back upstairs. Id. at 578. She claimed that when she came back downstairs, Mr. Jackson was choking Mr. Moody with a belt. Id. Ms. Riley testified that as Mr. Moody struggled, Mr. Jackson began beating Mr. Moody in the face with his arm cast. Id. at 579.

According to Ms. Riley, while this attack was going on in her living room, Ms. Riley went to the kitchen to make breakfast for the children. Id. at 579. When she looked back in the living room, she claimed that Mr. Jackson was straddled across Mr. Moody's chest and was stabbing him with a knife. Id. She testified that she saw the knife break and that Mr. Jackson got another knife and continued stabbing him. Id. at 579-580. After Mr. Moody was dead, Ms. Riley testified that

she and Mr. Jackson rolled him up in the carpet. Id. at 587. Then Ms. Riley went to get Mr. Moody's car and drove it around back of the apartment where she then helped to load the body into the back of his station wagon. Id. at 587-88. Ms. Riley testified that Mr. Jackson drove off with the body. Id.

Ms. Riley remembered throwing away the knife that had broken, but could not recall what she had done with the other knife, and may have put it in the sink. TR Vol. XV, p. 641. She also threw one of the belts away, but could not recall if it was the belt used to strangle Mr. Moody or the belt used to tie him up. Id. at 639-640. Ms. Riley testified that she and Mr. Jackson used Mr. Moody's money for various things, including making payments on outstanding bills, buying clothes and a new rug, and renting a car. Id. at 649-657. Ms. Riley enjoyed the profits of this crime for several days before she decided to go to the police on Thursday, December 5, 1985. This also happened to be the same day that Mr. Moody's body was found. TR Vol. XIV, p. 549. Ms. Riley testified that at some point during her encounter with the police, Detective Warren told her that she could either be a defendant or a witness. TR Vol. XV, p. 682.

Mr. Moody's body was found on after law enforcement investigated a report of an abandoned car at 3491 Brentwood Avenue. TR Vol. XIV, p. 508. The body was still rolled in the carpet in the back of the station wagon, and Officer Godbee with the Jacksonville Sheriff's Office arranged for a flat bed wrecker to take the

car and its contents to the Florida Department of Law Enforcement Crime Lab. Id. at 514. Once there, the carpet was unrolled and photographed. Id. at 515. Mr. Moody's body was taken to the Office of the Medical Examiner where an autopsy was performed. Dr. Lipkovic turned over Mr. Moody's clothing to Detective Warren on December 16, 1985. ROA Vol. I, p. 18. The items Detective Warren received from Dr. Lipkovic included Mr. Moody's tan pants and his eyeglasses. Id.

Detective Warren testified at the trial regarding statements that Mr. Jackson made to him after his arrest for the murder of Mr. Moody. According to Detective Warren's testimony, Mr. Jackson was not present when Mr. Moody was killed and Mr. Moody was already deceased and rolled up in the carpet when Mr. Jackson saw him. TR Vol. XVI, p. 828. Mr. Jackson maintained that it was Linda Riley who killed Mr. Moody and he only helped her to cover it up by helping her dispose of the body. Id. at 829, 838.

Mr. Jackson sought DNA testing on the following evidence 1) The arm cast recovered from Mr. Jackson (Entered as State's Exhibit 29), 2) Two butcher knives collected from Linda Riley's apartment on December 6, 1985 by Detective Warren and Detective Moneyhun and stored in the property room of the Jacksonville Sheriff's Office under property control number 8513844, 3) The brown belt collected from Linda Riley's apartment on December 6, 1985, by Detective Warren and Detective Moneyhun and stored in the property room of the

Jacksonville Sheriff's Office under property control number 8513844, 4) Mr. Moody's tan pants collected by Detective Warren from the Medical Examiner on December 16, 1985, and stored in the property room of the Jacksonville Sheriff's Office under property control number 8514263, and 5) Mr. Moody's eye glasses collected by Detective Warren from the Medical Examiner on December 16, 1985, and stored in the property room of the Jacksonville Sheriff's Office under property control number 8514263.

An investigator from CCRC contacted the Jacksonville Sheriff's office on March 17, 2010, to inquire about the location of the above evidence. The Sheriff's Office acknowledged that the above property control numbers were part of their numbering system. However, the Sheriff's Office indicated that the computer system showed that the above evidence was not in its possession. The investigator then spoke with property custodian James Burt who sent a fax verifying that all of the evidence was transmitted to the Clerk's Office in 1986. ROA Vol. I, p. 17.

The investigator traveled to the Clerk's Office on March 23, 2010 to view the evidence. The arm cast was present and preserved in a plastic bag. The remaining evidence was not in the possession of the Clerk. Therefore, Mr. Jackson asserted in his 3.853 Motion that the last known location of the butcher knives, brown belt, tan pants, and eyeglasses was the property room of the Jacksonville Sheriff's Office under the property control numbers listed above. ROA Vol. I, p.

9.

In its Response, the State asserted that four of the five items Mr. Jackson sought to have tested were no longer in the possession of the State. ROA Vol. I, p. 39. The State's Response included an affidavit from the same property custodian, James Burt. The affidavit stated that the items listed under property control numbers 8514263 and 8513844 "were *likely* destroyed from the water damage in the Christopher Building." Id. at p. 57(emphasis added). The State further argued that even if the four missing items could be located, Mr. Jackson has not demonstrated that DNA testing of those four items would exonerate him.

Mr. Jackson argued that the state circuit court should hold an evidentiary hearing to determine the location of the missing evidence. The state circuit court denied this request in its order denying relief. The state circuit court found that "the claims in the motion are purely speculative and fail to demonstrate a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if DNA evidence related to them had been admitted at the trial." ROA Vol. I, p. 319. The state circuit court did not address Mr. Jackson's constitutional claims. This appeal follows.

SUMMARY OF ARGUMENT

The lower court erred in failing to grant relief for the following reasons. First, Mr. Jackson made a sufficient showing under Florida Rule of Criminal Procedure 3.853 that he should be allowed to conduct DNA testing on the evidence. Mr. Jackson asserted that he is innocent of the murder of Linton Moody and innocent of the death penalty, that there exists a reasonable probability that DNA testing would exonerate Mr. Jackson or mitigate his death sentence, and that his identification as the murderer is in dispute. Every requirement of the rule was met.

Second, the lower court erred in failing to grant an evidentiary hearing to determine the location of the missing evidence. The affidavit produced by the state that the evidence was "likely" destroyed was insufficient. The State failed to provide documentation as to when the alleged water damage occurred and whether Mr. Jackson's evidence was even in that location at the time of the damage. Further, Mr. Burt had previously implied that the evidence was in the custody of the Clerk. Absent a full and fair hearing, the lower court's finding that the evidence is missing is speculative.

Finally, the lower court's denial of Mr. Jackson's request to submit this evidence for DNA testing violates his rights under the due process and equal protection clauses of the Florida and United States constitutions. As noted above, the lower court wholly failed to address Mr. Jackson's constitutional claims.

STANDARD OF REVIEW

Because this issue involves a mixed question of law and fact, this Court should apply a standard of *de novo* review, with deference given to any factual findings by the lower court that are supported by competent, substantial evidence.

ARGUMENT I

MR. JACKSON MADE A SUFFICIENT SHOWING FOR POST CONVICTION DNA TESTING UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.853 AND SECTION 925.11, FLORIDA STATUES. THEREFORE, THE LOWER COURT ERRED IN DENYING MR. JACKSON'S MOTION.

Mr. Jackson has always maintained that he is not guilty of the murder of Linton Moody, that it was Linda Riley who killed Mr. Moody and that Mr. Jackson only helped Ms. Riley dispose of the body after the murder. DNA testing was unavailable at the time of Mr. Jackson's trial. The strongest evidence against him came from Linda Riley, who was never arrested or charged for her role in the crime. When offered a choice between being a witness or a defendant, she unsurprisingly chose to be a witness. Without her testimony, the State would not have been able to convict Mr. Jackson and secure a death sentence against him. The DNA testing sought by Mr. Jackson would tend to exonerate him or mitigate his sentence. He satisfied all of the requirements in the statute and rule, and DNA testing should have been granted.

Florida Statutes, § 925.11, provides as follows:

(1) Petition for examination.—

(a) 1. A person who has been tried and found guilty of committing a crime and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced which may contain DNA (deoxyribonucleic acid) and which would exonerate that person or mitigate the sentence that person received.

(b) A petition for post-sentencing DNA testing under paragraph (a) may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

Rule 3.853, Florida Rules of Criminal Procedure, provides, in pertinent part, the requirements that must be met for the court to grant a motion for DNA testing as follows:

(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 establishing that the movant is not the person who

committed the crime;

(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.

Florida courts have determined that the purpose of the DNA testing statute is "to provide defendants with a means by which to challenge convictions where there is 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" Zollman v. State, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) (quoting In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 636 (Fla. 2001).

The threshold sufficiency requirement has intentionally been established to offer broad access to the review process. Accordingly, "a claim is facially sufficient with regard to the exoneration issue *if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if*

the DNA evidence had been admitted at trial." Knighten v. State, 829 So. 2d 249, 252 (Fla. 2d DCA. 2002) (emphasis supplied); King v. State, 808 So. 2d 1237, 1247 (Fla. 2002).

The crux of the State's argument and the lower court's ruling was that because Mr. Jackson vigorously challenged the State's evidence at trial through cross examination and argued that Linda Riley was the actual killer, Mr. Jackson's 3.853 motion did not demonstrate "a reasonable hypothesis…in which that evidence [he is seeking to test] would change the outcome in the defendant's favor." ROA Vol. II, p. 314. Each piece of evidence will be discussed in turn.

1. Arm Cast

Ms. Riley testified that Mr. Jackson beat Mr. Moody about the face repeatedly with his cast. The medical examiner testified that Mr. Moody had lacerations and bruises on his face and mouth consistent with being struck by a cast. TR Vol. XVI, p. 898. If this testimony is accurate, then blood, saliva, and/or skin cells from Mr. Moody would be present on the cast. The lower court relied heavily on the fact that Mr. Jackson told the police that he had washed the cast and concluded that was why forensic testing failed to produce any blood trace evidence. However, in 1985/1986, no tests existed to determine whether there was any DNA evidence from saliva, sweat or skin cells. This type of "touch" DNA was not available at the time of Mr. Jackson's trial. The lower court focused on the lack of blood on the

cast and did not address Mr. Jackson's argument that if he was the killer, the cast should contain the saliva, sweat, or skin cells of Mr. Moody.

The lower court's conclusion that washing the cast would eliminate any DNA evidence is not only speculative but completely inaccurate. A 2003 study, published in Canadian Society of Forensic Science, showed that even if an item has been washed, it is still possible to obtain a DNA profile. Jobin, R.M., and DeGouffe, M. Persistence of Seminal Constituents on Panties after Laundering: Significance to Investigations of Sexual Assault. Canadian Society of Forensic Science, Volume 36, Issue 1, March 2003, p. 1-10. In that study, analysts were still able to obtain a DNA profile from semen on cotton underwear after the underwear had been laundered. As such, the fact that there was no blood found on Mr. Jackson's cast does not eliminate the fact that if Mr. Jackson was in fact the killer, Mr. Moody's sweat, saliva, or skin cells likely remain on the cast in detectable amounts regardless of whether the cast had been washed.

The lower court's refusal to allow Mr. Jackson to swab the cast to determine if it contained sweat, saliva, or skin cells was error. The State conceded that the cast was used at trial to inculpate Mr. Jackson. "Indeed, with the exception of the cast, which Jackson used to argue Riley was not credible, none of the evidence Jackson requests to be tested was used to inculpate him." ROA Vol. I, p. 51.

At trial, Mr. Jackson attempted through argument and cross-examination, to

show that Linda Riley was the actual killer. Without any corroborating physical evidence, the jury rejected his argument. If the jury had heard that DNA does not disappear when an item is washed and that neither Mr. Moody's blood nor his saliva, sweat, or skin cells were present on Mr. Jackson's cast, there exists a reasonable probability that they would have rejected Linda Riley's testimony as not credible and would have acquitted Mr. Jackson. At the very least, this evidence would have secured the additional vote needed for Mr. Jackson to obtain a life sentence. As noted above, Linda Riley was the State's only eyewitness to the murder. She had been told by law enforcement that she could either be a witness or a defendant. She chose the former, and it was primarily her testimony that helped to secure a conviction and death sentence for Mr. Jackson. Further, the jury vote was only 7-5. Physical evidence corroborating Mr. Jackson's version of events and discrediting Linda Riley's version would have changed the outcome of the case. As such, Mr. Jackson has met the requirements in Fl. R. Crim. Pro 3.853 and the lower court should have granted DNA testing on the arm cast.

2. Two butcher knives

Without holding an evidentiary hearing, the lower court concluded that the two butcher knives collected from Linda Riley's apartment "either no longer exist, or they are no longer in the State's possession and their whereabouts are unknown." ROA Vol. II, p. 315. As will be discussed more fully below, this finding is

speculative and unsupported by the record.

The court further stated that "the motion itself does not aver that DNA evidence exists on any of these items. The movant's claim is merely that 'if' DNA evidence exists on these articles, it should be tested." ROA Vol. II, p. 315. The lower court ultimately rejected Mr. Jackson's request to test the knives as speculative. It is unclear how Mr. Jackson can be penalized for failing to state with certainty whether the knives actually contain any DNA evidence when Mr. Jackson does not have the ability to examine the knives due to the State's failure to maintain evidence in a death penalty case. Such logic is circular. The court concludes that Mr. Jackson cannot prove there is DNA on the knives because the knives cannot be located. Yet, the court denied Mr. Jackson an evidentiary hearing to take testimony to find out exactly how, when, and *if* the items were actually destroyed.

As to the relevance of the two butcher knives from Ms. Riley's apartment, one of those knives is most likely the murder weapon. As noted above, Ms. Riley testified that there were two knives used in the crime and that she threw away only the broken knife. She testified that she put the other one in the sink. The lower court conceded that this murder was a protracted struggle. As such, it is likely that the actual killer was cut during the attack. If Mr. Moody's DNA is recovered from one of those knives and skin cells/and or blood from Ms. Riley is present on the knife, that will conclusively prove that Ms. Riley stabbed Mr. Moody, which she

adamantly denied at trial. In addition, the absence of Mr. Jackson's DNA on the potential murder weapon will exonerate him or at the very least mitigate his sentence. As such, Mr. Jackson has met the requirements in Fl. R. Crim. Pro 3.853 and the lower court should have conducted an evidentiary hearing to determine the location of the knives.

3. Brown belt

Without holding an evidentiary hearing, the lower court made the same conclusion about the brown belt as it had the knives. The court stated these items "either no longer exist, or they are no longer in the State's possession and their whereabouts are unknown." ROA Vol. II, p. 315. As will be discussed more fully below, this finding is speculative and unsupported by the record.

The court further stated that "there is not even a suggestion throughout the record of this case that the brown belt or the knives found in the defendant's and Ms. Riley's home and recovered by the police well after the murder had taken place were the murder weapons." ROA Vol. II, p. 317. This finding is unsupported by the record. As noted above, Linda Riley testified that she threw one of the belts away, but was not sure whether it was the one used to tie up Mr. Moody or the one to strangle him. While the belt used to strangle Mr. Moody would be more probative, either belt would contain Mr. Moody's DNA and should not contain Linda Riley's DNA if her version of events is truthful.

The brown belt collected from Ms. Riley's apartment that was used to strangle Mr. Moody should contain DNA from both Mr. Moody and the actual killer. If Mr. Jackson used the belt to strangle Mr. Moody like Ms. Riley said, his DNA should be on the belt. The absence of Mr. Jackson's DNA and/or the presence of Ms. Riley's DNA on the belt will exonerate him or at the very least mitigate his sentence. As such, Mr. Jackson has met of the requirements in Fl. R. Crim. Pro 3.853 and the lower court should have conducted an evidentiary hearing to determine the location of the brown belt.

4. Victim's Pants and Eyeglasses

The lower court addressed Mr. Jackson's request to test Mr. Moody's pants and his eyeglasses as one request so they will be consolidated here. Mr. Moody's pants and eyeglasses are also missing from the Jacksonville Sheriff's Office. As such, Mr. Jackson has not had an opportunity to examine them to determine whether they contain any visible biological material. In denying Mr. Jackson's request on these items, the lower court continues its circular logic. The court calls Mr. Jackson's request speculative yet recognizes that the evidence cannot be located. Therefore, Mr. Jackson was unable to even conduct a visual examination, let alone conduct any scientific tests to determine the presence of blood or other biological evidence. Yet, the court denied Mr. Jackson an evidentiary hearing to take testimony to find out exactly how, when, and *if* these items were actually

destroyed.

As to the tan pants recovered from Mr. Moody, the pockets should contain the DNA of Mr. Jackson since Ms. Riley testified that Mr. Jackson went through his pockets to take the money. The absence of Mr. Jackson's DNA in Mr. Moody's pants pockets will undermine the credibility of Linda Riley and exonerate Mr. Jackson or at the very least mitigate his sentence.

As to Mr. Moody's eyeglasses, since there was a protracted struggle, the eyeglasses should contain DNA from sweat and/or skin cells of the actual killer. If Mr. Jackson was straddled over Mr. Moody's upper chest as Ms. Riley says, presumably he was sweating and/or depositing his skin cells on Mr. Moody's glasses, which apparently came off during the struggle. According to the crime scene photographs introduced by the State, the glasses were found pushed down around Mr. Moody's throat. TR VOL XIV, p. 518, 536. The lower court erroneously concluded that Mr. Moody's glasses "fell and lay on Ms. Riley's living room carpet. Even if her DNA were found on these items, its presence there is innocently explained by the evidence in this case." ROA Vol. II, p. 317-18. The court does not cite to a place in the record to support this assertion. Rather, the crime scene photographs, which were taken by law enforcement as Mr. Moody's body was carefully unrolled from the carpet, show the glasses lodged under his chin, around his throat. It is apparent from the evidence that the glasses were

pushed down in the struggle.

The lower court itself concluded that the murder "was no arms length transaction, nor drive-by shooting. This was a face-to-face, hand-to-hand physical assault upon a grown man. Mr. Moody was attacked with hands, a cast, knives, and a belt used as a garrote." ROA Vol. II, p. 314-15. If the eyeglasses can be located and were not improperly destroyed by the State, they are likely to contain sweat and/or skin cells of the actual killer. The absence of Mr. Jackson's DNA on Mr. Moody's glasses and/or the presence of Ms. Riley's DNA on the glasses will exonerate Mr. Jackson or at the very least mitigate his sentence. As such, Mr. Jackson has met of the requirements in Fl. R. Crim. Pro 3.853 and the lower court should have conducted an evidentiary hearing to determine the location of the pants and eyeglasses.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. JACKSON AN EVIDENTIARY HEARING TO DETERMINE THE LOCATION OF THE EVIDENCE SOUGHT TO BE TESTED.

As noted above, the two butcher knives, tan pants, brown belt, and eyeglasses collected under property control numbers 8514263 and 8513844 are not in the Clerk's Office as previously stated by the Jacksonville Sheriff's Office. ROA Vol. I, p. 17. In its response to Mr. Jackson's 3.853 Motion, the State attached an affidavit from former property and evidence warehouse custodian

James Burt. ROA Vol. I, p. 56-57. The affidavit stated that the evidence under property control numbers 8513844 and 8514263 "were stored in an old building, the Christopher Building, located across the street from the Sheriff's Office at 501 E. Bay Street, which building was utilized as an annex property and evidence storage facility." Id. at 56. It is not clear from the affidavit what information Mr. Burt relied on to determine that this was the exact location that Mr. Jackson's evidence was held. The affidavit further states that, "After diligent investigation, I have determined that due to deterioration of the building, the roof leaked causing rainwater to pour into the property and evidence and storage areas, resulting in damage, deterioration and destruction of evidence." Id. Finally, Mr. Burt explains that after an effort to locate the evidence, he has concluded that "the evidence in question, under the property control number 8513844 and 85142634 was likely destroyed from the water damage in the Christopher Building." Id. at 57.

This Court has recognized that evidentiary hearings are required in 3.853 proceedings "when there is some disputed factual issue." Overton v. State, 976 So.2d 536, 571 (Fla. 2008). The Overton Court listed examples of disputed factual issues and cited with approval Thompson v. State, 922 So.2d 383,383 (Fla. 2d DCA 2006), which held that "[a] decision by the postconviction court that DNA evidence does or does not exist is a factual finding and requires an evidentiary hearing." The Overton Court also cited with approval Carter v. State, 913 So.2d

701,702 (Fla. 3d DCA 2005), which held that "Where a defendant claims that DNA evidence exists, but the state denies the claim, a factual dispute results and an evidentiary hearing is required."

Moreover, Fl. Stat. 925.11(4)(2001) states in pertinent part:

> a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.
>
> b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

Under this statute, the Jacksonville Sheriff's Office was required to keep and maintain evidence in Mr. Jackson's death penalty case. Such a requirement inherently includes the obligation to maintain that evidence in secure, clean, and dry conditions and keep accurate records of its location.

The lower court denied Mr. Jackson's request for an evidentiary hearing because it ultimately concluded that even if the items were located, Mr. Jackson has not been able to demonstrate whether they contain DNA evidence to be tested. Such a finding defies logic. Because the evidence was missing, Mr. Jackson was

unable to examine the evidence to even conduct a visual examination as to whether it contained blood or other biological material.

Also, there is still a factual dispute about the existence of these items. Mr. Burt's affidavit merely states that it is "likely" the items were destroyed from water damage. The affidavit does not state with certainty whether this actually occurred. The State has failed to provide documentation as to when the water damage occurred and whether Mr. Jackson's evidence was actually in that location at the time of the damage. Further, it is unclear whether there is any documentation of the actual items that were destroyed by the Sheriff's Office. The affidavit says generally that evidence in the Christopher Building was damaged, deteriorated, or destroyed. ROA Vol. I, p. 56. It does not say whether there exists a list of the actual evidence affected by this water damage or whether any of the evidence was able to be salvaged. Absent a full and fair hearing, the lower court's finding that the evidence is missing is speculative. Denying Mr. Jackson an opportunity to cross-examine the State's witnesses regarding the location and timing of the alleged destruction of this evidence, or the possible continuing existence of this evidence, is a violation of his Due Process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. As such, Mr. Jackson requests that this Court remand for an evidentiary hearing to determine the location of this evidence.

ARGUMENT III

DENIAL OF MR. JACKSON'S ACCESS TO THE EVIDENCE TO CONDUCT DNA TESTING IS A DENIAL OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDEMENTS TO THE UNITED STATES CONSTITUTION.

In addition to Mr. Jackson's entitlement to DNA testing under Rule 3.853, the denial of his request to submit this evidence for DNA testing also violates his rights under the due process and equal protection clauses of the Florida and United States Constitutions. Those provisions, like Rule 3.853, have long recognized a defendant's constitutional right to prove his innocence by introducing evidence that a third party committed the crime – rooted in the fundamental right to "present a defense." U.S. Const. amend. VI, XIV; Florida Const. Art. 1 §§ 9, 16.

This fundamental right was reaffirmed in a highly analogous context in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006). In Holmes, a unanimous Supreme Court (Alito, J.) held unconstitutional a state rule that had barred a defendant from introducing evidence of possible third-party guilt, merely because the State's evidence of guilt appeared to be strong and included inculpatory forensic evidence. Id. at 1734-35. Holmes has clear implications for defendants like Mr. Jackson who seek post-conviction DNA testing for precisely this purpose: to obtain (and, ultimately, present to a fact-finder) DNA evidence that a third party may have committed the crime. Indeed, that reasoning was

recognized by an appellate court in New Jersey in State v. DeMarco, 904 A.2d, 797, 387 N.J. Super 506 (N.J. Super. Ct. App. Div. 2006). In DeMarco, the Court held that the defendant was entitled to post-conviction DNA testing on evidence from the murder case for which he had been convicted under New Jersey's post-conviction DNA testing statute. The Court expressly recognized that Holmes gave the defendant's statutory request for DNA testing substantial additional weight, because of Holmes' reaffirmation of the fundamental constitutional right to present evidence of third party guilt – a right that had also long been recognized as a matter of state law. See Id. at 805-06. As in DeMarco, Florida courts have long recognized, under state law, a defendant's fundamental right to present potentially exculpatory evidence. See Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) (recognizing fundamental right to present "evidence [that] tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt"); see also Story v. State, 589 So. 2d 939, 942-43 (Fla. 2d DCA. 1991); Campos v. State, 366 So. 2d 782, 783 (Fla. 3d DCA. 1978).

Mr. Jackson recognizes that the Supreme Court of the United States has decided District Attorney's Office for the Third Judicial Circuit v. Osborne, 557 U.S. 52, 129 S.Ct. 2308 (2009). However, Osborne was a narrow decision that merely held that Alaska's law governing procedures for post conviction relief did not violate due process. Osborne at 69-70. Moreover, the Court criticized

Osborne for attempting to sidestep the state process and bring his claim directly into federal court. Id. at 70-71. However, the Court never explicitly held that there is no right to DNA testing under the United States Constitution. Unlike Osborne, Mr. Jackson has sought post-conviction DNA testing through the prescribed state court process.

Similarly, in Skinner v. Switzer, 131 S.Ct. 1289, 179 L.Ed. 2d. 233 (2011), the Court continued to leave unresolved the issue of whether there is a right to DNA testing under the United States Constitution. Instead, the Skinner Court "granted review to decide a question presented, but left unresolved, in District Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. ---, 129 S.Ct. 2308,2318-19, 174 L.Ed.2d 28 (2009): May a convicted state prisoner seeking DNA testing of crime-scene evidence assert that claim in a civil rights action under 42 U.S.C. §1983, or is such a claim cognizable in federal court only when asserted in a petition for writ of habeas corpus under 28 U.S.C. § 2254?" Id. at 1293. The Court answered the question in the affirmative, holding that "a post conviction claim for DNA testing is properly pursued in a §1983 action." Id. The Court reasoned, "[s]uccess in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive." Id.

The decision in Skinner puts Mr. Jackson in a unique procedural posture due to the current constraints of Florida law. CCRC, under Florida Statute 27.702, is

not authorized to file, on Mr. Jackson's behalf, §1983 claims alleging a violation of due process and other federal constitutional rights based on a state court's denial of his request to seek DNA testing under a state statute. While the this Court recognized in Darling v. State, 45 So.3d 444 (Fla. 2010), CCRC's right to challenge method of execution claims under §1983, the Court's holding was very narrow and it explicitly stated, "Nothing in our opinion should be construed to authorize representation by CCRC in any other type of section 1983 claims." Darling v. State, 45 So.3d 444, 455 (Fla. 2010).[1] Therefore, Mr. Jackson's equal protection and due process rights are violated because he is indigent and his court appointed counsel is legally prohibited from filing a §1983 claim seeking DNA testing on his behalf should the state courts deny his claim under the state statute.

The lower court wholly failed to address Mr. Jackson's constitutional claims. The Florida Constitution and U.S. Constitution provide a right to access evidence for the purposes of DNA testing if that DNA testing could be used to prove one's innocence or to appeal for executive clemency. See Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001), Anstead, J. (concurring in part and dissenting in part) (stating

1 As noted above, this Court granted relief to Mr. Jackson on that issue as well ruling that CCRC was permitted to raise a method of execution challenge under § 1983 on behalf of Mr. Jackson. Jackson v. State, 50 So.3d 1137 (Fla. 2010) (unpublished order).

"At its core, access to DNA testing is simply a unique means of establishing a claim… under the constitutional writ of habeas corpus…. Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution…. The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred.") 807 So. 2d at 636-37. See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.) When DNA testing could prove Mr. Jackson innocent of the crime and/or of the death penalty, denying him such tests and executing him would deny Due Process, Equal Protection and access to the courts under the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Jackson's 3.853 Motion for Postconviction DNA Testing. This Court should order that Mr. Jackson is entitled to DNA testing on the arm cast and should remand to the lower court for an evidentiary hearing to determine the location of the missing evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to Meredith Charbula, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399 and Etheria Jackson, DOC #072847, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this ____ day of August, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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