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SC16-1498

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

- against -

STATE OF FLORIDA,

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA
THE HON. REGINALD WHITEHEAD, PRESIDING

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Mr. Zeigler has been on death row for 40 years for four murders he has always maintained he did not commit. He was convicted in a trial riddled with procedural errors on flimsy circumstantial evidence, and his jury was so uncertain of his guilt that it rejected the death penalty in just 25 minutes, with one juror stating in open court at his sentencing that she believed Zeigler was innocent.

It is against this backdrop that Zeigler filed a motion below for authorization to conduct DNA testing – at no cost to the State – of physical evidence that has been sitting in the courthouse evidence vault for decades. Zeigler presented extensive evidence in support of his motion, including expert testimony describing how advances in DNA testing technology now make it possible for DNA testing to prove that Zeigler could not have committed the murders. Even the State's expert, who the State fought vigorously to *prevent* from testifying, agreed that state-of-the-art testing would show whether Zeigler could have committed the murders.

Despite this overwhelming evidence, the court below denied Zeigler's motion. The court provided no analysis in its opinion, stating in conclusory fashion that Zeigler had not shown that the evidence would "probably lead to an acquittal" or was authentic. Both findings are clearly erroneous. Given that both experts agreed the testing would show if Zeigler shot and killed his victims, it is impossible to conclude that such testing results – literally, scientific evidence that

Zeigler *could not have committed the murders* – would be insufficient to establish reasonable doubt. There is also no question that the evidence Zeigler seeks to test – the clothing he and the victims were wearing the night of the murders – is authentic. All of the evidence at issue was admitted as authentic at Zeigler's trial, and has been stored since then by the Orange County Clerk. Portions of the garments Zeigler seeks to test were also previously tested in 2001 using comparatively antiquated technology, and the garments have been stored in the Orange County Courthouse evidence vault ever since.

As discussed in detail in this brief, Zeigler meets all of the legal requirements for DNA testing, and his motion should have been granted. Under Florida law, a post-conviction request for DNA testing must be granted where the requested testing, viewed in conjunction with other exculpatory evidence adduced in the case, would produce evidence creating a "reasonable probability" of reasonable doubt as to the defendant's guilt. The testing Zeigler seeks is likely to far exceed that standard. Among other things, it will prove that Zeigler could not have been the person who shot and killed Perry and Virginia Edwards at close range because he does not have any "backspattered" blood from either victim on his clothing. As both experts agreed, those close-range shootings would have necessarily resulted in a significant amount of backspatter which modern testing technology would easily detect on the perpetrator's clothing, even after 40 years.

The testing Zeigler seeks will also show that Zeigler could not have been the source of blood deposited on Zeigler's wife's body after she was killed. Proof that Zeigler did not shoot his in-laws, and that someone else smeared and dripped blood on Zeigler's wife after she was dead, would destroy the State's case against Zeigler.

The State's response to the obviously probative value of looking for backspatter is that "the absence of evidence is not evidence", but that is nonsense. A defendant's absence from a video showing a murder is clearly evidence that the defendant is not the perpetrator. This case is the same.

The appropriateness of testing is all the more apparent given the evidence Zeigler has already amassed showing that he is innocent, and the fact that the jury barely convicted Zeigler in the first place. As this Court has noted in the past, the key evidence against Zeigler was testimony from three witnesses, none of whom witnessed the murders. The first witness, Edward Williams, admitted he purchased two of the murder weapons, was found with one of those weapons in his possession, and lied to the police about his whereabouts and the clothing he was wearing the night of the crimes. The second witness, Frank Smith, admitted to selling two of the murder weapons to Williams, but claimed to have spoken with Zeigler – whom he had never met and whose voice he did not know – to discuss the sale. Those witnesses epitomize the flimsy nature of the State's case.

The third witness, Felton Thomas, testified that Zeigler lured him and one of the victims to an orange grove the night of the murders and had them shoot several guns, presumably so their fingerprints would be on the murder weapons. This Court has repeatedly pointed to Thomas' testimony in affirming the denial of prior DNA testing motions filed by Zeigler. The State has done the same, stating at a prior DNA hearing that Zeigler is "on death row because Felton Thomas said that . . . they went for a drive in Mr. Zeigler's car" and "that Mr. Zeigler had him test fire some weapons". Thomas, however, has since recanted critical portions of his trial testimony. He now states that he never fired any guns, that the police coached his testimony, and that he did not know whether the person he met the night of the murders was Zeigler or someone else.

Because motions for DNA testing require the court to balance the probative value of the requested testing against the existing evidence of guilt in order to determine if the testing would likely produce an acquittal, and because Thomas's recantation clearly affects that balancing, Zeigler filed a motion seeking to subpoena Thomas to testify about his new version of events. The State strongly opposed that motion because it wants to have things both ways: when it likes what Felton Thomas is saying, it repeatedly points to Thomas's testimony as a basis for not doing DNA testing, and when it doesn't, it claims that Thomas is irrelevant.

Not only have the facts changed, but the State's original case against Zeigler was flimsy to begin with. Zeigler's purported motive for killing his family – to collect on his wife's life insurance policies – never made sense because Zeigler was a successful businessman with no pressing debts or other need to commit an economic crime, the amount of insurance policies was modest, and the purported motive does not explain the murders of Zeigler's in-laws. The fact that Zeigler was shot in the stomach also renders the State's case highly suspect, since that is an extremely unlikely place for Zeigler to shoot himself.

The State's case against Zeigler was weak enough that the State had a very difficult time obtaining a conviction. The jury was initially split 6-6. After extensive deliberations, there remained a single holdout juror who repeatedly asked to speak to the judge about abuse by other jurors, and only changed her vote after the trial judge, unbeknownst to the defense, supplied her with Valium. The same juror stated in open court just two weeks after the jury rendered its verdict "I still feel he's innocent," explaining that she only changed her vote to guilty because "I just couldn't take any more." While the jury did vote to convict, it expressly rejected the death penalty – which can only be understood as an expression of doubt given the severity of the crimes and charges. Zeigler is on death row because the trial judge deemed it appropriate to override the jury's recommendation and impose the death penalty.

In short, the totality of the evidence creates substantial doubts about Zeigler's guilt. The DNA testing Zeigler seeks is highly likely – not just reasonably probable – to produce evidence that would shift the existing doubts in the case over the reasonable doubt standard.

While Zeigler has unsuccessfully sought DNA testing in the past, his current request is different in three important respects: first, Zeigler seeks testing using powerful new technologies that were not previously available; second, he seeks to test all bloodstains on his shirts and the other objects identified in this motion, which addresses this Court's concern that limited testing might miss important evidence; and third, the main piece of circumstantial evidence used by the Court to discount Zeigler's prior testing request – Felton Thomas's testimony – has now been compromised by Thomas's substantial revision of his trial testimony.

Zeigler meets the criteria for DNA testing and respectfully prays that the Order below be reversed and his motion be granted.

STATEMENT OF THE FACTS AND OF THE CASE

I. Background on the Nature of the Case

Tommy Zeigler was a young, happily married and successful man in 1975. R. 817. He owned a prosperous family-run furniture store in Winter Garden, Florida (the "Store"), had never been in trouble, had no criminal record, and had no history of violence. *Id*.

On December 24th of that year, however, everything dear to Zeigler was suddenly destroyed. That Christmas Eve, Zeigler's wife, Eunice, her parents Perry Sr. and Virginia Edwards, and a fourth man names Charles Mays were all brutally murdered in the Store the Zeiglers owned. *Id*. All four of the victims had been shot and at least two, Perry and Virginia Edwards, were shot at extremely close range, necessarily transferring "backspatter" or "blowback" of blood onto whoever killed them. 2005 ROA at 4683-86; R 1076-79, Trial Transcript ("TT") at 26, 2671.)[1] Perry Edwards and Charles Mays had also been beaten severely with blunt objects. 2005 ROA at 4683-4686; R 169-70, 189-90, 193-98. Zeigler was himself shot in the abdomen, and underwent immediate surgery after being found by police to save his life. R. 374-375, 817. Four days later, while Zeigler was in his hospital bed recovering from surgery, Zeigler was arrested and charged with committing the murders. R. 343. The following June, Zeigler was tried and convicted of committing two counts of first degree murder and two counts of second degree murder. Zeigler pled not guilty at trial and has maintained his innocence to this day. R. 816.

[1] "2005 ROA" refers to the Record on Appeal previously compiled in this action for the appeal numbered SC05-1333.

I. The Trial

a. Background Allegations Concerning the Murders

Zeigler's trial began on June 10, 1976. R. 162. Zeigler maintained from the start that he was not the perpetrator, but was instead a victim of what he believed was a botched armed robbery committed by Mays and at least two of his associates that went horribly wrong when Zeigler and his family got in their way. R. 183, 368-77. Zeigler testified that he and his wife had plans on Christmas Eve, 1975 to attend a neighborhood Christmas party along with their parents and several of their friends, including the Winter Garden Chief of Police, Don Ficke. R. 362-66. Before going to the party, Zeigler drove to the Store to pick up three large Christmas gifts he planned to deliver before the party that evening. R. 360-66.

When Zeigler arrived at the Store that Christmas Eve, he found the lights off and inoperable. R. 367-68. As he walked through the darkened building, he was suddenly and violently hit over the head from behind with such force that his glasses flew off his face. (*Id*.) Reeling from the blow, and unable to see clearly with the lights out and without his glasses, Zeigler picked himself up and fought for his life, striking and attempting to shoot his attackers with a heavy magnum he kept for protection. R. 370-74. Zeigler testified that he heard unfamiliar voices and saw two dark figures coming towards him. R. 371. In the course of the melee, Zeigler was shot in the stomach, fell to the ground and lost consciousness. R. 374-

75, 436-37. When he came to, Zeigler crawled over what he believed to be a body and called the Chief of Police for help. R. 376-80.

The State argued that it had been Zeigler who, using a number of different weapons, including **eight separate firearms**, killed his wife and in-laws. R. 165, 394-401. According to the State, Zeigler drove his wife to the Store in someone else's car at approximately 7:15 p.m. that night and then shot her in the head as soon as they entered. R. 169. Zeigler's purported motive for murdering his wife was to collect on her modest life insurance benefits, even though the evidence at trial showed Zeigler to be a wealthy man with no need for additional funds and no history of crime or violence. R. 176, 178, 359, and 420.

According to the State, Zeigler's in-laws arrived at the Store just minutes after Zeigler had murdered Eunice. When they arrived, the State contended, Zeigler promptly murdered them as well. R. 169-70. The State argued that Eunice and her mother, Virginia, who showed no signs of a struggle, must have been shot and killed in short succession. *Id.* Based on gunpowder residues and other factors, the State's forensic and blood spatter expert at trial, Professor Herbert MacDonnell, determined that Virginia had been shot from a distance of six to twelve inches. 2005 ROA at 4684. Perry Sr., the State contended, had struggled with his attacker "for some time," *Zeigler v. State*, 402 So. 2d 365, 367 (Fla. 1981), and was beaten severely with an object while being held in a headlock, in addition to being shot

from a "quite close" distance of "probably 3" to 6"." *Id*. The State never presented any motive or explanation for why Zeigler would murder his in-laws.

The State also asserted that over the course of the hour that followed after Zeigler killed Eunice and her parents, Zeigler separately coaxed three men to the store – Charlie Mays, Felton Thomas, and Edward Williams – so that Zeigler could kill them, too, and then frame them for the other homicides he had already committed. R. 168-76. Thus, according to the State's account, Zeigler planned to murder six people on Christmas Eve – all to collect on modest life insurance money from one victim that the evidence showed Zeigler did not particularly need. The State did not offer any theory as to why Zeigler would attempt to murder and frame three additional three men, rather than just one.

The State presented no direct witnesses to the murders, nor any witness who saw the murder scene prior to the police arriving. Nor did the State furnish any compelling physical evidence linking Zeigler to the murders. Instead, the State built its case upon two things: (1) circumstantial evidence in the form of the testimony of two witnesses who claimed they observed Zeigler acting in a manner consistent with having been the murderer on the night of the murders; and (2) limited physical evidence relating to Perry Sr.'s murder. As detailed below, neither of these categories of evidence continues to support Zeigler's conviction. One of the two key witnesses against Zeigler, Mr. Thomas, has recently recanted

substantial portions of his testimony, stating plainly in a recent interview "**I still don't know who it was**" that he saw the night of the murders. R. 478. The second key witness against Zeigler was thoroughly impeached at trial, lacks credibility, and in any event was only a circumstantial witness, not a witness to the murders. R. 122-23. Limited DNA testing performed 15 years ago has already rebutted the significance of the physical evidence relied on by the State, but the DNA testing Zeigler sought in his most recent motion would use that evidence to conclusively establish his innocence. R. 138-41, 707-709, 715-719, 730-735.

b. Physical Evidence Relied Upon by the State Was Extremely Limited

Aside from Williams' and Thomas's accounts, discussed below, the State relied principally on physical evidence consisting of bloodstains on the underarm of Zeigler's inner and outer shirts. According to the State, these stains proved that Zeigler held Perry Edwards in a headlock under his arm and beat him to death. R. 380, 401-02. The State theorized that if Zeigler killed Perry Sr., he must therefore have committed all of the murders.

The State supported its argument with testimony from a blood spatter expert, Professor Herbert MacDonnell, concerning the nature of the stain found on Zeigler's shirt. TT 1027-1030; R. 1017. Relying upon simple blood-typing – a procedure that has almost entirely been supplanted by DNA testing – the State asserted that Zeigler must have killed Perry, and thus the other victims, because

Zeigler's shirt had type A bloodstains on it and Perry had type A blood. R. 334, 380, 401-02. The blood could not have belonged to Zeigler or to Virginia, both of whom had type O blood, but could have belonged to Eunice or Mays, both of whom had type A blood, or to any of the hundreds of millions of other people who share that blood type.[2] R. 334.

c. The Bizarre Testimony of the State's Star Witness, Felton Thomas

The State's "star" witness was a man named Felton Thomas, who testified about briefly encountering a stranger he identified six months later at trial to be Zeigler while inebriated on the night of the murders. R. 261-62, 266. Thomas testified that he left a "beer joint" on Christmas Eve to accompany Mays to the Store, and that when they arrived, a "white man" approached Mays' van and told them that "the guy [who was] supposed to own the furniture store hadn't got there [yet]." R. 262-267. Thomas had never met this man before and did not know his name. Thomas and Mays got into the man's car, which had two doors and "looked like a Cadillac." R. 266-68, 285. Zeigler's car at the time was an Oldsmobile that did not match that description. R. 294-95.

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[2] This Court can take judicial notice of the fact that, according to the Red Cross, 40% of Caucasians, 31% of Hispanics, 27.5% of Asians, and 26% of African Americans in the U.S. have type A+ or A- blood. *See* http://www.redcrossblood.org/learn-about-blood/blood-types, last accessed November 23, 2016.

Thomas sat in front next to "the white guy [that] was driving," who drove Mays and Thomas to an orange grove and had them remove guns from a bag in the car and fire them out of the window of the car. R. 295-96. Thomas testified that both he and Mays fired guns out of the car's window into the orange grove. R. 267-68. As this Court has recognized, "[t]he state says that the purpose of the trip was to get the two to handle and fire the weapons in the bag," *Zeigler*, 402 So. 2d at 368, presumably so their fingerprints would be on the guns, even though that theory is inconsistent with the State's claim that Zeigler later wiped those same guns clean of fingerprints. R. 404.

According to Thomas' trial account, after shooting the guns in the orange grove, the white man drove Mays and him back to the store and asked Thomas to pull a switch on a box on the wall of the store, which Thomas did. R. 206-209. The man then climbed over a fence to try to gain access to the Store, telling Thomas this was necessary because "the man hadn't come to open the store yet, said he was in Apopka," and also attempted to break into the Store using a long rod before giving up and claiming that he might have an extra key at home. R. 273-75. Following these break-in attempts, Thomas testified, the three men drove in the same car to a house, where the "white man" rummaged around the garage and came back to the car with a box with either ammunition or a gun in it, which he threw to Mays and asked him to load. R. 276. They then drove back to the Store,

whereupon Thomas the man unlocked the Store and asked him to come in with Mays. R. 276-77. Thomas declined to go into the Store and left because it was dark inside, while Mays entered. *Id.*

Thomas stated that after leaving Mays and the "white man," he continued drinking at a bar in Tildenville, and drank beer until around midnight, when someone came into the bar and said that someone had been killed at the Store. R. 278. After hearing this information, Thomas got a ride to Oakland to see if the information was true, but, finding few people about, got a ride back to the Zeigler Store. R. 279-80. There, he saw a large crowd of people. R. 280. Despite the large police presence Thomas observed at the Store, R. 286, Thomas testified that he got a ride to Orlando, where he went to a restaurant, ordered coffee, and, upon seeing an officer at the restaurant, reported his information to the officer. R. 280-82. Zeigler flatly denied that he was the "white man" Thomas described in his account. R. 380-81. As described below, Thomas has subsequently recanted material portions of this testimony. *See infra* at V.

d. The Bizarre Testimony of the State's Other Key Witness, Edward Williams

The State also relied heavily at trial on testimony from a second man, Edward Williams, without which, the lead prosecutor told the jury, "I don't think we could have really made a case." R. 413. Unlike Thomas, who testified that he

had never met Zeigler before and did not know him, Williams knew Zeigler and worked for him as a handyman. R. 288-89. Williams testified that Zeigler asked Williams to come to his house at 7:30 p.m. on the night of the murders – the very time Zeigler was supposedly murdering his wife and in-laws – so that they could go to the Store together to collect and deliver Christmas presents. R. 290-91. Williams said he arrived at Zeigler's house at about 7:30 pm, parked behind Zeigler's truck, and waited. R. 292-93. According to Williams, eventually, at about 8:00 p.m., Zeigler got into Williams' truck and the two drove to the Store. R. 296-99.

According to Williams, upon arriving at the store, Zeigler led him down a hallway, pointed a pistol at Williams' chest, and pulled the trigger three times. R. 304-05. Williams testified that the gun did not fire and that he pleaded for Zeigler not to kill him and ran out of the building, where he encountered a locked gate. R. 305-06. Zeigler then followed him outside and tried to explain to Williams that it was all a mistake and Zeigler was not really trying to kill him. *Id*. Then, according to Williams, Zeigler handed him the pistol, which Williams put into his pants pocket, and tried to coax him back into the Store. R. 307, 309. Williams testified that Zeigler bent down on his knee and begged Williams to come into the store. R. 308. Williams refused, climbed over the fence and ran away. R. 309.

Eventually, after making several stops along the way, Williams went to the police station and handed over the gun Zeigler allegedly gave him. R. 310-11.

Several months later, Williams came forward with the story that he had purchased some of the guns allegedly used by Zeigler on Zeigler's behalf. As part of this late-volunteered story, Williams claimed that Zeigler asked him in June 1975 to help him buy a "hot" gun, and that he contacted a taxi driver named Frank Smith and made arrangements to obtain them. R. 312-14.[3] Williams handled everything from ordering the guns to picking them up. R. 315-17.

Smith also testified at trial. He admitted Williams requested untraceable guns and also claimed that at one point Williams put Zeigler, who Smith didn't know and was unable to identify at trial, on the phone to discuss the sale. R. 329-32. Smith had never met Zeigler before, so could not verify Zeigler's voice. R. 332. Williams testified that Zeigler gave him money to pay for the guns Williams bought from Smith, and said he received an open paper sack from Smith, in which Williams could see the butts of two handguns. R. 317-18. Williams claimed he folded open the top of the paper sack, R. 317-18, took the bag to Zeigler's home to deliver it, and left the sack of guns with Zeigler's wife (supposedly, the intended victim) to give to Zeigler. *Id.*

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[3] Smith testimony was limited to the "hot" gun issue—he was not a witness to events of the night of the murders.

Williams' testimony was heavily impeached at trial. Williams testified that he wore the same clothing on the night of the murders from the time he left his apartment at twilight, until, after turning himself in, a deputy sheriff took him to his apartment and collected the clothes. R. 322-23. The clothes he handed over included a black sweater and dark green pants. R. 415-16. But Williams' landlady, Mary Wallace, testified that she saw Williams exiting the front entrance of his apartment complex at twilight wearing khaki plants, a flannel shirt with stripes and checks, and a khaki jacket. R. 346-47. Williams also turned over a pair of boots that lacked any scuff marks and still had an unsoiled price tag on them, which was inconsistent with Williams' testimony that he wore those boots when he ran through a parking lot and climbed over a fence. R. 417-18.

Williams' alibi the night of the murders was also contradicted by an eye witness. Williams testified that he waited in Zeigler's driveway with his blue truck parked behind Zeigler's truck until Zeigler arrived at about 7:40, at which point Zeigler parked in his garage, closed the garage door, and left with Williams. R. 291-300. Zeigler's neighbor, Ed Reeves, refuted that account. Reeves testified that he had driven past Zeigler's house twice the night of the murders – at 8 o'clock when Reeves left home and at 8:45 when he returned – and had made a point of looking at Zeigler's house on both occasions. According to Reeves,

Zeigler's garage was open, empty, and had the lights on at both 8:00 and 8:40 - 8:45 that night – not closed with a car in it as Williams claimed. R. 349-53.

Finally, Williams testified that, after Zeigler allegedly tried to shoot him, he ran out of the Store and tried to open a gate, which he found to be locked, preventing his escape. R. 306. But in fact, when police arrived, they found that the locking mechanism of the gate was inoperable, and even in its apparent "locked" position, it could be opened with a simple push – something Zeigler's regular employee and handyman would surely know. R. 186-87, 325-27.

e. The State's Conduct During the Investigation and at Trial was Improper and Prejudiced the Defense

In a number of respects, the State's improper investigation techniques foreclosed Zeigler from pursuing additional lines of defense. From December 24, 1975 to January 8, 1976, the police maintained complete control of the store, and, without any warrant or attempt to obtain one, conducted an exhaustive search. R. 185. Many items of potential importance to the defense were taken and then lost through careless handling, and at least one significant avenue of investigation, blood subtyping, was entirely foreclosed to the defense because the state made the unilateral decision not to perform this testing.[4] R. 336-38.

[4] Sub-typing could not be performed at the time on blood stains that were more than two or three weeks old. R. 338.

Despite the failure to subtype, the State asserted at trial that Type A bloodstains on Zeigler's shirt were proof that Zeigler must have beat Perry Edwards. R. 380, 402. The State's basis for this assertion was that Zeigler and his mother-in-law were both Type O, while Eunice and Perry Edwards were Type A. R. 334, 438. But Mays also had Type A blood (R. 334), and thus the stains equally supported Zeigler's testimony that he had pulled himself across Mays' body to reach the phone he used to call the police. R. 376-79. Blood subtyping could have helped to distinguish Mays' and Perry Edwards' blood. The prosecution, however, had made the unilateral decision not to test blood samples taken from the victims for subtypes. R. 336-38. The result was that Zeigler was not able to provide a scientific rebuttal to the State's interpretation of the underarm bloodstain evidence. *Id*. Even the State Attorney criticized the techniques utilized to collect and test the bloodstain evidence, going so far as to send a letter to the Orange County Sheriff's Office stating that he was "very concerned with the methods and procedures employed in the crime scene processing in the Zeigler case, particularly with the handling of the blood evidence." R. 530.

Additionally, the State shredded and destroyed various partial fingerprints it recovered on items from the crime scene, including a gun, that could have been used to eliminate a particular person as the "owner" of the print. R. 257-59. A fingerprint specialist at Florida's Sanford Crime Laboratory testified that such

destruction was not good practice, R. 356-57; loss of the prints was a severe blow to the defense, since they might have been used to establish the presence and involvement of other individuals and thus support the defense case that the murders were committed by intruders. The prosecution likewise lost their imprint of a bloody shoeprint which they believed belonged to the murderer, denying the defense the opportunity to forensically test it to prove it did not come from Zeigler. R. 233-37, 239-41, 534-36.

Additionally, the Sheriff's Office removed bullets from the building where the murders occurred without adequately marking them, so that the defense could not determine the location from which particular bullets had been removed. R. 216-21. Had the bullets been properly labeled, the defense could have determined which shots were fired by each gun. When compared with the location of the victims and the estimated times of their deaths, such evidence might well have permitted the defense to show that one man could not have fired all of the bullets found in the store.

Also, a loose tooth shown in crime scene photographs was lost by the police. In the crime scene photographs, a tooth was shown lying on the parka of Charles Mays, and a forensic dental expert testified that the tooth in the photographs was not the same tooth that was turned over to the defense and which came from Mr. Mays. R. 340-41. Due to inadvertence or otherwise, the prosecution did not

recover the photographed tooth from the crime scene, and it was never found. This tooth, which the unrebutted evidence established was not the tooth of any person known to be at the Store that night, might have enabled the defense to show that an additional, unidentified person was present at the store that night, thus supporting its theory that one or more others committed the murders. R. 199-200, 213-15, 255, 340-41.

II. The State Barely Obtained a Conviction Through Extreme Juror Misconduct, Including the Drugging of a Holdout Juror

In its first vote on the case, Zeigler's jury was split evenly, with six jurors voting to acquit and six jurors voting to convict. *State v. Zeigler*, 494 So. 2d 957, 960 (Fla. 1986). Post-trial investigation revealed that the jury deliberation process was fraught with pre-judgment, intimidation and harassment, and other violations. Immediately after being elected foreman of the jury, the foreman stated that he had made up this mind two weeks earlier and didn't need to discuss the case or deliberate. R. 539-40. Juror Irma Brickel, who expressed strong doubts about Zeigler's guilt, was subjected to strong intimidation and harassment.

In response, Brickel asked to speak to the judge outside the presence of the other jurors to discuss "other jurors and decisions made before they [were] permitted to make them." TT 2715; R. 421. The trial judge denied that request and a subsequent similar request, in spite of the fact that at one point Mrs. Brickel fainted because of the pressure in the jury room. TT 2725-28; R. 421. Instead,

without consulting or even advising defense counsel, the trial judge called Juror Brickel's doctor and arranged a prescription for Valium for her. *See Zeigler v. State*, 632 So. 2d 48, 52 (Fla. 1993). Shortly after taking the valium, Mrs. Brickel abandoned her holdout position and voted with the other eleven jurors to convict Zeigler at 5:00 p.m. on July 2, 1976 - Friday afternoon of the Bicentennial July 4th weekend. R. 425-27.

At a sentencing hearing held just two weeks later on July 16, 1976, Mrs. Brickel stated in open court that she did not believe Zeigler was guilty and that she had only voted to convict because the pressure on her was too great.

> JUROR BRICKLE: If I could call back the Friday, I would have changed my mind. In fact, I almost did. **I still feel he's innocent**. My reasons don't seem to be important or they weren't.
>
> THE COURT: But you stated in open court that was your verdict.
>
> JUROR BRICKLE [sic]: I know I did, but I just couldn't take any more.
>
> THE COURT: **Well, we are not concerned.** R. 429.[5]

The prosecution did not present any witnesses at the sentencing hearing. The jury deliberated for only twenty-five minutes[6] and returned an advisory sentence of

[5] On information and belief, the trial transcript improperly spells Juror Irma Brickel's name as "Brickle."

life imprisonment on all counts. TT 2821-2824; R. 428. Despite that recommendation, and despite just hearing Juror Brickel's residual doubt, Judge Paul disregarded the jury's recommendation and sentenced Zeigler to death. R. 431.

III. After Trial, Zeigler's Counsel Discovered That the State Suppressed Numerous Pieces of Critical Evidence and Deliberated Used Perjured Testimony at Trial to Procure his Convictions

In the decades following his conviction, Zeigler has discovered that the State suppressed many pieces of critical evidence and provided perjured testimony to obtain his conviction. An exhaustive listing and description of this suppressed evidence and perjured testimony is not possible in this factual summary. The more egregious examples of suppressed evidence and perjury are detailed below.

a. The State Suppressed Crucial Witness Statements and Police Reports Made Early in the Police Investigation

Despite explicit requests by the defense,[7] the State failed to disclose key witness statements and police reports from the period early in the investigation when the defense lacked access to witnesses and the crime scene, including

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[6] It is difficult to interpret the jury's recommendation of life imprisonment as anything other than evidence of residual doubt amongst the jurors. Juror Brickel openly testified to her residual doubt. And if the jury was entirely confident in its verdict, it would be odd for it to not recommend the death penalty for a brutal mass killing of family members and a man allegedly killed in order to frame him for the murders—all for an alleged motive of monetary gain. At the very least, a jury that was entirely confident in its verdict would have debated imposing the death penalty for more than 25 minutes.

[7] Record on Appeal for the appeal previously filed in this action under number SC 12-2618 ("2012 ROA") at 335-36.

important impeachment materials. The State prevented Zeigler from using this evidence at trial by suppressing it until April 1987, when the State was compelled to grant access to Mr. Zeigler's file in response to counsel's Florida Public Records Act request.

One suppressed document was a 14-page report by the first police officer to arrive on the scene, in which the officer observed that Zeigler had only dry blood on his wounds and clothing. R. 548. The report refuted a crucial element of the State's case: that Zeigler shot himself immediately prior to the arrival of the police around 9:20 p.m. on the night of the crime, and not before. For the State's theory to be true, Zeigler needed time before shooting himself to kill his wife and in-laws at approximately 7:10-7:25, take Thomas and Mays to the orange grove, the Store, his home, and back to the Store, then kill Mays, then return home to meet Edward Williams, and finally return with Williams to the Store. R. 159-65, 389, 401-02. Had Zeigler shot himself after taking all of those actions, the blood surrounding his wound would have been wet, not dry, when the police arrived at 9:20. The presence of dry blood surrounding Zeigler's wound, by contrast, would strongly corroborate Zeigler's account that he had been shot shortly after arriving at the Store at approximately 7:40 – more than an hour and a half before the police arrived.

When questioned at trial about the condition of the blood on Mr. Zeigler, the officer, Chief Thompson, testified that he observed "what appeared to be dried blood and damp blood," which the State offered as proof that Zeigler shot himself shortly before calling the police (and after committing all four murders). R. 211. The defense was unable to cross-examine Thompson with his prior inconsistent statement that the blood on Zeigler was dry, not damp, because that report had been suppressed.

b. The State Suppressed a Recorded Conversation With an Eyewitness Across the Street From the Murders Whose Account Contradicted The State's Theory of the Case

The State also suppressed a tape-recorded telephone interview of Jon Jellison, an eyewitness not disclosed to the Defense prior to trial, by State investigator Jack Bachman. R. 560-65. Jellison, his parents and his sister were located in a motel immediately next to the Store, and witnessed some of the events at the Store on the night of the crime. He told the State's investigator that shortly after 9:00 p.m. he (and the rest of his family) saw a police car at the back of the store, that a police officer aimed his gun toward the store over the top of the car and fired shots, and that other police cars had arrived on the scene soon thereafter. R. 561-63.

The State's investigator made plain his disappointment with Jellison's recollection of events, apparently because it conflicted with the State's theory of

the case, stating: “As long as you heard the gunshots after you saw the police car, that wouldn't help us a bit.” R. 564. The state investigator then made a naked attempt to get the witness to tailor his memory to the State’s pattern. When Jellison asked if Mr. Bachman wanted to interview Jellison's mother, who had also witnessed the events, Bachman stated: “Not unless you all get together and decide you heard those gunshots before you saw the police car. In that case, we’d give you a free trip back to Florida.” R. 564-65.

Testimony by Jellison and other family members consistent with his taped statement would have refuted the State's theory of the case at several points, including the State’s contention that Zeigler fired the shots that killed Mays before 8:30 p.m., and probably before 8:05 p.m., when the State asserted Zeigler had gone to his home to meet Williams and drive him to the Store. R. 292-305.

c. The State Suppressed the Existence of, and Presented Perjured Testimony Regarding, a Key Witness to the Murders Who Was Also a Suspect in an Attempted Robbery Across the Street From the Murders, The Existence of Which Was Also Suppressed

The State suppressed the existence of a key witness named “Robert Foster” who came to the police two days after the murders seeking protection based upon what he knew about them, and the fact that this same individual was suspected of committing an armed robbery across the street from the murders on the same night. Lead detective Frye’s initial arrest report from December 30, 1975 recounts an interview with a “Robert Foster”, mentioning the name five times. R. 567-68. In a

subsequent February 6, 1976 report, the account initially attributed to Foster was attributed to Felton Thomas. R. 570-605. At trial, Frye denied knowledge of anyone named "Robert Foster, testifying that the original mention of "Robert Foster" was a "typographical error" and a "mistake," and that he was attempting to refer to "Felton Thomas" all along. R. 343, 617-18; 2012 ROA 350-51.

The Defense subsequently learned from the Chief Deputy Sheriff at the time that a man named Robert Foster came to the police seeking protection because he believed that someone was trying to kill him for what he knew about the Zeigler Store murders, and that "Robert Foster had been admitted into the county jail in a special section that we set aside for the protection of material witnesses." R. 621. The Defense also located eye witnesses who stated that Foster was present in Orange County after his release from prison in 1975; had attempted an armed robbery across the street from the Store on the same night as the murders; and that Police Chief Thompson—who later investigated the Zeigler Store murders—responded to the attempted Gulf station robbery and took notes. R. 624-27; 633-36.

Zeigler filed a timely Rule 3.851 motion to set aside his convictions based on these discoveries, which motion was denied on the ground that the suppression of Robert Foster's existence was not sufficient to "undermine [the Court's] confidence in the outcome" in light of other evidence of guilt such as "the

testimony of Smith, Thomas, and Williams." *See Zeigler v. State*, 130 So. 3d 694, at *1 (Fla. 2013), *cert. denied*, 134 S. Ct. 2292 (2014).

IV. Key State Witness Felton Thomas Has Now Recanted Critical Portions of His Testimony

This Court has repeatedly recognized Felton Thomas' testimony as key to Zeigler's conviction.[8] Mr. Thomas, however, has since recanted critical portions of that testimony. As discussed above, Thomas testified at trial that Zeigler picked him and Mays up the night of the murders, took them to a nearby orange grove, and had them fire guns out the window of the car. R. 266-69. According to the State, Thomas' account proved that Zeigler intended to kill Mays and frame him for the other murders by having Mays and Thomas handle the murder weapons so that their finger prints would be found on them. R. 391-94. The degree to which

[8] *See, e.g., Zeigler*, 130 So. 3d, at *1 ("there is no reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different . . . to have believed [Zeigler's] story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams . . . .") (citations and internal quotation marks omitted); *Zeigler v. State*, 116 So. 3d 255, 256-57 (Fla. 2013) *cert. denied*, 134 S. Ct. 825 (2013) ("in order to accept Zeigler's theory of the case, the jury would have had to disbelieve at least three witnesses who testified at the trial [Smith, Thomas, and Williams]. . . *even if the DNA results comported with the scenario most favorable to Zeigler, he still would not have been able to show that the evidence would have probably produced an acquittal*") (citations omitted) (emphasis in original); *Zeigler v. State*, 967 So. 2d 125, 131 (Fla. 2007) (same); *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995) (same); *Zeigler*, 402 So. 2d at 368 ("To have believed [Zeigler's] story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams . . . .").

the State emphasized Thomas's testimony cannot be overstated. *See e.g.*, R. 391-94, 399, 405, 407, 411.

Two critical aspects of Thomas's testimony were that (1) Thomas could positively identify the driver he rode with the night of the murders to be Zeigler, and (2) the driver had Thomas and Mays handle and fire the guns as part of his plot to frame them – which the State contended was the whole purpose for the trip. Thomas now states that neither of those two critical aspects of his trial testimony is true. Thomas, who reports still being afraid to speak about this case for fear of his safety and wellbeing despite knowing that Zeigler is in jail and on death row, insisted that the conversation take place in the front lobby of the Ft. Pierce, Florida police station, which is under video surveillance. R. 445.

In that conversation, Carty asked Thomas whether the "white man" he saw in the car the night of the murders was Zeigler. R. 478. Thomas responded "I still don't know who it was." *Id.* Thomas explained that the police never showed him a photo lineup *or even asked Thomas who he had seen that night*, R. 450; 500, even though Thomas did not know Zeigler and "only saw the person twice in my whole life . . . That night and at the courtroom". R. 450, 489. Instead, the police *told Thomas* that the man he reported seeing was Zeigler, and improperly provided Thomas with additional information about their case against Zeigler to solidify that thought in Thomas's mind. R. 497. Thomas recounted how instead of asking him

for the identity of the "white man" he had seen, "detectives" on the night of the murders "said Zeigler -- that this man Zeigler said he called and say Charlie tried to rob him -- Charlie tried to rob him. Said he had -- he had done shot himself in the side right here. They could tell he had shot himself in the side because he had gun powder right here." *Id*. Thomas explained that he stated that the "white man" from the car was Zeigler because "Zeigler" was "the way they call him," referring to the police, and that the police told him Zeigler had committed the murders. R. 478.

Not only was Thomas never shown any sort of lineup, but he readily concedes that if he had, he might have identified someone else. In response to the question "Do you think you could point out the wrong white guy?", Thomas responded "If I don't [know] a person . . . and you line a whole lot of people up I ain't seen but one -- one time, . . . I don't know who I might pick out . . ." R. 489. When pressed about whether Zeigler was the man from the car, Thomas referred to media reports that linked Zeigler to the murders, suggesting he had formed his view about whether Zeigler was the same person he had seen in the car from police and other accounts that Zeigler was guilty. R. 485. Thomas also explained in portions of his interview not captured on the recording that he was and remains illiterate and that substantial coaching by police bolstered his view that Zeigler was the man he saw in the car the night of the murders. R. 446.

Thomas also told Carty and officers Gene Jones and Jeff Thompson repeatedly that he never fired or even touched any guns the night of the murders. Thomas answered the question "So you didn't fire a gun?" with an emphatic "No, no, no. . . I ain't fire". R. 470. Carty confronted Thomas with his trial testimony, in which he states clearly that he did fire a gun the night of the murders, and Thomas responded "That's wrong . . . I don't give a shit what they say [referring to the transcript of his trial testimony]. I know I didn't do that, I didn't do that. . . I never had my hand on one of those guns. Never." R. 508-09.[9]

[9] When shown a picture of Zeigler's brother-in-law, Perry Edwards, Jr. ("Perry Jr.", and asked if he recognized him, Thomas said "I don't know that man by no mustache, no," R. 479, indicating that he did recognize him without a mustache—which Perry Jr. only grew after the murders. Perry Jr. (now deceased) inherited substantial assets under the Edwards' will following their murders. R. 662, 664-6, Perry Jr. probated the will on January 7, 1976, the date of Eunice's funeral. R. 667. Court records confirm that the Edwards' will was checked out in August of 1975, indicating that they were planning to make some sort of change to the will (ROA. 669-671). The Edwards' had approached Zeigler in November of 1975 to make him, and not Perry Jr., the executor of the estate. R. 673. There are indications that Perry Jr. and his parents did not get along well. R. 675-76. There is also evidence that Perry Jr. was in town on the night of the murders, and had a strange reaction upon receiving news of the murders. R. 678-79. Perry. Jr. had a history of violence. R. 681-85. And it appears that a ring missing from Eunice's body after the murders, R. 384-87, later came into the possession of Perry Jr.'s wife, Sandra Faye. R. 678. Despite all of this, it does not appear from the records of this matter that the State has ever considered Perry Jr., or anyone other than Zeigler, to be a potential suspect in this case—and rather rushed to judgment that Zeigler was the *only* possible suspect. This appears to have created a motivation for the State to ignore, and in many cases suppress, evidence contrary to this assumption.

Thomas further altered his trial testimony in at least two other important respects. *First*, Thomas stated that the car the "white man" was driving had four doors, rather than two as he testified at trial. When asked in his recent interview "How many doors? Do you remember how many doors [the white man's car] had?," Thomas responded "[y]eah. It got four doors on it." R. 520. At trial, by contrast, Thomas insisted that the car the white man was driving the night of the murders "didn't have no back door to it". R. 285. This is an important change in his story because Zeigler's car had only two doors, not four. R. 820.

Second, Thomas stated contrary to his trial testimony, there were no cars other than Mays' van and the car driven by the "white man" at the Store on the night of the murders. In his interview, Thomas stated that when he, Mays and the "white man" went to the Store, there were "[n]o cars. No nothing there. When we got back, there was nothing there but just [Mays'] van." R. 467. That account is flatly inconsistent with the State's claim that Perry and Virginia Edwards drove to the Store separately from Eunice and were subsequently murdered by Zeigler. It is also inconsistent with Thomas's trial testimony that "I saw a vehicle parked in front of the store when we first got there", which he "took [] to be a Buick," and that this extra vehicle "was still there" after Thomas returned with the "white man" from the orange grove. R. 271.

V. Zeigler's Prior DNA Testing Requests

In 2001, Zeigler obtained authorization to use DNA testing technologies on portions of his clothing the State presented to the jury at trial. R. 689-94. The testing results showed that the bloodstain sample taken from spots on Zeigler's shirt underarm – the same bloodstain the State relied on to show that Zeigler had allegedly held Perry Edwards in a headlock and brutally beaten him, and the same bloodstain that the State argued showed by inference that Zeigler had also killed his wife and mother-in-law – were not Perry Edwards' blood. R. 709, 715-19. Further, the testing showed that Perry Edwards' blood was found in the deep, saturated blood stains found on the upper calf and lower thigh of Mays' pants – which was consistent with Mays, not Zeigler, having knelt on Edwards' chest while Edwards was bleeding profusely. R. 745-46. The testing results also discredited the State's claim that Mays arrived more than an hour after Perry was killed at Zeigler's command. R. 438, 716-18, 696-709, 732-44. Rather, the results supported Zeigler's testimony that the stain on the underarm of his shirt, which the State argued arose from a savage beating of Perry Edwards while Edwards was held in a headlock, was created when he crawled over Mays' body to call the police. R. 716-18, 732-744.

After obtaining these test results, Zeigler moved in 2003 to set aside his convictions. R. 696-709. The Circuit Court held an evidentiary hearing on his

motion the following year at which two expert witnesses testified. R. 711-768. They explained that Zeigler could not have killed Perry Edwards in the manner described to the jury (beating him to death with a blunt instrument while holding him in a headlock) without transferring a large quantity of Perry's blood onto his clothing, and that the DNA testing conducted showed no trace of Edwards' blood in the areas identified to the jury as relevant by the State. R. 718-19, 733-34. The State contended in response that the sample was too small, mixed, or deteriorated to be reliable, despite presenting no evidence to support that contention. R. 439, 758. The State also argued that other physical evidence – entirely different spots from the portions of Zeigler's shirt that the State had pointed to at trial – might contain Perry Sr.'s blood and thus could prove Zeigler's alleged guilt. R. 720-21, 724, 758-59, 762, 767-68. This theory, however, was entirely new and had never been presented to the jury.[10] *Id*. In fact, the only thing the State's expert told the jury about the stains the State used to deny the significance of the DNA testing results in 2004 was that they might not be blood at all. R. 754-55, 757. The Circuit Court allowed the State to continue to hypothesize about how untested evidence could support a new theory of Zeigler's guilt over objections from the

[10] And the theory lacked any sound factual basis. Subsequent examination of the spots by another expert, Paul Kish, confirmed that the spots did not have the right shape to have been deposited on the shirt in the manner hypothesized by the State.

defense and ultimately denied Zeigler relief at least partly on that basis. R. 770-85. This Court affirmed. *Zeigler v. State*, 967 So. 2d 125 (Fla. 2007).

In 2009, Zeigler filed a motion seeking to test the additional stains the State in 2004 contended were evidence of Zeigler's guilt and other stains that could shed light on Zeigler's guilt or innocence. R. 436-43. The Circuit Court approved Zeigler's retention of an expert to review the physical evidence and design a plan for testing. The expert, Paul Kish, prepared a thorough report and presented himself for testimony and cross-examination. After an evidentiary hearing, the circuit court denied Zeigler's testing motion on the ground that it was barred as successive. R. 787-90.

This Court rejected the Circuit Court's basis for its holding (that Zeigler's motion for testing was successive), finding that Florida's Rule 3.853 in fact permitted successive DNA testing motions. The Court affirmed the circuit court's decision to deny Zeigler's testing motion, however, on the different ground that Zeigler had not demonstrated that "the absence of Perry's blood" on Zeigler's clothing would "give rise to a reasonable probability of acquittal or a lesser sentence" because (1) "it was possible to miss blood on the shirt, due to deterioration and improper storage," (2) "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area," and (3) "there was no way to know for sure that all of the contributors to the blood on Zeigler's clothing would

be identified unless every single bloodstain was tested." *Zeigler v. State*, 116 So. 3d at 259 (citation omitted).

VI. Zeigler's Current Motion for DNA Testing and Recent Advances in DNA Testing Technology

On July 2, 2015, Zeigler filed a new Rule 3.853 motion for DNA testing, seeking to test untested evidence using cutting edge DNA technologies that were either unavailable or in their infancy when Zeigler last sought testing in 2009. *See e.g.* R. 1178. Zeigler argued that his new motion was not barred by collateral estoppel or other grounds because the materials he sought to test – including skin cell evidence that was not previously testable – was different from the evidence Zeigler previously asked to be tested, and because significant advances in technology had solved the three factors identified by this Court as supporting the denial of his prior testing requests – namely, degradation, mixed samples, and the need to test every stain to be sure that Zeigler was not the perpetrator. R. 147-57, 1046-50. As Zeigler asserted in his motion, technology had solved the degradation and sample mixing problems, and it was now both possible and unnecessary to test "every single bloodstain" on his clothing. Zeigler also argued that these changes, as well as Felton Thomas' recantation, affected the probative value of his testing request.

Zeigler supported his motion with substantial evidence, including an affidavit by Richard Eikelenboom, an expert in cutting edge DNA testing techniques regularly engaged to support prosecutions. Eikelenboom explained how newly developed technology, including mini-STR, Y-STR, and touch DNA testing, make it possible to accurately identify bloodstains that are old, degraded, or from mixed samples – the very concerns this Court cited as its basis for affirming the denial of Zeigler's 2009 request for DNA testing. 793-94. Modern techniques also makes it possible to recover and identify an entirely new category of DNA called touch DNA, which refers to DNA recovered from epithelial (skin) cells deposited when a person makes contact with an object. R. 793. Using today's techniques, this DNA can be recovered and identified from the interior of a gun (the interior typically contains the touch DNA of the person who opened and cleaned the gun). R. 795-96. It can also be recovered from blood that has dripped from one person's hands onto another object because skin cells from that person's hands mix into the blood sample, creating two separate DNA profiles. R. 795. Modern DNA testing can both detect and separate those two profiles, revealing (1) who the dripped blood belonged to, as well as (2) whose hands the blood dripped from. R. 794-95.

The State opposed Zeigler's motion on the sole ground that it was barred under the doctrine of collateral estoppel, without presenting any expert testimony.

R. 866-83. On October 21, 2015, the Circuit Court held a status conference and ordered an evidentiary hearing, which was scheduled for March 31, 2016. R. 891.

VII. The March 2016 Discovery Hearing

After learning that Felton Thomas had recanted parts of his trial testimony, Zeigler filed a motion to subpoena Thomas to testify at a deposition or at the evidentiary hearing on his Motion (the "Discovery Motion"). R. 888-99. Zeigler also sought an order compelling the State to identify any expert it planned to present at the evidentiary hearing and to either produce a report or allow for a deposition of that expert in advance of the hearing. *Id*.

On March 1, 2016, the Circuit Court held oral argument on Zeigler's Discovery Motion. R. 920-26. Zeigler stressed that the Court had discretion to order discovery in connection with Zeigler's DNA Motion, and that Thomas' recantation was directly relevant to that motion because his trial testimony, which Thomas now argues vigorously is incorrect, had repeatedly been cited as a basis for concluding that DNA testing would not likely produce an acquittal. R. 926-928, 933. The State opposed the motion, arguing that Thomas' testimony had nothing to do with Zeigler's request for DNA testing. R. 929-931. The State agreed, however, to identify and present its expert for deposition, mooting that aspect of the Discovery Motion. R. 923-24.

On March 7, 2016, the Circuit Court denied Zeigler's Discovery Motion, holding that Rule 3.853 does not "permit a lay witness to testify at an evidentiary hearing premised on a motion for DNA testing, or allow[] a trial court judge to grant relief from a conviction and sentence based on that hearing." R. 917-18. Neither Zeigler's DNA Motion nor his Discovery Motion sought any relief from Zeigler's convictions – only the release of evidence for DNA testing. R. 937-40.

VIII. The March 2016 Evidentiary Hearing

On March 31, 2016, the Circuit Court held an evidentiary hearing on Zeigler's DNA Motion. Mr. Eikelenboom testified on behalf of Zeigler, and was accepted by the Court as an expert in DNA testing and analysis, crime scene reconstruction, and bloodstain analysis. R. 1060.

Eikelenboom explained that the first type of new technology Zeigler sought to use in the DNA Motion – called mini-STR or mini-filer technology – was first developed in 2007, six years after the limited DNA testing performed in 2001, and was "especially made" to "identify the source of older and deteriorated blood that older methods could not determine." R. 1067. He testified that this technology was significant in Zeigler's case because some of the victims had been shot at close range, explaining that a close range shooting produces "backspatter" of the victim's blood towards the shooter, and that this backspatter (which is sometimes called "blowback") produces very small "misting" of blood that was previously

difficult to see but which mini-STR testing is "very helpful" in identifying. R. 1076-78.

Eikelenboom stated that he "would expect" backspatter to be on Mr. Zeigler's clothing if he had been the individual who either shot or beat Perry Edwards, as both of those events would have resulted in a significant amount of Perry's blood being spattered onto his attacker. R. 1079. Eikelenboom stated that if he were to perform modern technology DNA testing on Mr. Zeigler's clothing, he would be able to tell whether Zeigler was the shooter and the beater of Mr. Edwards. *Id*. He further stated that if modern testing were performed and found none of Perry Edwards' DNA on Zeigler's clothing, then there would be "no support for the hypothesis that he shot Mr. Edwards." R. 1124.

Eikelenboom explained that in addition to allowing for previously impossible testing of small or degraded samples, mini-STR technology would also make it both possible and unnecessary to test "every single bloodstain" on a piece of clothing. He noted that a close range shooting – such as the shootings of Perry and Virginia Edwards – would produce hundreds or even thousands of individual bloodstains, and that while it is not necessary to test each stain to determine if the individual who wore the tested garment was the killer, it is possible to do so using a "taping" method that would "test everything". R. 1080-81.

Eikelenboom also explained how Y-STR and touch DNA testing could determine if Zeigler committed the murders. He testified that Y-STR would make it possible to eliminate all of the female DNA in a sample, leaving only the male DNA, and that this technique would be especially helpful in determining if Zeigler was the individual who smeared type-A blood onto Eunice Zeigler's clothing. R. 1072-75. Touch DNA testing, Eikelenboom explained, would also utilize mini-STR equipment, and would allow him to determine if Zeigler was the individual responsible for physically struggling with Perry Edwards over what the State contends was a life-or-death fight lasting several minutes. R. 1066-69, 1076-77, 1079-91. Touch DNA testing also makes it possible to determine if Zeigler was the individual who dissembled and cleaned the guns the State claims Zeigler owned and used to commit the murders. R. 1082. Eikelenboom testified that he believed he was the "first" to do touch DNA testing in the U.S. in 2008, but that it was still not widely used in the country. R. 1120-21.

Eikelenboom acknowledged that storage and handling conditions for the evidence were not perfect – as would always be true in a 40-year-old-case – and referred to the possibility that evidence would be "contaminated" in the sense that it could contain additional DNA deposited in small quantities by people who handled it over the last 40 years. R. 1110-1111. But there was no testimony suggesting that storage or other conditions would in any way affect the ability to

use modern DNA testing to determine if Zeigler was the individual who shot and beat his victims – testing that turns on the existence or absence of DNA that would necessarily be present if Zeigler were guilty, not on the presence of trace amounts of unrelated DNA deposited due to evidence handling procedures.

The State also brought an expert to the hearing, Dave Baer, whom the defense had previously deposed; however because the State declined to call him as a witness, Zeigler did so. R. 1127-29. The State vigorously opposed Zeigler's request to call State's expert as a witness. *Id*. After being allowed to speak, the State's expert, Mr. Baer, testified that he had reviewed Mr. Eikelenboom's affidavit laying out the testing Zeigler asked to conduct, found the requested testing to be "reasonable", and had "no problem" with Zeigler's requests to test Eunice Zeigler's clothing or Perry Edwards' fingernails. R. 1148-49. Baer's sole objection to the proposed testing was Zeigler's request to test every bloodstain on Zeigler's shirts – a request driven by this Court's rulings. R. 1131. Baer explained that "if there's a theory of the case that there is spatter or backspatter on this particular item from any particular occurrence, it's not going to be one drop" and that "[y]ou should be able to find it with by some random testing", and stated that he "suggested maybe check some additional stains, if necessary, but not every stain." *Id*.

Baer testified that, like Eikelenboom, he had personally examined some of the evidence Zeigler seeks to test, and that Baer had even identified "additional areas" on Zeigler's shirt that he "thought should be tested." R. 1146. Baer stated that if there was a close range shooting or a beating (as was the case with Perry and Virginia Edwards), "I would assume there would be quite a bit of transferred blood" and that there was "no" reason to think it would be hard to find that blood today. R. 1147. When asked directly "[h]ow could Tommy Zeigler have shot Perry Edwards at close range, beaten him, without getting Perry Edwards' DNA on his shirt in large quantities," Baer responded that if Zeigler was wearing that shirt, "you would expect there to be blood transferred back to him." R. 1147-48.

Baer testified that he had never done mini-STR, mini-STR touch DNA, or Y-STR testing, and that neither of the two state labs he has worked at – the Florida Department of Law Enforcement Sanford and Orlando labs – had the ability to do such testing even today, but that he had a general familiarity with the techniques involved. R. 1131-32, 1140. Baer explained that testing of degraded DNA using the technology available in 2001 might have produced "partial" or "no results", and that mini-STR technology, to his general understanding, solved that problem. R. 1139.

Baer also testified that 15 years ago, when limited DNA testing was last done in Zeigler's case, the federally maintained CODIS database used to match

DNA to suspects has "maybe under a million" DNA profiles in it, whereas today that database has "14 to 15 million" profiles and is "growing rapidly". R. 1145.[11]

IX. The Circuit Court's Order Denying Zeigler's DNA Motion

On July 18, 2016, the Circuit Court issued an order denying Zeigler's DNA Motion (the "Order"). R. 1178-1274. In the Order, the Circuit Court found that "Defendant established the physical evidence containing DNA still exists and is housed in the Office of the Clerk of the Court, Orange County, Florida." R. 1201-1202. Notwithstanding that holding, the Court found "the authenticity of the DNA is questionable because it may be contaminated based on a lack of protective equipment when it was handled and/or improper storage." R. 1202. The Court also held that "[a]lthough Defendant wants to test 'every single bloodstain' on his shirts and argues the absence of Perry's blood and/or DNA thereon proves his innocence, he failed to comply with Rule 3.853(b)(3)" because "he did not include a statement indicating the results of previous testing were inconclusive; instead he argued prior testing 'severely undermined' the theory of the murders and exonerated him, which does not comply with the Rule." *Id*. The Circuit Court

[11] In its closing argument, the State argued without support that Zeigler might not have the victims' DNA on him because he was wearing a raincoat when he committed some, but not all of the murders. R. 1109. Following the hearing, the State sent the Circuit Court an email purporting to identify support for this novel contention. R. 1021. Zeigler's counsel filed a response noting that there is no evidence whatever that Zeigler ever wore any raincoat on the night of the murders. The State moved to strike Zeigler's filing, and Zeigler responded. R.1026-30. The Circuit Court did not rule on the State's motion to strike.

further found that "Defendant's speculative claim that touch DNA testing of Perry's clothing may shed light on the murders cannot be the basis for granting a motion for postconviction DNA testing", R. 1203; that Zeigler "failed to provide any proof for his assertions that DNA from the assailant is under Perry's fingernails and/or on his coat or to specifically state, assuming DNA is present in these locations, how testing would exonerate him or lead to a lesser sentence", R. 1203-04; and that "[i]n regard to Eunice's clothing, Defendant asserts only that touch DNA and Y0STR testing will determine the source of the type A bloodstains thereon, which could not have come from him, and identify the person who put the blood there. R. 1204. However, he failed to demonstrate how that identity equates with his assertions that he is not the killer or how it would lead to his exoneration or a lesser sentence." *Id*. Zeigler appeals from that ruling.

SUMMARY OF ARGUMENT

Where, as here, a defendant appeals from the denial of a postconviction motion for DNA testing, the Court "conducts the de novo review of the postconviction court's application of the facts to the law." *Schofield v. State*, 67 So.3d 1066 (Fla. 2d DCA 2011). *See also Consalvo v. State*, 3 So. 3d 1014, 1015 (Fla. 2009). The Order does not withstand scrutiny under this standard. Rather, each of the Circuit Court's findings in denying the DNA Motion was erroneous and contrary to compelling evidence Zeigler presented in support of relief. As

discussed more fully below, experts for both the State and the defense *agreed* that because two of the victims were shot at close range and Perry Edwards was beaten, the blood and touch DNA of these victims would necessarily have been transferred in large quantities onto their killer's clothing. The experts further *agreed* that there would be no difficulty finding that DNA, and that given modern technology, the absence of that DNA on Zeigler's clothing would leave no support for the State's hypothesis that he is guilty. There is simply no way that a jury hearing that testimony – that there is no scientific support for the theory that the defendant is guilty – would find that the defense failed to show reasonable doubt. Indeed, any conviction would be contrary to the manifest weight of the evidence and would be subject to reversal. That is all the more true here when considered together with the totality of evidence refuting guilt, including the lack of any witness or other direct evidence, the absence of a coherent motive, and all of the other issues described above.

The Circuit Court also erred in holding that evidence Zeigler seeks to test is may not be authentic. Indeed, the Circuit Court expressly found that Zeigler had established that the articles containing the evidence are authentic. Nothing more is required. The Circuit Court's holding that Zeigler did not include a statement that prior testing was inconclusive is similarly erroneous.

Where, as here, the applicant is not insisting on State funding of the test, it denies him fundamental due process of law to bar his own tests on evidence that exists in the custody of the State which he believes will produce exonerating evidence. That is especially true if the denial is based on the possibility of inauthentic DNA, since the State is denying Zeigler the opportunity to test the very assumption on which access to the evidence is being denied. Accordingly, and because Zeigler overwhelmingly satisfied Rule 3.853's requirements, the Order should be reversed and testing authorized.

I. Zeigler Amply Demonstrated That Testing Would Generate Evidence that Would Probably Produce An Acquittal

The Court below erred in holding that Zeigler did not satisfy Rule 3.853's requirement that he show "a reasonable probability that the movant would have been acquitted . . . if the DNA evidence had been admitted at trial." Fla. R. Crim. P. 3.853(c)(5)(C). In fact, Zeigler far exceeded the required showing, demonstrating an expert *consensus* that the testing he seeks would prove whether he was the individual who shot Perry and Virginia Edwards. If such testing had been performed, and results had been presented to a jury showing that Zeigler had *no* backspatter from *either* of the two victims known to have been shot at extremely close range, there is no way a jury would have been able to find Zeigler guilty beyond a reasonable doubt, especially in light of the totality of evidence adduced to date showing Zeigler to be innocent. That is all the more true when the

additional DNA testing Zeigler seeks is considered, which would show, among other things, that someone *other than Zeigler* fought with and was bleeding all over the murder victims.

Rule 3.853 requires far less than Zeigler demonstrated in order to establish a "reasonable probability of acquittal". A defendant satisfies the requirement by showing a reasonable probability that DNA testing results would create reasonable doubt as to the defendant's guilt if they were presented to a jury. *See e.g. Schofield v. State*, 861 So. 2d 1244, 1245 (Fla. 2d DCA 2003) (reversing denial of DNA testing because "[i]f DNA testing confirms Schofield's allegations, the results would create a reasonable probability that Schofield would be acquitted *because reasonable doubt would exist that Schofield committed the murder*.") (emphasis added). Where a defendant has met that standard, "DNA testing procedures should be allowed." *Dubose v. State*, 113 So. 3d 863, 864 (Fla. 2d DCA 2012). Importantly, "Rule 3.853 does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing." *Schofield*, 861 So. 2d at 1246 (concluding "that the trial court should not have denied the motion on such a basis.")

In assessing the probative value of the DNA testing, the court is required to accept all of the movant's allegations as true – particularly the defendant's

allegations about the expected testing results, which cannot be known for certain until testing is actually performed. *See e.g., Montez v. State*, 86 So. 3d 1243, 1245 (Fla. 2d DCA 2012) ("[t]hese allegations in Mr. Montez's sworn motion must be taken as true.") The Court is also required to "consider the cumulative effect of all of the evidence that has been presented during [the defendant's] postconviction proceedings . . . ." *Hildwin v. State*, 141 So. 3d 1178, 1183 (Fla. 2014).

In Zeigler's case, the standard he must meet to obtain DNA testing is even lower because the State's case against him was almost entirely circumstantial.[12] As such, this Court's "special standard" requires that there be a "moral certainty that the accused and no one else committed the offense charged" and that there be "actual exclusion of the hypothesis of innocence." *Dausch v. State*, 141 So. 3d 513, 517-18 (Fla. 2014) (citations omitted). The evidence Zeigler presented in support of his DNA Motion far surpasses these requirements.

[12] *See State v. Zeigler*, 494 So. 2d 957, 960 (Fla. 1986) (Barkett, J., dissenting) (noting that Zeigler's was a "circumstantial evidence case" and urging "[i]n light of an initial vote by the jury in this circumstantial evidence case of six jurors to acquit and six to convict, the allegation of newly discovered evidence warrants a careful review of the record."). *C.f. Zeigler*, 654 So. 2d at 1164 (finding "[t]he State's case was not *entirely* circumstantial") (emphasis added).

a. Modern DNA Testing on Zeigler's Clothing Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

It is undisputed that Perry Edwards was shot once at a distance of just three to six inches, and a second time at a distance of six to eighteen inches – distances the State's original forensic expert described as "quite close". 2005 ROA at 4684. Virginia Edwards was shot from a distance of just six to twelve inches. *Id*.. It is also undisputed that Perry Edwards was beaten with a blunt instrument. *E.g.*, *id;* R. 9, 174-75, 189-90, 403.

Both the State and defense experts agreed that shooting a victim at close range, and beating someone with a blunt instrument, results in a significant amount of "backspatter" of the victim's blood onto the perpetrator. Zeigler's expert testified that this blowback could be in the form of "misting" of blood, which would have been difficult to detect in the past, particularly in an old case such as this one, but that such backspatter would be easy to detect using today's technology. R. 1076-78. The State's expert agreed, testifying that "there would be quite a bit of transferred blood" resulting from such a shooting, and that there was "no" reason to think it would be hard to find that blood using today's techniques and technology. R. 1147. The experts similarly agreed that the beating of Perry Edwards would have produced backspatter that they would "expect" to find on Zeigler if he was guilty. R. 1079, 1147-48.

In light of the sensitivity of modern DNA testing, and the ability to literally test *all* of Zeigler's clothing, it is clear that the absence of *any* DNA from either Virginia or Perry Edwards on Zeigler's clothing would be extremely powerful evidence that Zeigler could not have committed the murders. As Eikelenboom stated, such as finding would leave "no support" for the hypothesis that Zeigler shot and killed the victims. R. 1124. Even the State's expert conceded that if Zeigler were guilty, he "would expect" to find the victims' DNA on his clothing based on modern comprehensive testing. R. 1147-48.

The touch DNA testing Zeigler seeks to perform would also provide powerful evidence of reasonable doubt as to Zeigler's guilt, which under law would entitle Zeigler to an acquittal. It is undisputed that individuals shed thousands of epithelial skin cells every hour, and shed significantly more cells during a violent struggle, which involves both friction and pressure. R 793, 795-96. It is also undisputed that Perry and his killer struggled violently "for some time," *Zeigler*, 402 So. 2d at 367, and that Perry's touch DNA would have been transferred to his killer during that struggle. If this DNA exists on Zeigler's shirt, Eikelenboom testified that he expected it would be found, particularly if the extensive testing Zeigler proposes is done. If that testing fails to reveal any of Perry's touch DNA on Zeigler's clothing, it is inconceivable that Zeigler was the man who fought with and beat Perry – especially if the testing described above

also confirms that Zeigler has *no* backspatter from either Perry or Virginia Edwards on his clothing.

In light of the above, Zeigler has overwhelmingly demonstrated a likelihood that DNA testing would establish reasonable doubt and thus would produce an acquittal. Indeed, Florida courts have routinely deemed such evidence sufficiently probative so as to require testing under Rule 3.853. For instance, in *Dubose*, 113 So. 3d at 864-65, the Court found a DNA motion facially sufficient based on evidence of a struggle between the murder victim and the murderer, where (as here), the victim had been physically restrained by the murderer (in this case, the State contends that the murderer held Perry Edwards in a headlock while beating him). The Court found DNA testing warranted based on the defendant's allegations that "such a struggle would more likely than not have caused the assailant's DNA to transfer to the victim's clothing and would have involved the victim's clawing at the assailant's arms, thus transferring the assailant's DNA to the victim's fingernails." *Id*. The Court rejected the State's argument that DNA testing could not establish reasonable doubt because of eye witness testimony supporting guilt. *Id*. *See also Schofield*, 861 So. 2d at 1245.

In holding otherwise, the Circuit Court appears to have accepted the State's argument that because the results of yet-unperformed testing are not yet known, and thus are not yet certain, testing could be inconclusive so should not be

performed. That is incorrect. "[R]ule 3.853 is silent as to whether a claim for DNA testing may be denied if DNA testing of the evidence would be inconclusive. Rule 3.853 does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing." *Schofield*, 861 So. 2d at 1246 (holding "the trial court should not have denied the motion on such a basis."). Indeed, not only will the testing Zeigler seeks create reasonable doubt as to Zeigler's guilt, but if, as expected, it establishes that Zeigler could not have shot and killed his victims, Florida law would actually *require* a court to acquit him, for a guilty verdict would be contrary to the manifest weight of the evidence. *Smith v. Brown*, 525 So. 2d 868, 870 (Fla. 1988).[13]

Importantly, the testing Zeigler seeks to conduct on his clothing is both different from testing that has previously done and only recently possible to perform, in that it seeks to test different parts of his clothing using different technology. Zeigler has never before requested testing using mini-STR, which was not even released until 2007 and remains largely unavailable in Florida to this day,

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[13] In such circumstances, Florida law requires that the trial court act as a "safety valve" where "the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict" by either requiring a new trial or an acquittal. *State v. Hart*, 632 So. 2d 134, 135 (Fla. 4th DCA 1994) (internal quotation marks and citation omitted). *See also* Rule 3.600(a)(2) (requiring that new trial be granted where the verdict is contrary to the weight of the evidence, even where there was sufficient evidence to support a verdict).

nor has he requested touch DNA testing, which is similarly cutting-edge, or Y-STR testing. And even if he had, Zeigler would clearly satisfy Rule 3.853's provision for re-testing previously tested DNA because it is undisputed that none of the techniques Zeigler seeks to use existed in 2001, when prior testing was performed, and is also undisputed by the experts that, unlike prior testing which this Court deemed inconclusive, modern testing could definitively establish reasonable doubt in Zeigler's case.

b. Testing of Blood Stains on Eunice's Clothing Will Create Reasonable Doubt As to Zeigler's Guilt

Zeigler also requests, for the first time, modern DNA testing of blood stains found on Eunice Zeigler's clothing. One set of stains is located on the inside of Eunice Zeigler's coat. R. 244-46. A second set of bloodstains is located on the bottom of Eunice's socks and the inside of her shoes, even though Eunice was wearing shoes at the time she was found. R. 249-50, 253. A third set of bloodstains is located on the inside of Eunice's pants. R. 252-253. All three sets of bloodstains include blood that was *smeared* onto Eunice's clothing by someone; those stains did not "drip" there. R. 244-249. They also included dripped blood. *Id*. Zeigler, who has type-O blood, could not have been the source of any of these stains, as all are type-A blood. R. 334, According to the State's expert, Eunice could not have been the source of this blood, either. R. 250, 253.

New testing procedures allow these bloodstains to be tested in two crucial ways. First, they can be tested to determine the source of the blood deposited on Eunice's clothing. R. 795. This testing would utilize the recently developed Y-STR and mini-STR techniques, which as explained above carry a significantly greater ability to identify DNA from mixed, degraded or small samples than previously available techniques. *See* infra at Section B(1) of the Argument and R. 793. Second, they can also be tested to determine the identity of the person who smeared or dripped that blood onto Eunice's clothing. This is possible, as explained further below and in Eikelenboom's affidavit, because a person who smears blood onto an object transfers their own touch DNA to that blood. The touch DNA can be isolated from the blood DNA to reveal the source of each separate DNA profile. R. 795.

The significance of this testing cannot be overstated. As described below, the bloodstains on Eunice's clothing, and particularly the smeared stains, had to have come from Eunice's killer. The State acknowledged as much at trial. With respect to the blood on Eunice's coat, the State's blood spatter expert, Dr. MacDonnell, testified that: (i) Eunice's coat, which was found closed and buttoned up, "would have to have been open" at the time blood was dropped and smeared onto it, meaning that the coat was buttoned up *after* Eunice was killed but *before* she was found by police, indicating that her killer was the individual who buttoned

her coat; (ii) the blood would not have come from Eunice, who sustained a single gunshot to the head; (iii) the blood dropped and smeared on her coat "was in a manner that is possible that someone may have had their thumb on the outside and their hand on the inside holding the lapel"; and (iv) the blood found on Eunice's clothing was consistent with "someone with blood on their hands [leaving] those spots from the fingertips." R. 244-46. The State also argued at trial that Eunice's murderer repositioned her body after killing her.[14]

Dr. MacDonnell testified at trial that he also found blood spots on the *inside* of Eunice's shoes and that the blood stains *did not come* from Eunice's gunshot to the head but rather "*had to have come from some other source*." R.250 (emphasis added). He also found a "very heavy deposit" of blood on the *inside* of Eunice's pants, even though she was found fully clothed, which he testified "*definitely*" came from a source other than Eunice. Dr. MacDonnell explained that the blood on Eunice's pants "could not have come from a woman being shot in the head, either standing or lying down in that position." R. 293

These bloodstains must be tested. Modern DNA testing techniques make it possible to identify exactly whose blood is on Eunice's clothing, as well as who deposited that blood on her. That information will very likely reveal who killed

[14] The State also argued that this repositioning indicated Zeigler was the murderer, under a perverse theory that spousal tenderness would have motivated Zeigler, as Eunice's husband, to stage Eunice's murdered body in a more peaceful pose.

her and will confirm that Zeigler did not. For instance, if testing reveals that the blood found on Eunice's clothing belongs to Mays, that would form powerful evidence that Mays, not Zeigler, killed Eunice. There is simply no way to reconcile the discovery of Mays' blood on Eunice with the State's theory that Zeigler killed Eunice more than an hour before luring Mays into the store and then killing him. The same is true if testing reveals that the blood on Eunice's clothing belongs to one of the two key witnesses against Zeigler – Ed Williams or Felton Thomas. Both Thomas and Williams testified that they did not set foot in the Zeigler store the night of the murders. Indeed, Thomas testified that he had *never* been in the Zeigler store. There is therefore no reason for the blood of these men to be found on Eunice's body, and any discovery to the contrary would immediately implicate them as Eunice's murderers. At an absolute minimum, any such discovery would support substantial doubts about Zeigler's guilt, particularly because the only thing known with certainty about the Type-A bloodstains on Eunice Zeigler's clothing is that they could not have come from Zeigler.

The ability to test for the touch DNA of the individual who smeared blood on Eunice's clothing carries an equally powerful ability to prove Zeigler's innocence. As Mr. Eikelenboom explains, if Eunice's murderer already had blood on his hands at the time he handled her body, as Dr. MacDonnell suggested at trial, then the murderer could easily have transferred that blood onto Eunice's clothing.

Touch DNA testing makes it possible to determine both DNA contributors in such a scenario: the person whose blood is on Eunice's clothing *and* the person who smeared that blood on her clothing.[15] The testing techniques Zeigler seeks to use in his case may be new, but they are entirely sound and have been upheld as such in numerous cases. *See Montez*, 86 So. 3d at 1244 (ordering evidentiary hearing on motion for newly-available touch DNA testing.); *State v. Reynolds*, 186 Ohio App. 3d 1, 5, 2009-Ohio-5532, 926 N.E.2d 315, 318 (Ohio Ct. App. 2009) (holding that "Y–STR testing allows DNA technicians to differentiate between male and female DNA from a mixed source" and "mini-STR and touch DNA permit technicians to obtain a DNA profile from very small, degraded, and compromised samples" and holding that the defendant was entitled to conduct DNA testing using these new techniques as they did not previously exist and could yield probative results); *State v. Johnson*, 14 N.E.3d 482, 2014-Ohio-2646 (Ohio Ct. App. 2014) (same).

[15] The State routinely relies on the techniques Zeigler seeks permission to use in his DNA Motion to prosecute crimes. For instance, in November 2013, the St. Petersburg police department reported that since they began testing for touch DNA in August 2010, the technique had helped them solve 38 percent of their burglary cases. An ABC program covering that story noted that touch DNA testing requires a mere 30 skin cells – a trivial number considering human beings shed 30,000-40,000 skin cells hourly – and quoted Janel Borries, DNA supervisor at the Pinellas County Forensic Laboratory, as stating the accuracy of touch DNA testing is one in 330 billion. *See* "St. Petersburg Police report that touch DNA has helped solve 38 percent of burglary cases," last accessed on November 23, 2016 and available at http://www.abcactionnews.com/news/region-pinellas/st-petersburg-police-report-that-touch-dna-has-helped-solve-38-percent-of-burglary-cases; R. 793.

c. DNA on Perry Edwards Sr.'s Clothing Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The third category of testing Zeigler seeks in his DNA Motion is touch DNA testing of Perry Sr.'s clothing. This type of testing has never been requested or performed in this case because, until a few years ago, it did not exist. Since its development, it has been embraced around the country, including by Florida prosecutors, because of its power to shed light on instances where, for instance, a physical altercation occurred.

As explained by Mr. Eikelenboon, touch DNA can be transferred to objects such as clothing in a variety of ways, one of which is through physical contact associated with fighting. R. 793-96. In a fighting scenario, the victim comes into aggravated contact with his attacker's touch DNA in the course of trying to defend himself. Due to modern testing techniques, that DNA evidence can now be tested to determine the identity of the victim's attacker, in the same way as fingernail evidence can be used to identify an assailant.

As Mr. Eikelenboom's affidavit makes clear, touch DNA testing of Perry Sr.'s clothing could reveal crucial evidence in the case – namely, physical evidence identifying Perry Sr.'s killer. If, for instance, testing reveals Mr. Mays' DNA on Perry Sr.'s clothing, that evidence would corroborate Zeigler's claim that Mays fought with and killed Perry Sr., and destroy the state's case, which casts Mays as a victim rather than a perpetrator. Even if testing merely shows significant touch

DNA on Perry Sr.'s clothing that does not belong to Zeigler, that finding would be powerful evidence of Zeigler's innocence. It would certainly exceed the statutory requirement that the test result bear a "reasonable probability" of creating reasonable doubt when viewed in conjunction with all of the other evidence adduced in through post-conviction proceedings in the case. Accordingly, Zeigler has carried his burden under Rule 3.853 of establishing entitlement to conduct touch DNA testing of Perry Sr.'s clothing.

d. DNA on Perry Edwards Sr.'s Fingernails Are Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The fourth category of evidence Zeigler seeks to test in his Motion is the genetic material recovered from beneath Perry Sr.'s fingernails. As with the other evidence Zeigler seeks to test, this material would be tested using recently developed mini-STR and Y-STR techniques, which are capable of identifying the source of genetic material even if that material is degraded or found in limited quantities.

This testing, which was not previously possible, is likely to yield powerful evidence of reasonable doubt as to Zeigler's guilt. As in many other cases involving a physical struggle, fingernail evidence from Perry Sr. is critical because it carries the potential to reveal who Perry Edwards struggled with as he was being killed. Florida courts have routinely deemed such evidence sufficiently probative so as to require testing under Rule 3.853. *See e.g. Dubose*, 113 So. 3d at 864-65;

Schofield, 861 So. 2d at 1245 (motion seeking DNA testing of hair and fingernail scrapings was facially sufficient despite limited evidence that the victim struggled with her killer); *Reddick v. State*, 929 So. 2d 34, 36 (Fla. 4th DCA 2006) (reversing denial of Rule 3.853 motion where the victim was beaten and sexually assaulted because "[i]f DNA testing confirms the presence of DNA of someone other than Reddick from the vagina, rectum, mouth or fingernail swabs, ***those results surely would create a reasonable probability that [the defendant] would be acquitted of the charges***." (Emphasis added) (citation omitted).

e. DNA on the Interiors of the Saturday Night Special Guns Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The fifth category of evidence Zeigler seeks to test in his Motion is touch DNA from the interiors of the Saturday Night Special guns used to commit at least two of the murders. As Mr. Eikelenboom explained, touch DNA from the guns' interiors is likely to reveal the identity of the individual who cleaned those guns, which could reveal if Williams was one of the murderers. R. 796-97.

At trial, Williams testified that he collected the Saturday Night Special guns that were later used in the murders from Frank Smith in a bag, and delivered that bag to Zeigler's wife, Eunice, without ever opening the bag or touching its contents. Williams was very clear on this point. When asked "But you didn't look inside [the bag containing the guns]," Williams answered "No, I didn't open the package". R. 317-18, 321. If Williams was telling the truth at trial, none of his DNA will be

on the inside of the guns. If, on the other hand, Williams' DNA is found on the guns' interiors, then Williams must have opened them, meaning that he was lying when he testified, was the person who owned and maintained the guns, and was, quite likely, the person who used those guns to commit the murders.

There is already a long list of reasons to disbelieve Williams' testimony, including the incredible nature of his story and that he was found with one of the guns in his possession, failed to share his alleged story about buying the guns for Zeigler until months after giving his initial statement, and presented clothing to the police that he was not wearing on the night of the murders. The testing Zeigler seeks will establish whether Williams' handling and use of the murder weapons was as he claimed.

As this Court held as recently as 2013, Zeigler's prior request for DNA testing – which sought different testing using different techniques than those at issue here – failed to demonstrate that testing would create a reasonable probability of acquittal in part because of the existence of Ed Williams' testimony. The touch DNA testing Zeigler seeks of the guns would demonstrate that Williams' testimony was false, undermining what this Court has said has been a key reason for its affirmance of the Circuit Court's denial of Zeigler' prior DNA testing requests and other requests for post-conviction relief. Testing is therefore warranted.

I. Zeigler Amply Established that The Evidence He Seeks to Test is Authentic

The Circuit Court properly held that "Defendant established the physical evidence containing DNA still exists and is housed in the Office of the Clerk of the Court, Orange County, Florida." R. 1201-02. Notwithstanding that holding, the Court found "the authenticity of the DNA is questionable because it may be contaminated based on a lack of protective equipment when it was handled and/or improper storage." R. 1202. That holding was fundamentally misconstrues Rule 3.853's authenticity requirement and should be reversed.

The only authenticity requirement in Rule 3.853 is that a defendant seeking DNA testing present "reliable proof to establish **that the evidence containing the tested DNA** is authentic and would be admissible at a future hearing." Fla. R. Crim. P. 3.853(c)(5)(B) (emphasis added). The rule does not relate in any way to whether the DNA testing results are affected by contamination, which is an issue that goes to the conclusiveness of findings, not to the authenticity of the materials to be tested. Those materials are unquestionably authentic. Indeed, the clothing Zeigler seeks to test was admitted as authentic evidence at trial, has been stored since then by the State, and was itself subjected to limited DNA testing in 2001. There is no question that the clothing at issue is what it purports to be, and is therefore authentic.

In addition, the Circuit Court fundamentally misconstrued the evidence presented to it concerning the effects of time and storage on the evidence to be tested. As is true for *every* old case, the materials Zeigler seeks to test were originally stored without an eye to DNA preservation in mind, for the simple reason that DNA testing had not yet been invented. Zeigler's expert conceded that storage conditions could result in the *addition* of small quantities of genetic material onto the clothing to be tested, but further explained why this did not affect his opinion that testing would yield reliable results – as it did using old technology in 2001 – and would provide evidence of guilt or innocence in the case. R. 1074-79. If the possibility of a "lack of protective equipment" were sufficient to render DNA testing inauthentic, no testing would ever be possible in *any* old case pre-dating the advent of DNA testing. Rule 3.853, which was created to accomplish precisely the opposite aim by allowing defendants tried before DNA testing was available to benefit from it – cannot be read in such a manner.

Where, as here, the State has maintained custody of the evidence, its authenticity may be presumed. A State cannot argue that its own misconduct in handling the evidence should foreclose testing of it. Whatever issues may have arisen from the State's handling of the evidence should be revealed in the testing and be accounted for at that stage.

II. Zeigler Established a Right to Re-Test Evidence Using New Technology

The Circuit Court also erred in holding that Zeigler "did not include a statement indicating the results of previous testing were inconclusive" and "instead he argued prior testing 'severely undermined' the theory of the murders and exonerated him, which does not comply with the Rule." R. 1202. Zeigler fully complied with the rule, to the extent it even applies to this motion seeking to test *different* areas of clothing for different types of DNA material.

Zeigler clearly satisfied Rule 3.853's requirements by explaining in detail how this Court determined his prior testing was inconclusive. That is a matter of objective fact, not subjective opinion. That Zeigler believes the 2001 test results undermined the State's case is irrelevant. As Zeigler set forth in detail in his motion and supporting brief, this Court has previously determined that the 2001 DNA test results were inconclusive for four reasons. *First*, "there was no way to know for sure that all of the contributors to the blood on Zeigler's clothing would be identified unless every single bloodstain was tested." *Zeigler v. State*, 116 So. 3d at 259. *Second*, "it was possible to miss blood on the shirt, due to deterioration and improper storage". *Id*. (Citation omitted). *Third*, "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area." *Id.* (Citation omitted). *Fourth*, DNA test results would have been unlikely to create reasonable doubt for a jury because of the existence of witness testimony from Felton

Thomas, Edward Williams and Frank Smith. *Id*. Zeigler not only acknowledged these findings, but tailored his instant motion to specifically address this Court's concerns and findings. There is nothing inconsistent about Zeigler saying that the prior results undermined the State's case and explaining that this Court held that the prior results were not sufficiently conclusive as to entitle him to relief.

Moreover, the evidence Zeigler seeks to test in this motion is different from the evidence previously tested. The prior testing focused on a small number of locations in the left armpit area of Zeigler's shirts, because those were the only areas the State told the jury were relevant at Zeigler's trial. R. 716-18. Those portions of Zeigler's shirt were cut out of the garments, so cannot be retested. This motion seeks to test the remaining parts of Zeigler's shirts, as well as clothing belonging to Eunice Zeigler and Perry Edwards that has never previously been tested. As to these items, no statement as to the conclusiveness of prior testing is possible or required.

III. <u>Collateral Estoppel Does Not Bar Any of Zeigler's Testing Requests</u>

The sole legal argument the State advanced in opposition to the DNA Motion was collateral estoppel based on this Court's prior decisions denying DNA testing relief. The Circuit Court did not use the term "collateral estoppel" or provide relevant legal analysis, but appears to have based its denial of the DNA Motion in part on estoppel grounds. R. 1202-3. The Court below stressed

evidence that it was possible for Zeigler to have requested the testing he now seeks in 2011 (even though Zeigler's last testing motion was filed in 2009), and ruled that "his argument for this testing is a variation of the same arguments he presented in" prior motions for DNA testing. R. 1202-3. However, the Circuit Court mischaracterizes the nature of the DNA Motion, and the Circuit Court's decision is not consistent with Florida law concerning the application of collateral estoppel.

Throughout the evidentiary hearing, the State advanced arguments sounding in *res judicata*, stating about this Court's prior rulings that "if that is not res judicata, I do not know what is." R. 1169. *Res judicata*, unlike collateral estoppel, is a broad doctrine that bars a renewed motion raising any issue that was or *could have been* raised in a prior proceeding. *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003). This Court has already held, however, that res judicata does not apply to a Rule 3.853 motion. *See Zeigler*, 116 So. 3d at 258 n.3 ("We agree with Zeigler that his motion for postconviction DNA testing was not barred because it was successive" and noting that Rule 3.853 states that motions ""may be filed or considered at any time following the date that the judgment and sentence in the case becomes final" and allows for re-testing of DNA); *Ochala v. State*, 93 So. 3d 1167, 1169 (Fla. 1st DCA 2012) (same).

Since res judicata does not apply to this proceeding, the DNA Motion could only be barred if the State could show that the "identical" issues had been

previously presented and decided. *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998) (internal quotation marks and citation omitted). Where the claim or argument is not identical to that previously decided, collateral estoppel does not apply, even where the evidence in question overlaps. *Blidge v. State*, 933 So. 2d 1262, 1263 (Fla. 3d DCA 2006); *Hyatt Legal Servs. v. Ruppitz*, 620 So. 2d 1134, 1136–37 (Fla. 2d DCA 1993). Nor does collateral estoppel apply when circumstances have changed to create a new issue to which the prior decision is not applicable. *Emiddio v. Florida Office of Fin. Regulation*, 147 So. 3d 587, 590 (Fla. 4th DCA 2014); *Krug v. Meros*, 468 So. 2d 299, 303 (Fla. 2d DCA 1985); *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So. 2d 625, 627–28 (Fla. 1971); *Orlando Concrete Contractors v. Hinds*, 466 So. 2d 1272, 1274 (Fla. 1st DCA 1985).

The State did not argue that Zeigler's motion asserted "identical" issues. Rather, it conceded that it was "different" because from Zeigler's prior motions "we now have touch DNA, mini-STR and Y-STR" and argued "there was no reason they couldn't have asked for that testing" in the past while conceding "they didn't." R. 1170. The State's admission that Zeigler never previously requested the testing he now seeks is dispositive, and collateral estoppel cannot apply.

The result would be the same even if this Court treated the "issue" as DNA testing generally, rather than the probative value of the specific testing Zeigler now

requests. While this Court has ruled in the past concerning the significance of experts finding Zeigler's clothing to contain none of Perry Edwards' DNA, none of those holdings considered the probative value of such a finding in light of the powerful capabilities of modern DNA technology. As both experts testified, that technology is now such that if Zeigler shot Virginia Edwards, and shot and beat Perry Edwards, proof of that event would be easily detectable. Indeed, the State's expert was so confident in the power of modern tools to find proof of backspatter that he thought it was "absurd" to test for "every single bloodstain," as this Court has previously suggested might be needed if testing were to be done using old technology. R. 1131.

It is also important to remember that this Court's holdings about the significance of not finding Perry's blood on Zeigler's shirts dates back to 1995, decades before relevant advances in DNA testing techniques, and is also based on the incriminating nature of now-recanted testimony from Felton Thomas. Accordingly, the significance of modern methods finding no trace of Perry Edwards' DNA on Zeigler's clothing is effectively a new issue, and this Court's original finding should no longer bind the Circuit Court from considering whether this DNA evidence is probative of reasonable doubt.

Further, the courts have never considered the probative value of the additional tests Zeigler seeks in his motion, such as testing Eunice's clothing for

blood and touch DNA and testing for backspatter that would necessarily have been left on Zeigler's clothing had he shot Virginia Edwards. Zeigler cannot be collaterally estopped from showing how this testing could provide a reasonable probability of a different outcome at trial, as no prior decision has decided these "identical issues." *Bauder*, 718 So. 2d at 783; *Blidge*, 933 So. 2d at 1263. Nor, for that matter, has any court ruled as to what significance a failure to find backspatter from a close range shooting of Perry on Zeigler would have---prior applications and decisions have addressed only the State's claim that Zeigler held Perry in a headlock and beat him. *Zeigler*, 654 So. 2d at 1164; *Zeigler*, 967 So. 2d. at 131, *Zeigler*, 116 So. 3d at 258. Both Zeigler's expert and the State's expert testified that the point blank shooting of Perry Edwards would have left detectable backspatter on the perpetrator's clothing, and the Circuit Court should consider this new evidence and argument. R. 115-6, R. 1076-79, R. 1147-48.

Further, this Court's decision in 1995 cannot bind this Court or the Circuit Court from considering the relevance of modern testing establishing an absence of Perry's blood on Zeigler's clothing**.** "[C]ollateral estoppel [..] will not be applied if there is a change in circumstances [which has created] a new issue to be litigated." *Emiddio*, 147 So. 3d at 590. Here, the circumstances have changed so as to render this Court's prior decision no longer controlling. This Court's reservations regarding possible misleading or degraded samples are mitigated by

current methodology. *Zeigler*, 967 So. 3d at 259; *Zeigler*, 967 So. 2d at 131. The Court's 1995 decision was also anchored in the jury's ability to rely Thomas' testimony to render the State's case more than circumstantial. *Zeigler*, 654 So. 2d at 1164. Thomas has now recanted key portions of that testimony, including his identification of Zeigler, and proposed DNA testing on the murder weapons allegedly provided by Williams can impeach Williams' testimony as well. In deciding whether to apply collateral estoppel, the Court should examine the record and take into account the evidence relied upon when rendering a prior decision. *See Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). Here, the evidence has changed—as has the strength of the evidence which may be produced by up-to-date DNA testing methods.

Finally, even if the 1995 decision would otherwise collaterally estop Zeigler from making certain arguments, the Court should apply the "manifest injustice" exception it has found to exist. *McBride*, 848 So. 2d at 291-92. *See also Deras v. State*, 54 So. 3d 1023, 1024 (Fla. 3d DCA 2011, *case dismissed*, 90 So. 3d 273 (Fla. 2012); *Figueroa v. State*, 84 So. 3d 1158, 1162 (Fla. 2d DCA 2012). Zeigler has maintained his innocence for nearly 41 years and requests DNA testing that will prove either his innocence or his guilt. His trial was plagued by impropriety and malfeasance, from the suppression of key evidence by the police to the drugging of a juror by the trial Court. The jury elected to sentence him to life in

prison, but the judge unconstitutionally chose to override and impose the death sentence. Zeigler's motion seeks only the opportunity to examine (at no public cost) the available evidence with modern methods. If the results are inconclusive or do not support Zeigler's claims of innocence, the State is not prejudiced in any way. But given the increased accuracy of DNA testing methods, one key trial witnesses' recantation, and the potential for another witness to be impeached by DNA evidence, it would be manifestly unjust to deny Zeigler the opportunity to test the existing evidence as requested in the DNA Motion. *See Deras*, 54 So. 3d at 1024.

IV. The Court Below Erred In Holding that Discovery Was Unavailable

The court below also erred in holding that Zeigler could not subpoena Felton Thomas. According to the Circuit Court, no subpoena could issue because "nothing in Rule 3.853 permits a lay witness to testify at an evidentiary hearing premised on a motion for DNA testing". R. 917-18. That holding ignores settled law holding that courts may order relevant discovery in connection with Rule 3.853 motions, and the fact that this Court has repeatedly cited Thomas' trial testimony as relevant to Zeigler's prior Rule 3.853 motions. It is clearly unfair to say that Thomas' testimony is a ground for denying DNA testing, as this Court has done on several occasions, and then to refuse to even hear Mr. Thomas when he explains that his trial testimony was, in fact, false.

There is no dispute that courts are authorized to allow discovery in connection with a DNA motion, including in advance of an evidentiary hearing on a DNA motion. As the Circuit Court recognized, "limited pre-hearing discovery may be allowed on a motion for postconviction relief," and "may also be had on a motion for DNA testing". R. 917. *See also Kelley v. State*, 974 So. 2d 1047, 1050 (Fla. 2007). Discovery may be ordered into any matters "which are relevant and material," *Davis v. State*, 624 So. 2d 282, 284 (Fla. 3d DCA1993), based on the following factors: "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994). The absence of express language in Rule 3.853 allowing for discovery is thus clearly not required, and the holding of the court below to that effect was clear error. The Circuit Court's holding that Rule 3.853 does not allow relief from a conviction or sentence is similarly erroneous as Zeigler never sought relief from his conviction or sentences in his discovery motion – merely the right to subpoena a witness repeatedly identified as relevant to Zeigler's entitlement to DNA testing.

There is also no dispute that Thomas' testimony is relevant to whether Zeigler will be entitled to DNA testing. The State has repeatedly argued as much. For instance, at a 2004 evidentiary hearing on a prior DNA request, the State

argued explicitly that Zeigler is "on death row because Felton Thomas said that . . . they went for a drive in Mr. Zeigler's car" and "that Mr. Zeigler had him test fire some weapons", asserting "[t]here is nothing in this blood evidence that refutes that at all." 2005 ROA at 241. This Court has also emphasized Thomas' testimony as key to Zeigler's conviction and cited it in the past as a basis for denying DNA testing. *See Zeigler*, 654 So. 2d at 1164 (citing as a reason for denying Zeigler's prior DNA testing request that "[i]n order to accept Zeigler's theory of the case, the jury would have had to disbelieve at least three witnesses who testified at the trial" one of whom was Felton Thomas); *Zeigler*, 967 So. 2d at 128-29 (denying request for DNA testing and again identifying Thomas' testimony as key evidence of Zeigler's guilt); *Zeigler*, 116 So. 3d at 256 (same).[16]

While the Circuit Court did not analyze Zeigler's request to subpoena Thomas under any of the *Lewis* factors, those factors all favor allowing discovery. Giving deposition testimony would have minimally burdened Thomas or the State. And while the recording and transcript of the interview of Thomas is relevant and highly probative, Zeigler should have been offered the chance to have his counsel depose Thomas to provide the Circuit Court sworn testimony as to Thomas's

[16] Although this Court has referenced the importance of three trial witnesses – Thomas, Edward Williams, and Frank Smith – Thomas was by far the most important to the State's case, because Williams was heavily impeached at trial and Smith admitted he never met Zeigler and offered limited testimony. Smith's and Williams' testimony was exceedingly weak without Thomas.

recantation. Further, because Thomas has refused to provide an affidavit, absent an opportunity to subpoena him, Zeigler may not be able to obtain admissible evidence of Thomas's recantation. As such, if the Court does not order Zeigler's motion granted outright, it should remand for further proceedings to determine if Thomas' testimony provides an additional basis to authorize testing.

CONCLUSION

For the reasons set forth herein, the circuit court's Order denying Defendant-Appellant William Zeigler's motion for DNA testing should be vacated, and this case should be remanded with directions for the court below to issue an order granting the request for testing.

Dated: November 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 23, 2016, a true and correct copy of the foregoing Initial Brief of Appellant was served on Kenneth S. Nunnelly, Assistant State Attorney, Office of the State Attorney at knunnelly@sao.9.org and Vivian Singleton, Assistant Attorney General, Office of the Attorney General at Vivian.singleton@myfloridalegal.com via e-service notification through the Florida Courts E-Filing Portal.

DATED this 23rd day of November 2016.

/s/ Javier Peral II_____
Javier Peral II

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), because Times New Roman 14-point font has been used throughout, in body text and in footnotes.

DATED this 23rd day of November 2016. /s/ Javier Peral II_____
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