IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR. **Appellant,** **v.** **STATE OF FLORIDA,** **Appellee.**	**Case No. SC16-1498**

ON APPEAL FROM
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The first 35 pages of Zeigler's brief are devoted to rearguing every prior proceeding in this case. That excessive, and argumentative, section of the *Initial Brief* is irrelevant to the sole issue before this Court, which is simply whether the trial court was correct when it denied Zeigler's **fifth** motion for post-conviction DNA testing. Contrary to Zeigler's apparent belief, this is not a proceeding under *Florida Rule of Criminal Procedure* 3.851. When the hyperbole of Zeigler's brief is stripped away, all that remains is a bare complaint that the trial court should have credited his hand-picked expert, who does not have an accredited DNA testing laboratory, had never read the trial transcript, and who learned the facts of this case by watching a television documentary the name of which he could not remember. At the end of the day, the DNA testing claim in its most recent form is barred by collateral estoppel. The Circuit Court properly denied the motion for DNA testing.

FACTUAL AND PROCEDURAL HISTORY

In its last ruling affirming Zeigler's conviction and sentence, this Court described the facts in the following way:

> In 1976, Zeigler was convicted of the first-degree murders of Eunice Zeigler, his wife, and Charlie Mays, a friend, and the second-degree murders of his in-laws, Perry and Virginia Edwards." *Zeigler v. State*, 654 So. 2d 1162, 1163 (Fla. 1995). The facts are set forth in the Court's opinion on direct appeal. *See Zeigler v. State*, 402 So. 2d 365,

367–68 (Fla. 1981), *cert. denied*, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982). Zeigler pursued postconviction relief in numerous state court proceedings, and we ordered resentencing in *Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988). Zeigler's resentencing occurred in 1989, and we affirmed Zeigler's two death sentences on appeal. *Zeigler v. State*, 580 So. 2d 127 (Fla. 1991), *cert. denied*, 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991).

Subsequently, Zeigler filed another postconviction motion and a motion requesting the re-examination and DNA testing of certain evidence. *See Zeigler*, 654 So. 2d at 1163. We affirmed the trial court's denial of Zeigler's postconviction motion and the trial court's decision that Zeigler's DNA claim was procedurally barred. *Id*. at 1164. We then stated the following regarding Zeigler's DNA claim:

> Even if there were no procedural bar, we do not believe that Zeigler has presented a scenario under which new evidence resulting from DNA typing would have affected the outcome of the case. Zeigler admitted that he was at the scene of the crime, and there is no dispute that his blood as well as the blood of the four victims was present at the crime scene. The State's case was not entirely circumstantial, and 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. Zeigler's request for DNA typing is based on mere speculation and he has failed to present a reasonable hypothesis for how the new evidence would have probably resulted in a finding of innocence. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (The standard for a new trial based on newly discovered evidence is whether the evidence "would probably produce an acquittal on retrial."). Acknowledging that the issue before us is whether Zeigler should be allowed to subject the evidence to DNA testing rather than whether he should be granted a new trial based on newly discovered DNA evidence, *we find that 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.*

Id. (second emphasis added).

Subsequently in 2001, Zeigler filed a motion for DNA testing for the purposes of clemency proceedings and argued that: (1) identifying the source of the blood on Mays' clothing as the blood of Eunice or Perry could show that Mays was the perpetrator; (2) testing could reveal Zeigler's blood throughout the store, which would discredit the State's claim that he was not shot in the store; (3) identifying the source of the blood on Zeigler's clothes could cast doubt on the State's claim that he had the blood of the victims on his clothing and was therefore involved in the murders; and (4) identifying the source of several hairs found in the store might reveal whether Felton Thomas was in the store on the night of the murders, contradicting his testimony at trial. This time Zeigler's motion for DNA testing was granted.

After testing was completed, Zeigler filed a motion to vacate his sentences based on the newly discovered evidence and a motion to authorize (nunc pro tunc) DNA testing under rule 3.853. Zeigler argued that the DNA results demonstrated that Perry's blood was not on Zeigler's shirt, which allegedly contradicted the State's theory that Zeigler murdered Perry, and that whoever murdered Perry murdered the others. Furthermore, he argued that the DNA results revealed Perry's blood was on Mays' pants, which corroborated Zeigler's trial testimony that Mays was a perpetrator rather than a victim. The trial court denied the motion, and we affirmed. *See Zeigler v. State*, 967 So. 2d 125 (Fla. 2007).

Specifically, in 2007, we agreed with the trial court's findings that the presence of Perry's blood on Mays' clothing did not conclusively establish that Mays was the perpetrator and Zeigler was the victim because Mays and Perry were found near each other and, "if Mays were involved in a struggle with [Zeigler] while in close proximity with Perry's bloodied body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation." *Id*. at 130. Additionally, we agreed with the trial court's finding that "the presence of Mays' blood, and the absence of Perry's, on [Zeigler's] t-shirt does not conclusively show that [Zeigler] did not hold Perry in a headlock and beat him." *Id*. Furthermore, we noted that "in 1995 this Court came to the same conclusion as the trial court while assuming

that the DNA evidence would prove more favorable to Zeigler than it actually did." *Id*. at 131.

Then, in 2009, Zeigler filed a motion for DNA testing under Florida Rule of Criminal Procedure 3.853, requesting to test his shirts; Mays' shirts and shoes; Perry's shirt, pants, tie, tie clip, and fingernails; and Eunice Zeigler's clothing. Zeigler argued that DNA testing of these items will show (1) that Perry's blood is not on his clothing, which will demonstrate that he did not kill Perry; (2) that Perry's blood is on Mays' clothing, which demonstrates that Mays was the perpetrator and renders the trial testimony of Felton Thomas unreliable; and (3) that the blood spatter on his shirt is not attributable to the beating of Mays. Following the evidentiary hearing, the circuit court denied Zeigler's motion.

Zeigler v. State, 116 So. 3d 255, 256-7, (Fla. 2013).
Zeigler v. State, 452 So. 2d 537 (Fla. 1984).
Zeigler v. State, 473 So. 2d 203 (Fla. 1985).
State v. Zeigler, 494 So. 2d 957 (Fla. 1986).

RULING ON LAST DNA MOTION

In 2013, this Court affirmed the circuit court's denial of Zeigler's motion, finding that the claims were procedurally barred by collateral estoppel, and, even if they were not procedurally barred, he would not be entitled to relief on the merits. *Zeigler v. State*, 116 So. 3d at 258.

On the collateral estoppel issue, this Court found the following:

Specifically, in his current motion, Zeigler argues that (1) additional testing of his shirts will show that Perry's blood is not on his clothing and, therefore, he was not the assailant; (2) additional testing on Mays' clothing will reveal Perry's blood, which demonstrates that Mays was the actual perpetrator; and (3) additional testing on Zeigler's shirts will show whether the blood spatter on them is really from Mays. However, we previously addressed these claims and held that the absence of Perry's and the presence of Mays' blood on Zeigler's

clothing did not establish that Zeigler was not the perpetrator. *Id*. at 130–31. Likewise, we also held that the presence of Perry's blood on Mays' clothing did not establish that Mays was the perpetrator rather than a victim. *Id*. Thus, we already decided these same issues against Zeigler.

Accordingly, Zeigler's claims are barred by collateral estoppel, and we affirm the circuit court's denial of his motion for postconviction DNA testing.

> *Id*.
>
> In regards to the merits of the claims, this Court stated:

In this case, Zeigler has not met his burden of showing how the results of the DNA testing would give rise to a reasonable probability of a different outcome. First, he fails to present any viable arguments why more testing that shows more absence of Perry's blood on Zeigler's clothing would negate our previous conclusion that the absence of Perry's blood on Zeigler's clothing does not establish that he was not the perpetrator. Additionally, although Mr. Kish, a bloodstain expert, testified at the 2011 evidentiary hearing that he believed the six spatter samples he had selected on Zeigler's clothing for additional testing would reveal whether Zeigler was in close proximity to Perry when he died, we conclude that the absence of Perry's blood in these areas would not prove that Zeigler was not the perpetrator. Kish acknowledged at the evidentiary hearing that, even though the areas he selected for additional testing on Zeigler's clothing were intended to result in a representative sampling of all the blood spatter stains on the garment, 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. And Mr. Weiss, an expert in DNA identification, testified at the previous evidentiary hearing in 2004, that "it was possible to miss blood on the shirt, due to deterioration and improper storage" and that "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area." *Zeigler*, 967 So.2d at 130 (quoting trial court order). Therefore, even if additional testing on the six areas again revealed the absence of Perry's blood, it still would not give rise to a reasonable probability of acquittal or a lesser sentence.

> Second, Zeigler has failed to explain how further testing of Mays' clothing and the discovery of more of Perry's blood on Mays' clothing would give rise to a reasonable probability of acquittal or a lesser sentence. We previously stated that the presence of Perry's blood on Mays' clothing did not prove that Zeigler was not the perpetrator because, "if Mays were involved in a struggle with [Zeigler] while in close proximity with Perry's bloodied body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation." *Id*. at 130 (quoting trial court order). Moreover, the bloodstain expert testified at the 2011 evidentiary hearing that he had examined Mays' clothing and shoes and did not believe that additional testing needed to be performed on these items.
>
> Third, Zeigler has failed to explain how further testing on his shirts and the discovery of more of Mays' blood on his shirt will give rise to a reasonable probability of acquittal or lesser sentence when the prior testing already determined that Mays' blood is on Zeigler's shirt, and we found this was not exculpatory. *See id*. Furthermore, Zeigler completely fails to address how DNA testing of Perry's clothing, tie, tie clip, and fingernails, and Eunice Zeigler's clothing will exonerate him or mitigate his sentence.
>
> Accordingly, because Zeigler has failed to present an argument giving rise to a reasonable probability that he would be acquitted or would have received a lesser sentence, he is not entitled to the requested DNA testing.

Zeigler v. State, 116 So. 3d 255, 259 -260 (Fla. 2013).

CURRENT DNA CLAIM

On July 2, 2015, two years after this Court's last ruling on this issue, Zeigler filed his fifth request for DNA testing. In the motion, Zeigler asked for permission to test "every single bloodstain" on his red outer shirt and the white t-shirt that he wore underneath; two guns, Perry Edwards' shirt, jacket, and fingernails; and Eunice Zeigler's coat, slacks, socks and shoes. (R824). Zeigler argued that his

shirts would be tested "for touch DNA that would have been transferred had Zeigler held Perry Edwards in a headlock under his arm and beat him." (R825). Zeigler also argued that "all testing of his shirts be done using mini STR technology. (R826). He asked that testing for blood and touch DNA using mini STR and Y-STR testing technology be conducted on bloodstains on Eunice Zeigler's coat, trousers, socks, and shoes. Zeigler also asked that touch DNA testing be conducted on two guns and on Perry Edwards' fingernails and clothing. (R826-7).

The State filed a response arguing that Zeigler's motion was procedurally barred by collateral estoppel and did not include the required statement that the results of the previous DNA testing were inconclusive. The State also argued that his red outer shirt and white t-shirt have previously been tested for DNA and that Zeigler has had the opportunity since 2001 to have "every single bloodstain" on both shirts tested. (R876-8). The State argued that in the November 19, 2001 Order releasing the evidence for testing, the trial court stated the following:

> The defendant shall have sole authority to direct the scope and nature of the testing of the evidence released at his request, described in paragraph 2. The State shall have sole authority to direct the scope and nature of the testing of the evidence released at its request, described in paragraph 3. Each party shall have the right to designate for testing additional samples from the evidence selected by the other.

(R877). The State argued that Zeigler limited himself to only testing specific areas of the shirts when the trial court gave him the opportunity to expand the scope of

the testing on either shirt. (R877). The State also argued that Zeigler repeats requests for DNA testing that were previously denied by the trial court and upheld by this Court. (R869).

In the response, the State argued that Zeigler has not demonstrated how subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing his innocence. (R878). The State also pointed out that although Zeigler added two guns to the list of items he wants tested for DNA, he did not explain why he had not previously requested that the guns be tested if they are critical as he argues or demonstrated how the testing of the guns would lead to a reasonable probability of an acquittal or a lesser sentence. (R880-1).

In February2016, Zeigler filed a motion for discovery under Florida Statute §925.11 and Florida Rule of Criminal Procedure 3.853 seeking court permission to subpoena witness Felton Thomas to take his deposition or to call him as a witness at the hearing. *See Motion for Discovery in Support of Motion for DNA Testing* (R888-899). The State opposed the motion, arguing that neither the statute nor the procedural rule gave Zeigler the right to depose or call any witness who would not be testifying specifically regarding DNA evidence. *See State's Response and Objection to Motion for Discovery* (R903-911). The trial court denied the motion.

See Amended Order on Defendant's Motion for Discovery in Support of Motion for DNA Testing. (R941-945). The trial court stated as follows:

> Limited pre-hearing discovery may be allowed on a motion for postconviction relief. *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994) (in allowing limited discovery, trial court must consider issues presented, time between the conviction and the post-conviction hearing, burdens on the opposing party and witnesses, whether alternative means of securing the evidence exist, and any other relevant facts). Pre-hearing discovery may also be had on a motion for DNA testing, but is limited to the factors set forth in *Lewis*. *Spaziano v. State*; 879 So. 2d 51, 54-55 (Fla. 5th DCA 2004) (holding that defendant was entitled to engage in discovery to verify that evidence no longer existed, but discovery was limited by the standards established in *State v. Lewis*).
>
> However, nothing in Rule 3.853 permits a lay witness to testify at an evidentiary hearing premised on a motion for DNA testing or allows a trial court judge to grant relief from a conviction and sentence based on information obtained at that hearing. *See Brown v. Sec'y for Dep't of Corr*., 530 F.3d 1335, 1337-38 (11th Cir. 2008) which states, in applicable part:
>
> > Brown's motion was filed under Florida Rule of Criminal Procedure 3.853. That Rule "provides procedures for obtaining DNA ... testing [authorized] under sections 925.11 and 925.12, Florida Statutes. ' If the movant is successful, those procedures culminate only in "the results of the DNA testing ordered by the court [being] provided in writing to the court, the movant, and the prosecuting authority." Thus, *a Rule 3.853 proceeding involves an application for discovery only, pursuant to ·which the court lacks authority to order relief from the movant's sentence or conviction based on the DNA test results. If the movant believes those results provide a basis for a successful collateral attack on his judgment of conviction, he may then institute a proceeding under Florida's collateral attack rules and only in that manner secure such relief.*

(internal citations omitted) (emphasis added). *See Amended Order on Defendant's Motion for Discovery in Support of Motion for DNA Testing*. (R942-944).

The trial court held an evidentiary hearing on the motion for DNA testing on March 31, 2016. (R1031).

Zeigler called as a witness, Richard Eikelenboom, a forensic scientist who worked at the Netherlands Forensic Institute in 1993 where he specialized in trace recovery, finding DNA and coordinating cases for the courts. (R1055-6). He began working with touch DNA in 1997and has conducted training on blood spatter analysis in the Netherlands. (R1058, 1060, 1111). He began working in the United States in 2006. (R1112). Eikelenboom and his wife started Independent Forensic Services, a Colorado lab which specializes in touch DNA. The Colorado laboratory has no accreditations. (R1057-8, 1083-4). Eikelenboom testified that he does DNA testing in his Netherlands lab which is accredited by the Dutch Board of Accreditation. (R1121).

Eikelenboom began using the Minifiler testing kit in 2007. (R1098, 1112). He testified that Y-STR was well established in 2007. (R1118-9). In 2008, his lab became the first to use touch DNA in the United States' courts. (R1120-1). Eikelenboom did not read any testimony from Zeigler's 2011 evidentiary hearing on DNA. (R1113).

For Zeigler's case, Eikelenboom testified that he reviewed bloodstain reports, the 2001 DNA testing results, and pictures of the crime scene. He also reviewed physical evidence from the case, including the guns as well as the clothing of Eunice Zeigler and some of the clothing of the Appellant. (R1074). Eikelenboom testified that on Eunice Zeigler, he saw what appeared to be visible bloodstains and "very small specks which could be bloodstains created by coming from the wound injury of the victim, back spatter." Eikelenboom testified that he also saw some stains on the inside of the coat, which could have been transferred by the perpetrator. (R1075). He did not know if Zeigler hugged his wife sometime that evening and left DNA on her coat but admitted that it was possible. (R1114).

In regard to Perry Edwards, Eikelenboom testified that he received several blows and that it would be very difficult for the person administering the blows to evade blood stains. (R1076). Eikelenboom testified that he learned that the State's theory was that Zeigler held Perry Edwards in a headlock from a documentary that he watched and a DNA investigation by the defense. (R1101). Because he did not read the trial transcript, Eikelenboom was unable to show in the record that there was evidence that Zeigler held Perry Edwards in a headlock. (R1102). Eikelenboom did not know if Zeigler had any scratches on himself. (R1114).

Eikelenboom also testified that if a person shoots someone at close range, there will be blood coming back toward the shooter. (R1076). "If Mr. Zeigler was

the shooter, I would expect it on his clothing." (R1077). Eikelenboom testified that the Minifiler kit would be helpful in determining the source of DNA from very small bloodstains in storage. (R1078). Eikelenboom admitted, however, that the fact that gunfire can produce back spatter was known before 2001. (R1126).

Eikelenboom opined that if he performed modern technology DNA testing on Zeigler's shirt, he would be able to tell whether or not he was the shooter and beater of Perry Edwards. (R1079).

Stating that he expected a lot of contamination to be on the outside of the guns because they were handled without gloves, Eikelenboom stated that testing the interior of the guns may be helpful to find the DNA of people who cleaned the guns. (R1082). Eikelenboom admitted that he was not sure which of the eight guns in evidence he would want to test for DNA. (R1086-7). Eikelenboom also did not know who attached orange zip ties on the revolvers or if gloves were used when the attachments were made. He testified that if gloves were not used, he would expect a transfer of DNA on the guns. Eikelenboom did not know if the guns had been test fired or cleaned, both of which could either add touch DNA or destroy it. (R1087-8). Eikelenboom, who did not know if the guns had been processed for fingerprints, wanted to test the inside of the guns. (R1089-91).

Eikelenboom testified that he watched a documentary about the case but had not read the trial transcript. (R1092-3). He admitted that he had no first-hand

knowledge of the case and that the only knowledge he had about the case came from scientific reports and a documentary. Eikelenboom could not recall the name of the documentary or the producer of the documentary. (R1093, 1095). He testified that he would not rely on the video in reaching his conclusions on the analysis of the DNA if testing is ordered. (R1122).

Eikelenboom testified that he would expect to find genetic materials from the items even after 41 years, although he could not reference any specific data. (R1099-1100). His opinions were based upon descriptions of the evidence given in reports from the forensic bloodstain experts, photographs and the DNA report. (R1100). Eikelenboom testified that he had only seen photographs of Zeigler's shirt but did not know when the picture was taken. Eikelenboom testified that he did not look at the shirt because he did not want to contaminate it. (R1095-6, 1099). Although he wore gloves while handling the evidence he viewed, he let his wife handle the clothing. (R1111). Eikelenboom testified that he did not wear a hat or a mask and that people were talking. He testified "[t]hat's a problem in this case. That nobody seemed to wear protective clothing, so there will be issues with contamination and small amounts of touch DNA left by all kinds of people." (R1096, 1111).

Eikelenboom did not know the sequence of the murders nor was he aware, prior to the hearing, that there was a gap between the first set of shots that were

heard and the second set. (R1100-1). He did not know what Zeigler may have been doing before the first murder and the second murder or if Zeigler had the opportunity to change clothes between the killings. (R1101, 1108-9). While admitting that the manner in which evidence is stored affects how long DNA is viable on the evidence, Eikelenboom did not know how long the evidence in the case had been stored in the evidence vault in the courthouse, how it was stored before it was moved to the courthouse or where it was previously stored. (R1103-4). Eikelenboom also did not know who handled the evidence before it was moved to the courthouse. (R1104). He also did not know how Zeigler's clothes were removed from him or how they were treated after removal. (R1118). He expected to use the taping method to collect DNA on the garments. (R1104). He would then do DNA profiling and if there's a mixture found, he would determine who donated to the mixture. But one problem that Eikelenboom referenced is that jurors in the United States touch evidence. (R1106-7). Eikelenboom testified that there will be DNA from some of the jurors who handled the evidence and he won't be able to identify all of the jury donors. (R1107, 1111). He admitted that he expects contamination in the case. (R1110). But he testified that blood is a good source of DNA compared to touch DNA and that touch DNA would not cover the back spatter or bloodstains on the clothing. (R1124).

State witness David Baer, a retired senior crime laboratory analyst from the Florida Department of Law Enforcement, examined Zeigler's shirt and two revolvers. Baer was called as a defense witness. (R1129-30). Although he is not an expert in mini STR testing or Y-STR testing, he was familiar with the technologies. Baer has received training on DNA testing and testified in court regarding it. (R1134).

Baer testified that he thought it would be absurd to test every stain. He opined that if there is back spatter, it was not going to be one drop but should be able to be found by random testing. (R1131). Most of the shirt had blood on it, either smears or drops. As far as finding areas for just touch DNA, Baer testified that there were very limited areas that would not have blood mixed in with it. (R1146). Baer was not sure if testing would yield any results. He also noted that back in the 1970s, they did not wear gloves when examining evidence and they were not worried about sensitivity or biohazards. "So who knows who might have touched it in the laboratory." (R1146). Baer testified that he saw a few stains that might be reasonable to test if testing was going to be done. (R1146).

When Baer was asked how could Zeigler have shot Perry Edwards at close range and beaten him, without getting Perry Edwards' DNA on his shirt in large quantities, Baer responded that "[i]f that was the item of clothing he had on at the time and there wasn't anything on top of it, you would expect there to be

transferred blood back to him." (R1147-8). Baer opined that there is a possibility that the evidence that has been in the clerk's custody since 1976 has been contaminated but there is no way to quantify it. (R1153). There is also no way to quantify whether or not DNA results can be obtained that can be interpreted. (R1153). Baer opined that there is probably no way to know who has handled the evidence and that in theory you could conceivably find DNA from anyone who has even been close to the evidence. (R1153-4). Baer testified that it would be impossible to say that any DNA found on the items of clothing or the guns or any other item to be tested is or is not definitely linked to the crime. (R1154).

Baer opined that there is no reason that additional testing of any of the items that Zeigler is asking to test now could not have been tested using touch DNA in 2011 if it had been requested. (R1155-6).[1]

TRIAL COURT ORDER

The trial court issued its order on July 18, 2016 denying Zeigler's motion. (R1178-1205). The trial court stated as follows:

[1] During closing argument, the State noted that a raincoat and rubber gloves were missing from the crime scene and that Zeigler might have changed clothes after the murders. (TR142). The defense claimed in rebuttal that there was no evidence "of any raincoat." (TR145). At 5:07 PM on March 31, 2016 (the day of the hearing), the State sent the following e-mail to the Court and to defense counsel: The portion of the trial transcript referring to the gloves and raincoat referenced by the State is found at pages 149-151 of the 1976 trial. That e-mail triggered an additional written "response" from the defendant, which is irrelevant here.

In the instant case, Defendant established the physical evidence containing DNA still exists and is housed in the Office of the Clerk of the Court, Orange County, Florida. Having carefully listened to the testimony presented at the evidentiary hearing and argument from the parties, the Court finds 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. The Court also finds even if the proposed DNA testing results harmonized with his arguments, Defendant still would not be able to show it would have probably produced an acquittal or resulted in a less severe sentence if admitted at trial. Fla. R. Crim. P. 3.853 (c)(5)(A)-(C).

Although 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). Even though he cannot assert his shirts were not previously tested for DNA, 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.

Furthermore, his argument for this testing is a variation of the same arguments he presented in his June 1994 motion for release of evidence, January 2003 motion to authorize (*nunc pro tunc*) DNA testing, and August 2009 petition for DNA testing, all of which were denied by the trial court and affirmed on appeal. *Zeigler*, 654 So. 2d at 1164-65; *Zeigler*, 967 So. 2d 130-31; *Zeigler*, 116 So. 3d at 258. He also presented a variation of the same argument in his January 2001 motion for release of evidence for clemency purposes.

As previously stated in this Order, in November 2001 an order was entered releasing both shirts for DNA testing and stating, *inter alia*, Defendant had the "sole authority to direct the scope and nature of the testing" of evidence released at his request and the right to "designate for testing additional samples" from evidence released at the State's request. Accordingly, he could have tested "every single bloodstain" on both shirts at that time, but he did not do that.

Additionally, as stated in the trial court's April 2005 order, which was subsequently upheld by the Florida Supreme Court, it is undisputed

that Defendant's blood, as well as blood from the victims, was present at the crime scene; previous testing identified blood on the clothing of both Defendant and Mays but "did not conclusively eliminate Defendant as the perpetrator of the crimes;" and "[T]he fact that only Mays' blood was found on the left arm of Defendant's t-shirt does not exonerate Defendant or even tend to exonerate Defendant ... the presence of Mays' blood, and the absence of Perry's, on Defendant's t-shirt does not conclusively show that Defendant did not hold Perry in a headlock and beat him." *Zeigler*, 967 So. 2d at 130. *See also Zeigler*, 116 So. 3d at 259 ("[W]e previously addressed these claims and held that the absence of Perry's ... blood on Zeigler's clothing did not establish that Zeigler was not the perpetrator."). (internal citations omitted). The Florida Supreme Court also found Defendant failed to adduce "any viable arguments why more testing that shows more absence of Perry's blood on Zeigler's clothing would negate our previous conclusion that the absence of Perry's blood on Zeigler's clothing does not establish that he was not the perpetrator." *Id*. Accordingly, even if the modem DNA testing techniques that Defendant wants to use now revealed Perry's blood and DNA are not on the shirts, he still would not be able to show this result would either exonerate him or mitigate his sentence. Fla. R. Crim. P. 3.853(b)(3) and (4). *See also Lambrix v. State*, 124 So. 3d 890, 896 (Fla. 2013) ("As this Court has previously held, a trial court does not err in denying a motion for DNA testing where the defendant cannot show that there is a reasonable probability that the absence or presence of DNA at a crime scene would exonerate him or lessen his sentence.").

Defendant has known since trial, and possibly even before that, about the guns he allegedly asked Williams to procure and deliver to him but never mentioned them in his previous motions for DNA testing. Although he now argues testing is "crucial," he fails to explain why he did not ask to test them previously, how or why an urgent need to do so has suddenly developed, or how finding Williams' DNA on the inside of the guns would exonerate him or even cast doubt on Williams' trial testimony. *Hitchcock*, 866 So. 2d at 27; *Scott*, 46 So. 3d at 533; Fla. R. Crim. P. 3.853(b)(3), (c)(5).

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. *Hitchcock*, 866 So. 2d at 26. Furthermore, he 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. *Hitchcock*, 866 So. 2d at 27; *Scott*, 46 So. 3d at 533.
>
> In regard to Eunice's clothing, Defendant asserts only that touch DNA and Y-STR 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. 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. *Hitchcock*, 866 So. 2d at 27; *Scott*, 46 So. 3d at 533.

(R1201-04).

SUMMARY OF THE ARGUMENT

For the fifth time, Zeigler is seeking permission to perform DNA testing. His motion includes a request to test the inner and outer shirts that he wore on the night of the murders, even though both shirts have already been tested for DNA. In addition, Zeigler is repeating requests for DNA testing that this Court has previously denied, including the testing of the clothing of Eunice Zeigler and Perry Edwards, as well as Edwards' fingernails. He has now added a request to test two guns to the list. This motion is procedurally barred because of collateral estoppel. However, even if the motion was proper, Zeigler has not proven how any additional DNA testing is reasonably likely to prove that he is innocent.

ARGUMENT

As with rulings on other postconviction claims, this Court reviews *de novo* the trial court's application of the law to the facts. *Hendrix v. State*, 908 So. 2d 412, 423 (Fla. 2005).

Neither Zeigler's motion before the trial court, his *Initial Brief* before this Court, nor testimony from the evidentiary hearing, provide a basis for the ordering of additional testing. Zeigler was given the opportunity in 2001 to test for "every single bloodstain" from his inner and outer shirts, as he now requests again. Because the trial court gave him the authority to determine the scope of the testing, Zeigler limited himself in deciding what areas to test. While Zeigler argues that he wants to perform "touch DNA" testing using mini-STR technology, defense expert Eikelenboom admitted that Y-STR testing was available in2007, which is when he began using the Minifiler kit. Eikelenboom, who never read the trial transcript or the transcript from the 2011 evidentiary hearing, admitted to having no first-hand knowledge of the case, with his only knowledge coming from scientific reports and watching a documentary whose name he could not recall. In addition, his laboratory in Colorado has no accreditation.

Although Eikelenboom testified that he would expect to find genetic materials from the items in evidence after 41 years, he could not reference any specific data for which he based that assertion. (R1099-1100). He admitted that

he had not actually seen Zeigler's shirt because of fear of contaminating it. Eikelenboom had only seen photographs of it but did not know when the pictures were taken. With Zeigler's expert having so little factual knowledge of the case – having never read the transcripts, relying upon information from an unnamed documentary, and no first-hand knowledge of the case – Zeigler's arguments in the *Initial Brief* that he has demonstrated that testing would generate evidence that would "probably" produce an acquittal (*IB* at 47) is meritless. If the expert does not read the trial transcript, then the expert has no factual knowledge as to how the conviction was obtained in the first place. The failure to read witness testimony along with testimony regarding the physical evidence makes it impossible for an expert to opine with any amount of credibility that the DNA testing being sought gives rise to a reasonable probability of acquittal. As this Court noted in a prior ruling, "[t]he State's case was not entirely circumstantial, and 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." *Zeigler*, 654 So. 2d at 1164. Since Eikelenboom did not read the trial transcript, he does not know what facts were established through the testimony of the witnesses.

Considering his lack of information, Eikelenboom is not qualified to render a reliable opinion. For example, it is significant that Eikelenboom did not know when the photographs of Zeigler's shirt were taken because if the pictures he

viewed were taken closer in time to the murders, it would cast doubt on the validity of Eikelenboom's testimony that genetic material still exists on the garment 40 years later. Eikelenboom had no idea how Zeigler's clothes were removed from him after the murders. Expert Baer testified that in the 1970s, investigators did not use gloves in handling pieces of evidence. While admitting that the manner in which evidence is stored affects how long DNA is viable on the evidence, Eikelenboom did not know how long the evidence in the case had been stored in the evidence vault in the courthouse, where it was previously stored before it was moved to the courthouse and under what conditions. Eikelenboom admitted that he expects contamination on the evidence from jurors who handled the evidence. He testified that if there is a mixture of DNA found on the evidence, he would determine who donated to the mixture. However, this assertion is unrealistic considering the number of people who have touched the evidence. With Eikelenboom having not viewed the shirt recently and lacking knowledge as to when the photographs he viewed were taken, there is no proof to support his testimony that genetic material still exists on the garment. It is highly unlikely that any viable evidence would remain considering the fact that over four decades has passed. Since Zeigler's expert admits that the evidence will be contaminated, any further testing would be a waste of judicial resources and no proof has been presented that it would lead to an acquittal.

Zeigler's argument that there was "an expert *consensus* that the testing he seeks would prove whether he was the individual who shot Perry and Virginia Edwards" (*IB* at 47, italics in original) is not supported by the trial transcript, as state expert Baer never testified to that effect. When asked by defense counsel how could Zeigler shoot Perry Edwards at close range and beat him without getting blood on his shirt, Baer's response was "[i]f that was the item of clothing he had on at the time and there wasn't anything on top of it, you would expect there to be transferred blood back to him." (R1147-8). Baer's response was based only on **if** Zeigler did not change clothes and **if** there was nothing on top of his clothes. However, the record reflects that there was a large gap in the time frame between the first and second series of shots.[2] Thus, Zeigler would have had time to change clothes. Although Baer testified that it would be reasonable to test the clothes if testing was ordered, he opined that "it would be absurd to test every stain." (R1131).

Zeigler has not demonstrated a reasonable probability of proving his innocence. He is seeking to test items – except for the guns - that he has requested to test before. This Court has previously noted that even when accepting his allegations as true, Zeigler has not proven that DNA testing would lead to an acquittal. In 1995, this Court held that "we find that even if the DNA results

[2] See trial testimony of Barbara Tinsley, Direct Appeal, V19, pp. 625, 632.

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." *Zeigler*, 654 So. 2d at 1164. The evidence has not changed and Zeigler still has not proven that more DNA testing would lead to his acquittal.

a. Modern DNA Testing on Zeigler's Clothing Is Not Likely to Create Reasonable Doubt as to Zeigler's Guilt. (restated).

Zeigler argues that both experts testified that the beating of Perry Edwards would have produced backspatter that they would expect to find on Zeigler if he was guilty. (*I.B.* at 50). This argument is not accurate. State expert Baer testified that he would expect to find backspatter on Zeigler's clothing **only** if that was the item of clothing that he had on at the time and did not have anything on top of it. (R1147-8).[3]

This argument also does not surpass the procedural bar to this claim. Zeigler has made an argument regarding back spatter in prior motions. In the 2011 evidentiary hearing, defense expert Paul Kish's testimony regarding back spatter did not dissuade this Court from finding that "even if additional testing on the six areas again revealed the absence of Perry's blood, it still would not give rise to a reasonable probability of acquittal or a lesser sentence." *Zeigler*, 116 So. 3d at

[3] And, given that Zeigler had time to change clothes, and that a raincoat and gloves that could have been used to avoid exposure to blood were missing from the crime scene, Zeigler's *ipse dixit* argument fails.

259. Zeigler is simply raising arguments he has previously made or had the opportunity to make.

Zeigler argues that the testing he seeks to conduct on his clothing is both different from testing that has previously been done and only recently possible to perform. (*I.B.* at 53). However, defense expert Eikelenboom admitted that it was known in 2001 that gunfire could produce back spatter. In a November 19, 2001 Order releasing the evidence for testing, the trial court stated the following in paragraph 4:

> The defendant shall have sole authority to direct the scope and nature of the testing of the evidence released at his request, described in paragraph 2. The State shall have sole authority to direct the scope and nature of the testing of the evidence released at its request, described in paragraph 3. Each party shall have the right to designate for testing additional samples from the evidence selected by the other.

Thus, Zeigler has had an opportunity since 2001 -- 15 years -- to have "every single bloodstain" tested. His failure to avail himself of that opportunity in some semblance of a timely fashion does not supply a basis for the relief he now wants.

Zeigler's argument that the testing he seeks is only possible to perform recently is not supported by the testimony of his own expert or his brief. Defense expert Eikelenboom testified that Y-STR testing was well established in 2007. (R1118-9). Zeigler admits in the *Initial Brief* that mini-STR was released in 2007. (*I.B.* at 53). While he argues that he never before requested testing using mini-STR or touch DNA, Zeigler does not explain why he did not request using these

"cutting edge" (*IB* at 53-4) testing methods when he requested DNA testing in 2009. Zeigler also fails to explain why he waited nine years to request DNA testing using these methods.

Zeigler also has not proven with specificity how the use of either of these technologies would lead to an acquittal or lower sentence. Although Eikelenboom testified that if he performed modern technology DNA testing on Zeigler's shirt that he would be able to tell whether or not Zeigler was the shooter and beater of Perry Edwards, Eikelenboom has nothing factual on which to base this opinion. He has only seen Zeigler's shirt in photographs for which he does not know the date in which the pictures were taken. Without seeing the shirt in its current condition, there is no way Eikelenboom could state with certainly what type of genetic evidence, if any, could be found on the shirt. Furthermore, even if Eikelenboom was able to test the shirt, this Court has previously found that the absence of blood on Zeigler's shirt does not prove his innocence. "[H]e fails to present any viable arguments why more testing that shows more absence of Perry's blood on Zeigler's clothing would negate our previous conclusion that the absence of Perry's blood on Zeigler's clothing does not establish that he was not the perpetrator." *Zeigler*, 116 So. 3d at 259.

b. Testing of Blood Stains on Eunice's Clothing Would Not Create Reasonable Doubt as to Zeigler's Guilt. (restated).

Here, Zeigler argues that he is requesting, "for the first time," modern DNA testing of blood stains found on Eunice Zeigler's clothing. (*IB* at 54). This is by no means Zeigler's first time asking to test Eunice Zeigler's clothes for DNA. He made a similar request in 2009. Although he now argues that he would use "recently developed Y-STR and mini-STR techniques," (*IB* at 55), the Y-STR testing method is by no means a new procedure. As stated above, it has been available since 2007. Eikelenboom also testified that he began using touch DNA testing in 1997. (R1058; 1060). In 2008, his lab became the first to use touch DNA in courts in the United States, according to Eikelenboom. (R1120-1). Thus, the testing methods that Zeigler is now requesting are not new. Although Zeigler argues that "the significance of this testing cannot be overstated" (*IB* at 55), he again fails to explain why he did not previously request to use these methods in 2009 when he asked to test Eunice Zeigler's clothing.

Zeigler argues that identifying who deposited bloodstains on Eunice Zeigler's coat "will very likely reveal who killed her and confirm that Zeigler did not." (*IB* at 56-7). However, Eikelenboom's testimony does not support that argument. The defense expert testified that he saw some stains on the inside of the coast, which he says **could** have been transferred by the perpetrator. Eikelenboom

also opined that on Eunice Zeigler, he saw what appeared to be visible bloodstains and "very small specks which could be bloodstains created by coming from the wound injury of the victim, back spatter." (R1075). He also admitted that it was possible that Zeigler could have hugged his wife sometime that evening and left DNA on her coat. (R1114). Nevertheless, Zeigler has failed to prove how testing Eunice Zeigler's clothing would lead to his acquittal.

c. DNA on Perry Edwards Sr.'s Clothing Is Not Highly Likely to Create Reasonable Doubt as to Zeigler's Guilt (restated).

Zeigler argues that the testing being requested for Perry Edwards' clothing has never been requested or performed in this case because, "until a few years ago, it did not exist." (*IB* at 59). This argument is disputed by Zeigler's own brief in which he states that mini-STR was released in 2007. (*IB* at 53). His own expert began using touch DNA in 1997 and in courts in the United States since 2008. (R1058; 1060; 1120-1). Thus, this technology existed prior to Zeigler's request for DNA testing in 2009, which included a request to test Perry Edwards' clothes.

Although Zeigler argues that "touch DNA testing of Perry Sr.'s clothing **could** reveal crucial evidence in this case" (*IB* at 59), such a statement is merely speculation. It does not satisfy the requirement that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime. *Fla. R.*

Crim. P. 3.853(b)(2). As this Court said in its last ruling on Zeigler's successive postconviction motion, that Zeigler "completely fails to address how DNA testing of Perry's clothing, tie, tie clip, and fingernails, and Eunice Zeigler's clothing will exonerate him or mitigate his sentence." *Zeigler*, 116 So. 3d at 260.

d. DNA on Perry Edwards Sr.'s Fingernails Are Not Highly Likely to Create Reasonable Doubt as to Zeigler's Guilt. (restated)

Here, Zeigler seeks to test genetic material that he argues was recovered from Perry Edwards' fingernails. (*IB* at 60). However, Zeigler presumes that there was genetic material recovered from Edwards' fingernails. While his defense expert testified that "the DNA of perpetrators is often found under fingernails" (R1082), there was no testimony presented that investigators recovered any genetic material from Edwards' fingernails. This argument is based upon nothing more than mere speculation. The evidence in Zeigler's case has not changed in the past 40 years. Although Zeigler argues that fingernail evidence is likely to yield powerful evidence of reasonable doubt as to his guilt, he has not provided any proof that even if such genetic material was available that it would yield exculpatory evidence.

e. DNA on the Interiors of the Saturday Night Special Guns is Not Highly Likely to Create Reasonable Doubt as to Zeigler's Guilt. (restated).

For this argument, Zeigler references Eikelenboom's testimony "that touch DNA from the guns' interiors is likely to reveal the identity of the individual who cleaned the guns, which could reveal if Williams was one of the murderers." (*IB* at 61). However, Eikelenboom's testimony later in the evidentiary hearing was not so definitive. He stated that testing the interior of the guns **may** be helpful to find the DNA of people who cleaned the guns. (R1082). Eikelenboom also admitted that he was not sure which of the eight guns in evidence he would want to test for DNA. (R1086-7). In addition, the defense expert admitted that he did not know if the guns had been test fired or cleaned, both of which could either add touch DNA or destroy it. (R1087-8). Finally, it appears that the defense expert would have the Court believe that useful DNA evidence could be obtained from the internal parts of the various firearms. His stated intent to "disassemble" the firearms is incredible. As a result, Zeigler has not provided any proof that the testing of the inside of the gun would lead to his acquittal, especially since the defense expert does not know if any of the inside of the guns was contaminated. Testing is not warranted.

I. Zeigler has not Established that the Evidence He Seeks to Test is Authentic. (restated).

The trial court properly found that the authenticity of the evidence Zeigler wants to test is questionable. Zeigler has not provided any reliable proof that the evidence he wants to test is authentic. Investigators did not use protective methods, such as gloves, when handling evidence in the 1970's. The defense expert even admitted that he expects the evidence to be contaminated because of the jurors handling the evidence. In addition, the defense expert was not aware of where the evidence was kept prior to it being moved to the courthouse or the prior method of storage. The fact that the evidence was authentic at trial does not mean that it is currently authentic after the passage of 40 years.

Absence of evidence is not evidence of absence here, particularly with there being a time gap between the first and second series of gunshots. The first series occurred at 7:24 p.m. based upon when the clock stopped after being struck by a bullet. The second series of gunshots occurred after 9 p.m., shortly before a call to Judge Vandevender's home. The defense expert admitted that he did not know what Zeigler may have been doing before the first murder and the second murder or if Zeigler had the opportunity to change clothes between the killings. (R1101, 1108-9). The authenticity of the evidence cannot be presumed, as Zeigler argues, especially with his expert having so little factual knowledge on which to base his opinions.

II. Zeigler Has Not Established a Right to Re-test Evidence Using "New Technology." (restated).

As argued earlier in this Response, Zeigler's request to re-test evidence does not involve the use of new technology. The testing methods he proposes to use have been around for several years and were both available when Zeigler made his last request for DNA testing in 2009. Zeigler fails to explain in his brief why he did not request to use these testing methods at that time.

The trial court did not err in finding that Zeigler did not include the required statements in his motion. Under Florida Rule of Criminal Procedure 3.853(b)(2), a motion for postconviction DNA testing must include, *inter alia*, a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime. *Fla. R. Crim. P*. 3.853(b)(2).

Zeigler's motion before the trial court did not include the required statement that the results of the previous DNA testing were inconclusive. Instead, Zeigler argued the opposite – that the "[t]he results of that testing severely undermined the prosecution's entire theory of the murders – and directly exculpated Zeigler from the murder of Perry Edwards." Motion for DNA Testing Pursuant to Fla. Stat. §925.11(1)(a) at 7.

In addition, Zeigler has not proven that the prior DNA testing was inconclusive or that further DNA testing would lead to his acquittal. With this being the fifth time he has sought DNA testing, Zeigler has simply rehashed the same arguments he had previously made in an effort to conduct more DNA testing.

Zeigler argues that the evidence he seeks to test in this motion is different from the evidence previously tested. (*I.B.* at 66). However, Zeigler fails to disclose that he was given the ability by the trial court to determine the scope of the prior testing and Zeigler chose to limit the testing to the areas that were previously tested. He has had an opportunity to conduct the testing that he now requests.

III. Collateral Estoppel Bars Zeigler's Testing Requests (restated).

This claim is procedurally barred because Zeigler is relitigating arguments that have previously been denied. In Florida, the doctrine of collateral estoppel bars relitigation of the same issues between the same parties in connection with a different cause of action. *Topps v. State*, 865 So. 2d 123, 1255 (Fla. 2004).

Zeigler's motion raises the same issues that he has previously argued or has had the opportunity to argue. In 2001, Zeigler asked that his clothing be tested for DNA. In 2003, he again asked that his shirts be tested for DNA. In 2009, Zeigler requested the testing of several items, including his inner and outer shirts, Perry's shirt, pants, jacket and fingernails and Eunice Zeigler's clothing. Zeigler is now

asking, again, that these same items be tested for DNA. In 2013, this Court found that collateral estoppel barred Zeigler's claims, stating as follows:

> Specifically, in his current motion, Zeigler argues that (1) additional testing of his shirts will show that Perry's blood is not on his clothing and, therefore, he was not the assailant; (2) additional testing on Mays' clothing will reveal Perry's blood, which demonstrates that Mays was the actual perpetrator; and (3) additional testing on Zeigler's shirts will show whether the blood spatter on them is really from Mays. However, we previously addressed these claims and held that the absence of Perry's and the presence of Mays' blood on Zeigler's clothing did not establish that Zeigler was not the perpetrator. *Id*. at 130–31. Likewise, we also held that the presence of Perry's blood on Mays' clothing did not establish that Mays was the perpetrator rather than a victim. *Id*. Thus, we already decided these same issues against Zeigler.

Zeigler, 116 So. 2d at 258.

This time, Zeigler is again asking that his shirt be tested. He argues, once again, that the results of the testing will reveal the identity of the true killer. Although Zeigler is now arguing to use touch DNA and Y-STR testing, nothing prevented him from asking that such testing methods be done during his last motion requesting DNA testing in 2009.

The rules require Zeigler to prove that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime. Fla. R. Crim. P. 3.853(b)(2). Zeigler has not met the requirements of the rule because he has not demonstrated how testing the clothes or the guns for touch DNA or using the mini

STR technologies would lead to an acquittal or lower sentence. "[A] movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence." *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004). "In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case." Zeigler has not made that demonstration through his pleadings nor the testimony from the evidentiary hearing. Since there is no dispute that he was present at the store, his blood and the blood of the victims would logically be found at the crime scene. Any argument regarding what impact testing for touch DNA or using newer technology to test the evidence would make is purely speculation and does not point to any difference additional testing would make. Collateral estoppel bars this claim, which the State argued in briefing and at the evidentiary hearing.

IV. Whether the Court Below Erred in Holding That Discovery was Unavailable. (restated).

Zeigler's argument that the trial court erred in holding that discovery was unavailable should be denied. Zeigler's motion for DNA testing was filed pursuant to Fla. Stat. §25.11 and Rule. 3.853, both of which pertain to DNA testing only. Neither the statute nor the procedural rule gives a defendant the right to depose or

call any witness who would not be testifying specifically regarding DNA evidence. As a lay witness at trial, Felton Thomas would not be called as an expert witness to testify on the DNA evidence in the case. Zeigler simply attempted to use the DNA Motion to try to circumvent the procedural rules and put Thomas back on the witness stand in an effort to get Thomas to change his testimony. In footnote 5 of his motion, Zeigler admitted that his desire was for the trial court to apply a standard applicable in Rule 3.851 to this Rule 3.853 litigation, which is contrary to the Florida Rules of Criminal Procedure, has no legal basis.

The trial court properly applied the *Lewis* factors to Zeigler's request to subpoena Thomas. One of the questions presented to this Court in *Lewis* was can parties engage in pre-hearing discovery when pursuing post-conviction claims pursuant to Florida Rule of Criminal Procedure 3.850? *Lewis*, 656 So. 2d at 1249. This Court held that the trial judge, in deciding whether to allow this limited form of discovery, shall consider 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. *Id*. at 1250. Contrary to Zeigler's argument, the *Lewis* factors do not "all favor allowing discovery." (*IB* at 74). In fact, this Court stated in *Lewis* that "[t]his opinion shall not be interpreted as automatically allowing discovery under rule 3.850, nor is it an expansion of the discovery procedures established in

rule 3.220. We conclude that this inherent authority should be used only upon a showing of good cause." Zeigler did not demonstrate a good cause basis for taking Thomas' deposition in preparation for an evidentiary hearing that was being held solely on whether DNA testing would be permitted. Zeigler's argument that "[t]here is no dispute that Thomas' testimony is relevant to whether Zeigler will be entitled to DNA testing" (*I.B.* at 73) is illogical since Thomas is not a DNA expert. As stated earlier, Zeigler was simply using this argument in an attempt to put Thomas on the witness stand and try to get him to recant his trial testimony. Zeigler admits this in the *Initial Brief*, where he argues "Zeigler should have been offered the chance to have his counsel depose Thomas to provide the Circuit Court sworn testimony as to Thomas's recantation." (*I.B.* at 74-75). The trial court properly denied this motion. This Court should affirm the trial court's ruling on the discovery motion and deny Zeigler's request to remand for further proceedings to determine if Thomas' testimony provides an additional basis to authorize testing.[4]

CONCLUSION

Testimony from the evidentiary hearing as well as Zeigler's motion and brief before this Court reveal that this latest request to perform DNA testing is no more

[4] Any issue about Thomas, and any testimony by him, belongs in a motion under Rule 3.851.

than a fishing expedition to see what evidence could be found. It is procedurally barred by collateral estoppel. Zeigler has had an opportunity to perform the tests he now requests on his outer and inner shirts. He has previously asked to test all of the evidence he seeks now to test from Eunice Zeigler and Perry Edwards. Although he has now added testing two guns to the list, any evidence from the outside of the guns have been contaminated and cleaning or test firing of the guns would affect the viability of any evidence in the inside of gun. Zeigler has provided no proof whatsoever that the testing would produce exculpatory evidence. The State respectfully requests that this Honorable Court deny this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the following by electronic transmission via e-portal: Javier Peral, II, Esq., Hogan Lovells US LLP, javier.peral@hoganlovells.com, 600 Brickell Ave., Suite 2700, Miami, Florida 33131; John Houston Pope, Esq., Epstein Becker & Green, P.C., jhpope@ebglaw.com, 250 Park Ave., New York, New York 10177; and Dennis H. Tracey, III, Esq., email: dennis.tracey@hoganlovells.com, David R. Michaeli, Esq., email: david.michaeli@hoganlovells.com , Hogan & Hartson, L.L.P., 875 Third Ave., New York, New York 10017 on this 13th day of December, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,

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