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IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Appellant, Case No. SC 16-1498

- vs. -

STATE OF FLORIDA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330(a), appellant William Thomas Zeigler, Jr. ("Zeigler"), by and through his undersigned attorneys, hereby submits his Motion for Rehearing, and states as his grounds:

1. The Court rendered its opinion ("the Opinion") in this matter on April 21, 2017. The Opinion affirmed the court below in all respects.

2. The Court should rehear the appeal on the following four issues: (1) the Court's Opinion overlooked and did not address the fact that Zeigler's DNA testing request also sought to demonstrate that a second victim's DNA – Virginia Edwards – is also not present on Zeigler's clothing, and that because she was shot at close range, the absence of her DNA would prove Zeigler was not the person who shot her; (2) the Court misapprehended the scope of its prior decisions, which dealt solely with blood DNA, in holding that the Court had previously addressed testing requests for touch DNA; (3) the Court misapprehended the standard for

"identical issues" under the doctrine of collateral estoppel; and (4) the Court overlooked uncontested testimony from both State and defense experts concerning the exculpatory nature of Zeigler's requested testing.

Evidence and Argument Concerning Virginia Edwards' Murder

3. The Court's Opinion held that Zeigler's request to use "modern technology to . . . show that Perry Edwards's blood and DNA are not on his clothing [and], therefore, he did not kill Perry" was procedurally barred, but did not consider or address Zeigler's separate argument that DNA testing is necessary to prove that Zeigler could not have shot and killed Virginia Edwards. Zeigler cannot be procedurally barred from seeking DNA testing on this basis as it is undisputed that Zeigler has never before sought to test for Virginia Edwards' blood or other DNA and thus no court could have previously considered the "identical" issue. Moreover, the undisputed expert testimony established that Zeigler's requested testing would prove that Zeigler could not have shot Ms. Edwards, making the testing not just exculpatory but exonerating.

4. The uncontroverted factual findings in the record establish that Virginia Edwards was shot from a distance of just six to twelve inches. *See* 2005 ROA at 4684[1]. Zeigler's expert, Richard Eikelenboom, testified that a close range shooting such as Mrs. Edwards' necessarily produces "backspatter" of the victim's

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

blood towards the shooter, and that this backspatter (which is sometimes called "blowback") produces very small "misting" of blood on the perpetrator's clothing that modern technology can easily detect, even decades later. R. 1076-78.

5. The State's expert, Dave Baer, agreed with the defense's expert, explaining 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." R. 1131. Baer further testified that in cases (such as Mrs. Edwards') of a close range shooting, "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.

6. Zeigler has never previously sought DNA 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." *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998) (internal quotations and citations omitted); *Blidge v. State*, 933 So. 2d 1262, 1263 (Fla. 3d DCA 2006).

7. The Court's Opinion overlooked these facts and the evidence presented in Zeigler's appeal, and did not mention Zeigler's request for DNA testing to prove that he could not have killed Virginia Edwards. Accordingly, this

Court should rehear this issue and find that Zeigler's request for testing to prove he did not shoot Virginia Edwards is not precluded, is meritorious, and should be granted.

The Court Misapprehended Critical Facts and Misapplied Florida Collateral Estoppel Law

8. The Court misapprehended important points of law and fact by concluding that collateral estoppel barred relief to Zeigler, because the issues presented in the instant appeal differ from the Court's decisions in *Zeigler v. State*, 967 So. 2d 125 (Fla. 2007) and *Zeigler v. State*, 116 So.3d 255, 259 (Fla. 2013). *See* Opinion at 1–2.

9. This Court has repeatedly held that for collateral estoppel to apply, the *identical issue* must have already been litigated and determined in a previous judgment. *See, e.g.*, *City of Oldsmar v. State*, 790 So. 2d 1042, 1046 n.4 (Fla. 2001); *The Florida Bar v. Clement*, 662 So. 2d 690, 697–98 (Fla. 1995). For the issues in two matters to be "identical," the earlier litigation must have brought to light the "precise facts" that were brought to light in the later litigation. *See Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952); *Mass v. State*, 927 So. 2d 157, 160 (Fla. 3d DCA 2006) ("For purposes of collateral estoppel, the facts are the same when they are shown by the same testimony or evidence."). Moreover, "all points and questions" must have been addressed and answered by the previous litigation. *Gordon*, 59 So. 2d at 44.

10. The facts and testimony from Zeigler's prior DNA testing requests could not have presented "identical" issues because they sought completely different types of testing based on different theories of innocence, and were supported by different testimony and other evidence. In its Opinion, the Court applied collateral estoppel to bar Zeigler's testing request after finding that the Court had "already concluded that the absence of Perry's DNA on Zeigler's clothing is not exculpatory." Opinion, at 1 (*citing Zeigler v. State*, 116 So.3d 255, 259 (Fla. 2013). The Court's prior decisions, however, only considered the potential significance of not finding Perry's *blood* on Zeigler's clothing. The Court has never previously considered the significance of not finding Perry's skin cells and "touch DNA" on Zeigler's clothing because the technology did not exist to search for those cells. The holding in the Opinion that the Court has previously considered the absence of Perry's *DNA* is therefore inaccurate – the Court has only considered the significance of not finding Perry's *blood*. Since Zeigler never previously sought DNA testing for Perry's skin cell DNA, the Court could not previously have concluded that the absence of that DNA on Zeigler's clothing was exculpatory.

11. Further, the Court's previous findings about the significance of not finding Perry's blood on Zeigler's clothing were based on, and largely informed by, the technological limitations present at the time. For instance, in its 2013

decision (which itself relied heavily on this Court's conclusions regarding DNA evidence from its 1995 decision, *Zeigler v. State*, 967 So. 2d 125 (Fla. 1995)), this Court held that testing to show the absence of Perry's blood (but not Touch DNA) on Zeigler's clothing would not establish a probability of an acquittal because "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"; "it was possible to miss blood on the shirt, due to deterioration and improper storage"; and "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area." *Zeigler v. State*, 116 So. 3d at 259. The issues on this appeal are necessarily different from those previously considered because improvements in technology have addressed each of those concerns. This Court never previously considered whether confirmation using modern testing that Zeigler's clothing has none of his victims' DNA on it would be exculpatory; indeed, the uncontroverted expert testimony presented in these proceedings shows that it would be.

12. Additionally, the Court overlooked Zeigler's argument that applying collateral estoppel to bar Zeigler's current DNA testing request based on different and narrower prior testing requests would perpetuate manifest injustice. *See McBride v. State*, 935 So. 2d 28, 29 (Fla. 3d DCA 2006) (remanding a Rule 3.850 motion for consideration of the merits because applying a procedural bar would

cause manifest injustice). Preventing Zeigler from attempting to prove his innocence through additional, modern DNA testing because the Court reached a decision on different testing request, based on different expert testimony and the limitations of now-antiquated technology, offends all notions of justice and would constitute a deprivation of fundamental due process.

13. Accordingly, this Court should rehear this issue and find that collateral estoppel does not apply.

The Court Overlooked Critical and Uncontested Testimony Concerning the Exculpatory Nature of Zeigler's Requested Testing

14. The Court overlooked critical testimony from both defense and prosecution experts in finding that Zeigler had not demonstrated how his requested testing would create a reasonable probability of acquittal. Specifically, the Court held in its Opinion that "even if additional testing on Zeigler's shirts again revealed the absence of Perry's blood or DNA, it still would not establish a reasonable probability that he would have been acquitted had the results been admitted at trial." Opinion at 2. The Court also held that "Zeigler failed to explain how identifying the specific source of the blood or touch DNA on Eunice's clothing would exonerate him, particularly in light of the testimony at the evidentiary hearing that it was possible Zeigler's own DNA was on Eunice's clothing", and that "[a]s to Perry's clothing and fingernails, because this Court has already determined that the absence of Perry's blood on Zeigler's clothing is not

exculpatory, it follows that the lack of Zeigler's DNA on Perry's clothing or body is also not exculpatory." *Id.*

15. The above findings misapply this Court's precedents on when evidence is exculpatory and are not supported by – and are in fact contrary to – substantial and uncontroverted evidence in the record. This Court has long held that "[e]vidence is exculpatory if it is favorable to the defendant and tends to negate the guilt of the accused or tends to negate the punishment." *Maharaj v. State*, 778 So. 2d 944, 953 (Fla. 2000) (citing *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Doyle v. State*, 460 So.2d 353 (Fla.1984). *See also Beasley v. State*, 18 So. 3d 473, 487 (Fla. 2009) ("Exculpatory evidence has been defined as that "tending to establish a criminal defendant's innocence.") (*quoting Black's Law Dictionary* 597 (8th ed. 2004)). The testing Zeigler seeks is clearly exculpatory under these standards.

16. With respect to the significance of not finding Perry's touch and other DNA on Zeigler's clothing, the Court overlooked the expert testimony of Richard Eikelenboom, who testified that the requested testing would literally show "whether [Zeigler] was the shooter and beater of Perry Edwards". R. 1079-80. He explained, that particularly in light of modern DNA testing technology, if none of Perry's DNA is found on Zeigler's clothing, there would be "no support" for the hypothesis that Zeigler was the killer. R. 1124. There can be no serious question

that evidence of this kind is exculpatory, or that a jury hearing that testimony would find reasonable doubt.

17. Moreover, the State's expert, Dave Baer, actually *agreed* with the defense expert on this crucial point, testifying that "you would expect there to be transferred blood back to [Zeigler]" if he was the individual who shot Perry and Virginia Edwards at close range, and there would be "no" reason it would be hard to find that blood today. R. 1147-48. The Court overlooked this uncontested testimony in holding that Zeigler had not demonstrated his requested testing would be exculpatory.

18. The Court also overlooked uncontested testimony and other factual information in the record with respect to the significance of identifying the source of blood on Eunice Zeigler's body. The only information currently known about that blood is that it (1) could *not* have come from Zeigler or the victim and (2) was both dripped and smeared onto Eunice's body by someone *other than Zeigler after she was killed*. Identifying the third individual who dripped and smeared blood on Eunice after she was killed would prove that someone other than Zeigler was present and bleeding on Eunice's body after she was killed – which is entirely inconsistent with the State's case and is powerfully exculpatory. The Court also misapprehended Mr. Eikelenboom's testimony in finding that it was possible for Zeigler's DNA to be on Eunice's body. As Eunice's husband, it is possible that

trace amounts of his DNA could be on her clothing, however any such finding would be immaterial as testing has already shown that the blood on Eunice is Type A and therefore could not have come from Zeigler, who has Type 0 blood. In order words, while trace amounts of skin cell or other DNA from Zeigler could be present on his wife's clothing by virtue of their cohabitation, we already know that the *blood* on Eunice – the focus of the DNA tests Zeigler seeks to conduct – came from someone other than Zeigler. There is no explanation for someone's blood other than Zeigler's being on Eunice's body, other than someone other than Zeigler killing Eunice, which identifying the source of that blood would allow Zeigler to prove. It is difficult to imagine DNA testing that could produce more exculpatory results.

19. The Court's finding with respect to fingernail DNA is also inconsistent with the record, which reflects that Perry Edwards fought violently for several minutes with his attacker during the struggle that resulted in his death. *See Zeigler v. State*, 402 So. 2d 365, 367 (Fla. 1981) (finding that "Perry probably surprised [Zeigler] with his strength and stamina," that "they struggled for some time," and that Zeigler shot Perry after he "subdued Perry and rendered him harmless"). It is well-settled that DNA testing of fingernail scrapings is appropriate, and is exculpatory, where after a victim struggled, DNA other than the defendant's is found. *See e.g. Dubose v. State*, 113 So. 3d 863, 865 (Fla. 2d DCA

2012). That is exactly the result Zeigler expects to find here – an expectation bolstered by the fact that blood found on Eunice could not have belonged to Zeigler – and which would provide further proof that someone other than Zeigler was the individual who fought with and ultimately murdered Perry and the other victims.

20. Florida courts have routinely confirmed the importance of permitting post-conviction access to fingernail scrapings and approved DNA testing under Rule 3.853 in such situations – even in cases where, unlike here, it was not clear that a violent struggle between the victim and perpetrator even took place. *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).

21. In light of the uncontested testimony regarding the exculpatory nature of Zeigler's requested testimony, the Court should rehear the issue of whether testing would be exculpatory and, on rehearing, finding that it would be.

WHEREFORE, appellant respectfully requests that this Court grant rehearing, reconsider its opinion affirming the court below, and grant relief as requested in the briefs filed herein, for the reasons set forth therein and additionally noted herein.

Dated: May 8, 2017

Respectfully submitted,

By: */s/ Javier Peral II*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2017, 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 8th day of May 2017.

By */s/ Javier Peral II*
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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 8th day of May 2017.

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