**IN THE SUPREME COURT OF FLORIDA**

**WILLIAM THOMAS ZEIGLER,**

**Case No. SC05-1333**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**
**_____/**

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

# ANSWER BRIEF OF APPELLEE

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## INTRODUCTION

Zeigler has been before this Court eight (8) times since his 1976 convictions and death sentences were imposed. In addition, Zeigler has filed three (3) Federal habeas corpus petitions, and has been before the Eleventh Circuit Court of Appeals twice. Zeigler has filed three petitions for certiorari in the United States Supreme Court, each of which has also been denied.

In its 1995 decision in this case, this Court affirmed the denial of Zeigler's request for DNA testing, finding that the claim was procedurally barred. This Court went on to hold:

> 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.**

*Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995). [emphasis added]. The irony of this appeal is that the DNA testing did not establish as much as this Court assumed that it would in its decision issued a decade ago.

## STATEMENT OF THE CASE[1]

In its 2003 decision affirming the denial of Zeigler's Federal habeas corpus petition, the Eleventh Circuit Court of Appeals described the history of this case in the following way:

> In 1976, Zeigler was convicted of 2 counts of first degree murder and 2 counts of second degree murder. The historical facts of the murders are set forth in the Florida Supreme Court's opinion on direct appeal. *Zeigler v. State*, 402 So. 2d 365 (Fla. 1981). The jury recommended a sentence of life imprisonment. But, the trial court sentenced Zeigler to death. The Florida Supreme Court affirmed, 402 So. 2d at 377, and the United States Supreme Court denied certiorari. *Zeigler v. Florida,* 455 U.S. 1035, 102 S. Ct. 1739, 72 L. Ed. 2d 153 (1982).
>
> In the 27 years after his conviction, Zeigler has filed a variety of petitions for collateral review in both state and federal court. In 1982, he filed the first petition for a writ of habeas corpus in federal court. Because some of Zeigler's claims had not been exhausted, the district court granted a continuance to allow Zeigler to exhaust his state remedies. Zeigler then filed a motion to vacate his sentence in accord with Florida Rule 3.850. The state court denied Zeigler's petition, and the Supreme Court of Florida affirmed. *Zeigler v. State*, 452 So. 2d 537 (Fla. 1984) (affirming denial of eighteen claims and remanding one

[1] The "Statement of the Case" set out at pages 1-9 of Zeigler's brief is argumentative and is denied.

claim); *Zeigler v. State*, 473 So. 2d 203 (Fla. 1985) (affirming denial of remaining claim after remand).

The district court then ordered Zeigler to file an amended habeas petition. Zeigler filed a habeas corpus "checklist" which the district court treated as an amended habeas petition. The district court denied the petition. After the time for filing a notice of appeal expired, Zeigler's execution was set for May 1986. Zeigler then filed a Rule 60(b) motion for relief from judgment, a motion to file an amended habeas petition, and a second federal habeas petition. This second habeas petition raised Zeigler's original claims and a claim of ineffective assistance of counsel for the failure to file a timely notice of appeal from the denial of his first amended federal habeas petition. The district court denied the motions and the petition. Zeigler appealed.

While Zeigler's appeal was pending in federal court, he filed a second Rule 3.850 motion in state court which was denied. In November 1986, we vacated the district court's denial of Zeigler's motions and habeas petition and remanded the case to the district court with instructions to allow Zeigler to file a new amended petition limited to claims "on which exhaustion was completed or initiated not later than January 14, 1983." *Zeigler v. Wainwright*, 805 F.2d 1422, 1426 (11th Cir. 1986). In May 1987, Zeigler filed his amended habeas petition in the district court.

Before Zeigler's amended petition was decided by the district court, Zeigler filed a habeas petition in the Florida Supreme Court. [FN1] In April 1988, the Florida Supreme Court vacated the death sentence. *Zeigler v. Dugger*, 524 So. 2d 419, 421 (Fla. 1988). Zeigler's second federal habeas petition was then dismissed without prejudice.

> [FN1] Florida law allows for two kinds of post-conviction proceedings. A prisoner can file a motion to vacate sentence under Rule 3.850 of the *Florida Rules of Criminal Procedure*. A prisoner may also directly petition the Florida Supreme Court for a writ of habeas corpus.

In August 1989, Zeigler was re-sentenced to death. Zeigler appealed his sentence; and, while his direct appeal was pending, he filed a Rule 3.850 motion. In April 1991, the Florida Supreme Court ruled on Zeigler's direct appeal, affirming the death sentence. *Zeigler v. State*, 580 So. 2d 127, 131 (Fla. 1991). The United States Supreme Court again denied certiorari. *Zeigler v. Florida*, 502 U.S. 946, 112 S. Ct. 390, 116 L. Ed. 2d 340 (1991). Zeigler then amended his Rule 3.850 motion in October 1989 and again in March 1992. The amended motion was denied, and the denial was affirmed by the Florida Supreme Court. *Zeigler v. State,* 632 So. 2d 48 (Fla. 1993).

After his amended Rule 3.850 motion was denied, Zeigler filed another 3.850 motion in March 1994. This fourth motion was denied in June 1994. In October 1994, Zeigler filed a habeas petition in the Florida Supreme Court which was summarily denied. After denying the habeas petition, the Florida Supreme Court affirmed the denial of Zeigler's March 1994 -- that is, his fourth -- 3.850 motion. *Zeigler v. State*, 654 So. 2d 1162, 1165 (Fla. 1995).

On 21 August 1995, Zeigler filed this habeas petition -- his third -- in the district court. Zeigler's petition raised many claims. On 10 July 2000, the district court denied relief on all claims. On 28 November 2001, we granted a certificate of appealabiltiy (COA) covering 11 of Zeigler's claims. [FN2]

> [FN2] After oral argument, Zeigler filed a motion to reconsider our denial of a COA on ground IV.B of his petition. Zeigler argues that, under the Supreme Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), a COA should have been granted for this claim (the claim alleges that a juror was improperly prescribed Valium during the deliberations). In *Miller-El*, the Supreme Court said that a COA should be granted "only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" 123 S. Ct. at 1039. Under this standard "a

> petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Id. (*quoting Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 1599, 146 L. Ed. 2d 542 (2000)) (alteration in original). This standard is not a new standard. *Id*. We used this standard when issuing our COA, and we see no reason to expand our COA to cover additional claims. The motion is denied.

*Zeigler v. Crosby*, 345 F.3d 1300, 1302-1303 (11th Cir. 2003).

On January 26, 2001, Zeigler filed a motion for post-conviction DNA testing. (SR1-22). That motion was granted on November 19, 2001. (R385-390). On January 15, 2003, Zeigler filed a successive *Florida Rule of Criminal Procedure* 3.851 motion alleging "newly discovered evidence" based upon the DNA results. An evidentiary hearing was conducted on December 20 and 21, 2004, and, in an order issued on April 19, 2005, all relief was denied. (R5972-5987).

## STATEMENT OF THE FACTS[2]

[2] The "Statement of the Facts" set out at pages 9-24 of Zeigler's brief is argumentative and is not accepted as accurate by the State. As the Fifth District Court of Appeals has pointed out, "[t]he purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000).

On direct appeal from his convictions and sentences of death, this Court summarized the facts of this case in the following way:

> On Christmas Eve, December 24, 1975, Eunice Zeigler, wife of defendant (hereinafter referred to as wife), and Perry and Virginia Edwards, parents-in-law of defendant (hereinafter referred to as Perry and Virginia), were shot to death in the W. T. Zeigler Furniture Store in Winter Garden, Florida. In addition, Charles Mays, Jr., (hereinafter referred to as Mays), was beaten and shot to death at the same location. Times of death were all estimated by the medical examiner as within one hour of 8:00 P.M. The defendant was also shot through the abdomen.
>
> The state's theory of the case may be summarized as follows:
>
> Edward Williams had known defendant and his family for a number of years. Williams testified that in June 1975 defendant inquired of him about obtaining a "hot gun." Williams then went to Frank Smith's home and arranged for Smith to purchase two RG revolvers. The revolvers were delivered to defendant. Also, during the latter part of 1975 defendant purchased a large amount of insurance on the life of his wife. Thus was shown the means and the motive.
>
> Mays and his wife came to defendant's furniture store during the morning of December 24 and Mays agreed to meet defendant around 7:30 P.M. The store was closed around 6:25 P.M.
>
> Mays left his home around 6:30 P.M. He went to an Oakland beer joint and saw a friend, Felton Thomas, who accompanied Mays to the Zeigler Furniture Store.
>
> The theory of the state's case is that defendant had two appointments on Christmas Eve, one with Mays and one with Edward Williams. Prior to these appointments he took his wife to the store and in some manner arranged for his parents-in-law to go there. He killed his wife, Eunice, quickly, and for her, unexpectedly,

since she was found with her hand in a coat pocket, shot from behind.

Because of the location of her body, Virginia was probably trying to hide among the furniture. Perry probably surprised defendant with his strength and stamina as they struggled for some time. After defendant subdued Perry and rendered him harmless, defendant shot him. Considering the fact that a bullet penetrated Virginia's hand, the state said it was likely she was huddled in a protective position when she was executed.

Defendant then left the store, returning to meet with Mays who had arrived there at about 7:30. He was probably surprised to see the presence of another man, Felton Thomas, with Mays. He took Thomas and Mays to an orange grove to try the guns. The state says that the purpose of the trip was to get the two to handle and fire the weapons in the bag. From the grove he returned to the store, but was unsuccessful in getting Mays or Thomas to provide evidence of a break-in. He did, however, get Thomas to cut off the lights in the store. The three returned to defendant's home. Defendant got out, went to the garage, came back and took a box of some kind to Mays and told him to reload the gun. They returned to the store. Defendant could not persuade Thomas to enter the store, so Thomas lived. When Thomas disappeared, the defendant returned to his home and picked up Edward Williams. Defendant had killed Mays.

Defendant was successful in getting Williams partially inside the back hallway. Defendant put a gun to Williams' chest and pulled the trigger three times, but the gun did not fire. Williams said, "For God's sake, Tommy, don't kill me," and ran outside, refusing to return to the store. The state says that the empty gun was as much a surprise to defendant as it was to Williams. The state says that in all probability defendant thought he was holding the gun that Mays had shot in the orange grove and which defendant told Mays to reload.

When he was unable to get Williams into the store, the defendant became desperate and conceived the idea that he would appear uninvolved if he happened to be one of

> the victims. Accordingly, he shot himself and then called Judge Vandeventer's residence where he knew the police officers would be.
>
> The defendant denies that he had any contact with Smith or purchased any guns from him. He says that the increase in the amount of the insurance policy was pursuant to advice on an estate plan. Defendant says that his wife, Perry, and Virginia were killed during the course of a robbery; that Mays was involved in the robbery but was killed by his confederates; that he was shot by the burglars and left to die. The jury obviously did not believe the testimony of the defendant. **To have believed his story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams and would have had to have found no significance in the other substantial evidence.**
>
> We have carefully examined the extensive record and find that there was substantial evidence upon which the jury verdict could be based, and we find that the evidence was sufficient to sustain the verdict.

*Zeigler v. State*, 402 So. 2d 365, 367-368 (Fla. 1981). (emphasis added).

THE EVIDENTIARY HEARING FACTS

Shawn Weiss is an Associate Technical Director at LabCorp, the private laboratory that conducted the DNA testing in this case. (R15-16). He used the PCR method of testing to analyze selected blood stains found on the trousers worn by victim Charlie Mays, and the shirt and undershirt worn by Zeigler.[3]

[3] Bloodstains found on the bottom Zeigler's socks were also analyzed. (R55). No bloodstains were found inside Zeigler's shoes, and no footprints were found at the scene suggesting Zeigler was walking around in his sock feet. (R108). Testing produced one (1) marker -- the "14/17" that can be from either Mr. Mays or Mr. Edwards. (R54).

(R28, 31, 36, 38). Weiss tested four (4) bloodstains from Mr. Mays' trousers: one from the cuff, one from the left knee, and two from the front near the zipper and belt loops. (R31-32). The stain at the cuff produced eight (8) markers which were consistent with the blood of victim Perry Edwards. (R34).[4] The bloodstain located on the knee of Mr. Mays' trousers produced one marker that was consistent with Perry Edwards' blood. (R36).[5] No other person at the crime scene had that particular marker. (R36).

Weiss tested blood taken from the left pocket area of Zeigler's shirt,[6] and generated 12 (out of 13) markers that were consistent with Mr. Mays' blood. (R37). Mr. Edwards was not the source of this blood. (R38). Blood taken from the underarm area of Zeigler's undershirt generated only one (1) marker. (R39). That marker was consistent with Mr. Mays' blood and not consistent with Mr. Edwards' blood. (R40). However, Weiss testified that this particular marker is what is called a "14/17" -- Mr. Mays and Mr. Edwards share "14" but not "17."

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[4] The DNA testing process used by Weiss generates a total (or maximum) of 13 markers. (R29).

[5] The blood at the top of the trousers was consistent with Mr. Mays' blood. (R45). The spatter patterns associated with this blood are bizarre, but are extraneous to the issue before the Court. (R156-57).

[6] The blood found **under** the arm of this shirt was not tested. (R49).

(R52). This may be a mixed stain from two sources, and Mr. Edwards cannot be excluded as a source. (R52-53).

Weiss was not able to generate a DNA profile on "a lot of the items" that were tested because of the age of the samples. (R44). He does not know the source of any of the blood that was not tested, and because of the age (and resulting degradation) of the evidence, Mr. Edwards' blood may be on Ziegler's' shirt but simply cannot be identified. (R50). It is possible that there were multiple contributors of the blood (R52), and, as Weiss emphasized, "absence of evidence is not evidence of absence." (R50). Mr. Edwards cannot be excluded as a source of the blood. (R53).

Stuart James is a forensic scientist with expertise in the area of blood spatter interpretation. (R65-66). There are a number of "contact stains" on Zeigler's shirt and undershirt in the underarm area, but it is not possible to determine the sequence of events that caused those stains. (R75-79). The bloodstains on Mr. Mays' pants appear to be saturation stains -- it is not possible to determine where Mr. Mays was when Mr. Edwards was killed. (R95-96, 100).[7] Mr. Mays' body had been moved by law enforcement, and the blood evidence had been altered quite a bit. (R115, 116). Blood can remain wet enough to

[7] No shoeprints were located, but the pooling blood around Mays' body would have covered them up. (R100).

produce a “wet transfer” stain for as long as 24-48 hours -- such a transfer would have been possible 30 minutes after Mr. Edwards was killed. (R120). The absence of Mr. Edwards’ blood in the stains found on Zeigler’s shirts does not mean that Zeigler did not kill him. (R122). The stains found on Mr. Mays’ trousers that are Mr. Edwards’ blood are not spatter-type stains -- they do not mean that Mr. Mays was present when Mr. Edwards was killed, but rather only mean that those trousers came into contact with Mr. Edwards’ blood. (R122).

There is no way to determine if the stains found on Zeigler’s shirt are related, but there are spatter-type stains on both the front and back of the shirt collar as well as on the sleeves and inside the cuffs. (R129-30). Assuming that this is Mr. Mays’ blood, the blood was deposited on the shirt while Mr. Mays was on the floor being beaten to death. (R134-143). This spatter pattern is explained by Zeigler being Mr. Mays’ killer. (150). Sufficient blood to cause a contact transfer was located on the front of Mr. Mays’ sweatshirt. (R153). None of the evidence suggests that Zeigler crawled over Mr. Mays’ body. (R154).

## PERTINENT FACTS FROM THE PRIOR PROCEEDINGS

Three of the victims, Charles Mays, Eunice Zeigler, and Perry Edwards, had the same blood type (type “A”). *Zeigler v.*

*State*, 654 So. 2d at 1163. Zeigler's theory in the 1995 proceeding was, in the words of this Court, that:

> Because three of the victims, Charles Mays, Eunice Zeigler, and Perry Edwards, shared the same blood type, Zeigler argued that DNA testing methods currently available may establish that the bloodstains on May's clothing were from Eunice Zeigler or Edwards. Zeigler contended that such evidence would corroborate his trial testimony that Eunice Zeigler and Edwards were murdered during the course of a robbery committed by Mays and others and rebut the State's theory regarding the murders. Zeigler further argued that DNA testing may rebut the State's hypothesis that the type "A" bloodstains found on Zeigler's clothing originated from a struggle with Mays or Edwards.

*Zeigler v. State*, 654 So. 2d at 1163-1164. In closing argument, referring to the bloodstains on Zeigler's shirt, the State Attorney argued:

> That [bloodstain under the arm] could have gotten there only by his having **someone** in his arm who was Type A blood. He didn't get that crawling around on the floor. **Who** was bleeding Type A blood?

(TT2553). (emphasis added).

Zeigler testified at trial. (TT2335). The position of Mr. Mays' trousers when his body was found is inconsistent with that testimony. (TT267).

Zeigler struggled with Mr. Edwards' for some time before he was subdued and killed. *Zeigler v. State*, 402 So. 2d at 367. The "blood halo" around Mr. Mays' body overlays other blood. (TT986-87). The gunshot wound sustained by Mr. Mays was not fatal -- he

died as a result of being beaten to death. (TT267, 282).[8] Mr. Mays' body was located in close proximity to Mr. Edwards' body (some 15-20 feet). (TT264). A severed rubber glove fingertip with blood inconsistent with Zeigler's was located at the scene. (TT, 542-43, 798, 1424, 1447-48, 1450).

THE TRIAL COURT'S ORDER

In its order denying relief on Zeigler's most recent *Florida Rule of Criminal Procedure* 3.851, the collateral proceeding trial court found as follows:[9]

> After reviewing the Motion, files, and record of the cases, and having heard argument from both sides, the Court concludes that even if the alleged newly discovered evidence resulting from the DNA testing had been admitted at trial, there is

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[8] In affirming the application of the heinousness aggravator on appeal from resentencing, this Court stated:

> In support of his finding that Mays's murder was especially heinous, atrocious, or cruel, the judge wrote:
>
> > Charles Mays was shot twice, neither being the cause of death, and while still alive and struggling he was beaten savagely on the head with a blunt instrument.
>
> This finding is supported by the medical examiner's testimony. We agree with the trial judge that these facts are sufficient to apply this aggravating factor.

*Zeigler v. State*, 580 So. 2d 127, 128-129 (Fla. 1991).

[9] The collateral proceeding trial court summarized the evidence from trial and from the DNA hearing, as well. Where relevant, those findings are discussed in the argument section of this brief.

no reasonable probability that Defendant would have been acquitted. *See Jones v. State*, 709 So. 2d at 521.

Defendant admitted that he was at the crime scene, and there is no dispute his blood, as well as the blood of the other four victims, was present at the scene. Although DNA testing identified, in some cases, *whose* blood was on the clothing of both Defendant and Mays, it did not conclusively eliminate Defendant as the perpetrator of the crimes.

The bodies of both Mays and Perry were found at the back of the furniture store within a few feet of each other. While the blood found on Mays' shoes and the stains on his pant leg and cuff areas revealed a genetic profile consistent with Perry, these findings are consistent with Mays standing next to Perry, or being in close proximity to his body, after Perry was killed. These findings do not show, as Defendant asserts, that Mays was the perpetrator, rather than a victim of the crimes. Instead, if Mays were involved in a struggle with Defendant while in close proximity with Perry's bloody body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation.

Testimony given at both the trial and evidentiary hearing indicated that the stains on the back of Defendant's red shirt were not transferred from the floor, as Defendant claims, but instead were consistent with a beating wherein the instrument used in the beating caused the blood to initially spray upward, then fall back onto the shirt. Even though all the stains on the shirt were not tested, testimony was adduced that if the spatters on the Defendant's shirt came from Mays, Defendant was the one who beat Mays to death. No findings were introduced which contradicted this testimony.

> Patterns made by smeared blood were present on Mays' sweatshirt and on top of those patterns were stains from force consistent with a beating. The blood patterns had dried for fifteen to thirty minutes before the spatter landed on top of them. Testimony at the evidentiary hearing indicated that while the bloodstains could have been transferred from Mays' sweatshirt to Defendant's shirt, merely crawling over the shirt, as Defendant claims he did, would not be sufficient; instead, Defendant would have to lie across Mays' torso in order to achieve those particular stains.
>
> Finally, the 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. As Weiss stated at the evidentiary hearing, it was possible to miss blood on the shirt, due to deterioration and improper storage. It was also possible to have a mixed stain, from multiple contributors, in the same area. Thus, 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.
>
> Based on the foregoing, the Court finds that Defendant has not shown that DNA testing results would exonerate him or mitigate his sentence. *See Robinson*, 865 So. 2d at 1265-65.

(R5984-86).

## SUMMARY OF THE ARGUMENT

The collateral proceeding trial court correctly denied Zeigler's motion for post-conviction relief, assuming that DNA testing should even have been allowed in the first place. Zeigler's arguments before this Court are based on theories

about what the DNA evidence “shows” and what the trial record says. Despite the facially complex nature of this claim, it collapses because it has no basis in fact. Zeigler’s claims have changed over the years to fit the facts, and, despite his protestations to the contrary, the DNA evidence is anything but exculpatory -- it demonstrates Zeigler’s guilt.

The collateral proceeding trial court correctly refused to allow Zeigler to litigate claims that are clearly procedurally barred because they are either raised for the first time in this proceeding, or have previously been litigated and found procedurally barred. A claim of “newly discovered evidence” does not trump the settled procedural bar rules.

The collateral proceeding trial court properly denied Zeigler’s motion for “additional” DNA testing. That motion was not ruled on before Zeigler filed notice of appeal from the denial of relief -- that is an abandonment of the motion, and the trial court lost jurisdiction when notice of appeal was filed. Alternatively, there was no reason for Zeigler not to test the blood at issue unless he was concerned about what it would reveal -- Zeigler cannot complain about not testing blood evidence that has been known since the time of trial.

**ARGUMENT**

## I. THE TRIAL COURT PROPERLY DENIED RELIEF[10]

On pages 27-55 of his *Initial Brief*, Zeigler engages in a misleading and inaccurate discussion of the law and the facts applicable to the DNA evidence.[11] Central to this claim are lengthy discussions of foreign precedent and *ad hominem* abuse directed toward the collateral proceeding trial judge and the prosecutors.[12] However, when the adjective-laden argument is stripped away, the most that remains is a colorful demonstration of Zeigler's dissatisfaction with the result. There is no basis for relief.

PRELIMINARY MATTERS

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[10] Zeigler's repeated references to *Dedge v. State,* 832 So. 2d 835 (Fla. 5th DCA 2002), in an attempt to make his case resemble it, are unavailing. *Dedge* is an example of the sort of case in which DNA testing is highly valuable -- Zeigler's case is an example of the sort of case in which it leads to nothing more than speculation about how those results can be interpreted. The fact remains that large amounts of blood from Zeigler's four victims was all over the crime scene.

[11] The correctness of allowing DNA testing in this case is debatable. There is no question that Zeigler was at the scene, nor is there any doubt that the scene itself was extremely bloody. "[H]is identity and physical contact with the decedent[s] are not at issue. *See Marsh v. State*, 812 So. 2d 579, 579 (Fla. 3rd DCA 2002) (holding that DNA testing of rape kit would be superfluous because the defendant's unsuccessful defense at trial was consensual sex and not identity)." *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004).

[12] On June 12, 2006, the United States Supreme Court decided *House v. Bell*, 126 S.Ct. 2064 (2006). While that case dealt, in part, with DNA testing, it is fact-specific, and does not compel relief in this case.

The basis for Zeigler's claim is that the "central tenet" of the State's case was that the blood on Zeigler's shirt came from Perry Edwards. *Initial Brief*, at 27. The problem with this theory for Zeigler is that it has no basis in fact. The transcript of Zeigler's 1976 capital trial shows that the evidence at trial, and the State's argument to the jury, was that Mays was the most likely source of the blood on Zeigler's shirt because he was beaten to death (instead of dying from a gunshot wound as did Edwards). (TT250; TT2559-60). Zeigler's claims to the contrary are based on a misrepresentation of the record. Because that is so, this claim, which on first impression seems complex, collapses on itself and provides no basis for reversal of the trial court's denial of relief because it has no basis in fact.[13]

THE STANDARD OF REVIEW

Because Zeigler's successive motion to vacate was denied following an evidentiary hearing, the standard of review applied by this Court is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses

[13] One question, found on page 2425 of the trial transcript, can be read as suggesting that the blood on Zeigler's shirt could have come from Edwards. That is far from being the "central tenet" of the State's case.

as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998); *Guzman v. State,* 721 So. 2d 1155, 1159 (Fla. 1998) (Sitting as the trier of fact, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility.).

THE "NEWLY DISCOVERED EVIDENCE" STANDARD

Newly discovered evidence claims, which this claim is, are evaluated under the well-settled standard that was announced in *Jones*:

> In *Jones v. State*, 591 So. 2d 911 (Fla. 1991), this Court set forth the standard that must be satisfied in order for a conviction to be set aside based on newly discovered evidence. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Id.* at 916 (*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)). **Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."** *Jones*, 591 So. 2d at 915. In determining whether the evidence compels a new trial under *Jones*, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id*. at 916. This determination includes
>
> > whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether this evidence is

> cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
>
> *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

*Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006). The existence of a newly discovered evidence claim does **not** resurrect claims that have been previously decided on procedural bar grounds. *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002) ("However, claims of cumulative error are properly denied where individual claims have been found without merit or procedurally barred. *See Rose v. State*, 774 So. 2d 629, 637 (Fla. 2000); *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).").

Zeigler's Prior DNA Claims.

In the 1995 proceedings before this Court, Zeigler's argument in favor of allowing DNA testing was that the type A blood on Mays' clothing might be from either Eunice Zeigler or Perry Edwards, and that "DNA testing **may rebut** the State's hypothesis that the type "A" bloodstains found on Zeigler's clothing originated from a struggle with Mays or Edwards."[14] *Zeigler v. State*, 654 So. 2d at 1163-64. (emphasis added).

[14] Once the DNA results were available, Zeigler modified his claim to fit them. Once Mays' blood was identified on Zeigler's shirt, he re-wrote the State's theory (from his earlier version of it) to be that it was absolutely Perry's blood on Zeigler's shirt. Rule 3.853 does not allow the defendant to force-fit his

In the January 2001 motion for DNA testing (which was ultimately granted), Zeigler's theory was that the blood on **Mays**' clothes could have come from Mrs. Zeigler or from Mr. Edwards,[15] and that testing of Zeigler's shirt "could cast doubt upon the State's suggestion that Zeigler had the blood of victims on his shirt." (SR3-4).

Finally, in the January 2003 post-conviction relief motion (which was filed **after** testing had been done), Zeigler argued that he was entitled to relief because Edwards' blood was not on his shirt (even though Mays' blood was), and because the blood found on Mays' pants probably came from Edwards. (R316). As to the first claim, it is clearly inconsistent with Zeigler's prior claim that the blood on his shirt came from someone **other** than Edwards **or** Mays. The claim for relief as to this component is clearly a *post hoc* argument that, while styled as a basis for relief, is actually nothing more than an attempt to explain away evidence that points toward Zeigler's guilt and is consistent with (and supportive of) what Zeigler claimed the State's theory was when he was before this Court in 1995.

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"theory" into the DNA results by waiting until the test results are in before formulating that theory. Zeigler has undertaken the sort or "fishing expedition" condemned in *Lott v. State*, 31 Fla. L. Weekly S222 (Fla. Apr. 13, 2006).

[15] The trial testimony indicated that type A blood was on Mays' pants. (R2302).

As to the presence of Perry Edwards' blood on Mays' pants, the fact remains that this Court found, in 1995, 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." *Zeigler v. State*, 654 So. 2d at 1164.[16]

The Court's Ruling Follows Florida Law.

The first component part of Zeigler's claim is that the trial court "misapplied" *Jones* in denying relief. While Zeigler argues that the trial court "blended" the *Jones* standard with the Rule 3.853 standard, a fair reading of the order does not bear that conclusion out. The true facts are that the trial court was well aware of the *Jones* standard, and was likewise well aware of the Rule 3.853(c)(5)(C) requirement that, in ruling on a motion for DNA testing, the Court is required to find "[w]hether there is reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."

[16] Zeigler now claims, without elaboration, that these stains are "located in places and deposited in a manner that inculpates Mays in Edwards' murder." *Initial Brief*, at 28. How those stains are inculpatory is the subject of yet another "theory" by Zeigler in his ongoing efforts to fit his theory to the facts. Since the location of those stains has been known since the murder in 1975, and the fact that those stains were type A blood has been known since 1976, it stands reason on its head to claim that the evidence is as important as Zeigler claims it is. That strategy seems to be one born of a desperate attempt to confuse clear evidence of guilt.

(R5977, 5984). Despite Zeigler's protestations, there seems to be no functional difference between *Jones* and Rule 3.853(c)(5)(C). Both standards use the same language, and Zeigler's "claim" to the contrary is inconsistent with plain use of the English language.

To the extent that further discussion of this claim is necessary, the dispositive language in the trial court's order is:

> After reviewing the Motion, files, and record of the cases, and having heard argument from both sides, the Court concludes that even if the alleged newly discovered evidence resulting from the DNA testing had been admitted at trial, there is no reasonable probability that Defendant would have been acquitted. *See Jones v. State*, 709 So. 2d at 521.

(R5984). That statement by the trial court could not be clearer -- the trial court properly applied Florida law in denying relief.

In footnote 15 on page 33 of his brief, Zeigler argues that prior adjudications of "his claims of newly discovered evidence presented prior to 1991" are not *res judicata* because those claims were decided under pre-*Jones* law. Zeigler cites no authority for this proposition, presumably because none exists. However, this novel claim suffers from the more fundamental defect that no guilt stage newly discovered evidence claims were litigated in the pre-1991 proceedings. Instead, this Court decided a number of guilt stage issues in the 1993 and 1995

decisions -- in both cases, the "newly discovered evidence" was found procedurally barred. *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995); *Zeigler v. State*, 632 So. 2d 48 (Fla. 1994). Implicitly recognizing this defect in his theory, Zeigler cites *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002) for the proposition that procedurally barred claims are properly considered in the "cumulative analysis." *Initial* Brief, at 33. That is simply not what *Roberts* says -- the true holding is squarely the opposite:

> Finally, we agree with Roberts that our case law requires cumulative analysis of newly discovered evidence. In determining whether newly discovered evidence warrants setting aside a conviction, a trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial to determine whether the evidence would probably produce a different result on retrial. *See Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999); *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998). This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. *Lightbourne,* 742 So. 2d at 247. **However, claims of cumulative error are properly denied where individual claims have been found without merit or procedurally barred**. *See Rose v. State*, 774 So. 2d 629, 637 (Fla. 2000); *Downs v. State,* 740 So. 2d 506, 509 n.5 (Fla. 1999).

*Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002). (emphasis added). Finally, to the extent that further discussion of this claim is necessary, Zeigler never raised this theory in the trial court -- he cannot raise matters for the first time on

appeal, and this failure to timely raise this claim is yet another reason that it is not a basis for relief. In the final analysis, at the end of the day, little more is known about the crime than was before the jury in 1976. Zeigler has succeeded in proving that he had the blood of at least one of his victims on his shirt, and that blood from one of the other victims was found on Mays' pants. Neither fact is at all surprising, since that was what the trial evidence showed. The trial court applied the proper standard, and should be affirmed in all respects.

The Trial Court Understood the Facts.

In the second component of this claim, which is set out at pages 40-51 of the *Initial Brief*, Zeigler argues that the trial court misapprehended the facts. In so doing, Zeigler greatly overstates the significance of the DNA results. The true facts are that it has been known, since the time of trial, that type A blood was found on Mays' pants and Zeigler's shirt. Likewise, it has been known since trial that Charles Mays, Perry Edwards, and Eunice Zeigler all had type A blood.[17] Finally, there is no

[17] In defense counsel's closing argument, Mr. Hadley said, " ... look at Charles Mayes'(sic) pants, both legs. It's not splattered blood, Ladies and Gentlemen, it's soaked blood that Charles Mayes got when he was kneeling down finishing off Mr. Perry Edwards. That blood is type A." (TT. 2610). Further, "... look at (Mayes) shoes. Look at what's on them. I tell you what it is. It's type A blood, the same type he had, yes, but there's no way in receiving a beating that he gets blood all over the bottom of his shoes, the sides, the tops. How do you get blood

dispute that the crime scene was very bloody, that Mays' and Edwards' bodies were found a few feet apart (R5984), and that the evidence indicated that Edwards fought with his killer. *Zeigler v. State*, 402 So. 2d at 367.

In deciding the claim that was before it, the collateral proceeding trial court found:

> After reviewing the Motion, files, and record of the cases, and having heard argument from both sides, the Court concludes that even if the alleged newly discovered evidence resulting from the DNA testing had been admitted at trial, there is no reasonable probability that Defendant would have been acquitted. *See Jones v. State*, 709 So. 2d at 521.
>
> Defendant admitted that he was at the crime scene, and there is no dispute his blood, as well as the blood of the other four victims, was present at the scene. Although DNA testing identified, in some cases, *whose* blood was on the clothing of both Defendant and Mays, it did not conclusively eliminate Defendant as the perpetrator of the crimes.
>
> The bodies of both Mays and Perry were found at the back of the furniture store within a few feet of each other. While the blood found on Mays' shoes and the stains on his pant leg and cuff areas revealed a genetic profile consistent with Perry, these findings are consistent with Mays standing next to Perry, or being in close proximity to his body, after Perry was killed. These findings do not show, as Defendant asserts, that Mays was the perpetrator, rather than a victim of the crimes. Instead, if Mays were involved in a struggle with Defendant while

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there, you get it by killing somebody like Perry Edwards." (TT.2612).

in close proximity with Perry's bloody body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation.

Testimony given at both the trial and evidentiary hearing indicated that the stains on the back of Defendant's red shirt were not transferred from the floor, as Defendant claims, but instead were consistent with a beating wherein the instrument used in the beating caused the blood to initially spray upward, then fall back onto the shirt. Even though all the stains on the shirt were not tested, testimony was adduced that if the spatters on the Defendant's shirt came from Mays, Defendant was the one who beat Mays to death. No findings were introduced which contradicted this testimony.

Patterns made by smeared blood were present on Mays' sweatshirt and on top of those patterns were stains from force consistent with a beating. The blood patterns had dried for fifteen to thirty minutes before the spatter landed on top of them. Testimony at the evidentiary hearing indicated that while the bloodstains could have been transferred from Mays' sweatshirt to Defendant's shirt, merely crawling over the shirt, as Defendant claims he did, would not be sufficient; instead, Defendant would have to lie across Mays' torso in order to achieve those particular stains.

Finally, the 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. As Weiss stated at the evidentiary hearing, it was possible to miss blood on the shirt, due to deterioration and improper storage. It was also possible to have a mixed stain, from multiple contributors, in the same area. Thus, 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.
>
> Based on the foregoing, the Court finds that Defendant has not shown that DNA testing results would exonerate him or mitigate his sentence. *See Robinson*, 865 So. 2d at 1265-65.

(R5984-86).

While Zeigler undoubtedly disagrees with the trial court's findings of fact, those findings are supported by competent substantial evidence, and should not be disturbed. The trial court should be affirmed in all respects.[18]

While the trial court's ruling is correct, the testimony presented at the evidentiary hearing is, in actuality, little different from the facts presented at trial (and the facts assumed by this Court in 1995). *See, Zeigler v. State*, 654 So. 2d at 1164. The true facts are that it has been known since the time of the crimes that type A blood was present on Mays' pants. (TT2302). Likewise, it has been known, since the time of trial, that type A blood was present on Zeigler's shirt. (TT1456-58, 1460). At the time of trial, the jury was well aware of the limitations of ABO blood group typing, which, of course, cannot

[18] Zeigler seems to believe that, since DNA testing has been conducted, the State is obligated to explain the location of each drop of blood. That is not the law, and the bizarre facts of this case demonstrate that. Zeigler is the only person who knows the fine details of what happened on Christmas Eve of 1975. Notably, his theory about those events has changed several times in response to the DNA results, a fact that calls his credibility into even greater question.

determine whether a specific individual was the source of the blood. (TT1411). The problem for Zeigler is that, unlike his previous theory, DNA typing has proven that the blood present on his shirt came from one of his victims - - in an attempt to deflect this damaging result, Zeigler now claims that the State argued that he had Perry Edwards in a "headlock" while beating him. The record does not support that claim. (R2553).[19] And, putting aside the fundamental tenet that the arguments of counsel are not evidence, that argument would be a wholly legitimate inference from the evidence presented that no way misstated the facts or overplayed the evidence. When stripped of its histrionics, Zeigler's argument is nothing more than a desperate attempt to invent an after-the-fact explanation for why the testing he demanded showed that he was covered in the blood of one of his victims. That fact is hardly helpful to him -- it does not establish **any** probability of a different result, let alone a reasonable probability.[20]

[19] The State argued to the jury that Mays was the likely source of the blood on Zeigler's shirt. (R250; 2559-60). See page 18, above.

[20] As discussed above, Zeigler's theory was that the blood on his shirt came from an unknown third party until the DNA testing showed that it came from one of his victims. At that point, Zeigler began proposing progressively more fanciful theories in an effort to explain away evidence that, to say the least, is highly inculpatory.

With respect to the blood found on Mays' clothing, the DNA testing shows nothing other than the rather unremarkable fact that blood from one murder victim is present on the clothing of another -- considering that the bodies were found in close proximity, and that the floor between the bodies was "littered with the [blood] spatter" produced by the two killings, it should come as little surprise that Edwards' blood was on Mays' clothing. Under these facts, there is no probability at all of a different result based on that evidence.[21] When the evidence is viewed in the light most favorable to the State, as this Court has repeatedly held it must do, there is no basis for relief of any sort.

The Court's Order is not Based on Improper "Speculation."

On pages 51-55 of his *Initial Brief*, Zeigler argues that the trial court "engaged in prejudicial speculation" to deny relief. What Zeigler describes as "speculation" is found in the trial court's summary of the testimony of the witness James, and is an accurate description thereof -- Zeigler does not claim to the contrary. The trial court was well aware that the spatter

[21] The presence of Mays' blood on Zeigler's shirt is **inculpatory** -- it does not help Zeigler's case at all, despite his efforts to spin it into a "favorable" result. The obvious explanation (which Zeigler pointedly ignores) is that the blood got there when he killed Mays. That view of the evidence makes sense, and Zeigler's strained theories do not.

stains on Zeigler's shirt had not been determined to be blood, nor had their source been determined. (R5982 n.10).

Zeigler also complains that the trial court found that:

> Testimony given at both the trial and evidentiary hearing indicated that the stains on the back of Defendant's red shirt were not transferred from the floor, as Defendant claims, but instead were consistent with a beating wherein the instrument used in the beating caused the blood to initially spray upward, then fall back onto the shirt. Even though all the stains on the shirt were not tested, testimony was adduced that if the spatters on Defendant's shirt came from Mays, Defendant was the one who beat Mays to death. No findings were introduced which contradicted this testimony.

(R5985). What Zeigler fails to recognize is that this finding is in the context of a rejection of his own **hypotheses about how the stains came to be on Zeigler's shirt.** As witness James testified, and as the trial court found, "all of the spatter evidence would be explained if Defendant was the killer." (R5983). Zeigler cannot base his case on speculation and conjecture (even if he does call it a "hypothesis") and complain when the trial court rejects those theories based upon the evidence before it. The trial court did nothing improper, and was well aware of the character of the evidence under discussion -- there is no basis for relief.

## II. THE "LIMITATION ON THE EVIDENCE" CLAIM

On pages 55-65 of his *Initial Brief*, Zeigler argues that the trial court erred when it limited the presentation of

evidence to “those matters directly related to the DNA test results supporting the motion.” (R5941). This claim has two components: that this Court’s remand in *Hitchcock v. State*, SC03-2203 (Fla., May 3, 2005) requires the same result in this case, and that the Court must consider all of the other evidence (which is procedurally barred) in addition to the DNA evidence.

The Trial Court Properly Refused to Consider Claims that are Procedurally Barred.

Despite the hyperbole of Zeigler’s brief, the true facts are that the claims that the trial court refused to consider are procedurally barred and were properly precluded for purposes of this litigation. While Zeigler does not admit it, his pleading to the Circuit Court established, on its face, that the “non-DNA” claims were procedurally barred because they had either been presented in prior proceedings, or were raised in the DNA proceeding for the first time. With respect to the claim that was raised for the first time in this proceeding (the “real estate transaction” claim), Zeigler admitted in his successive motion that this claim had never been raised before. (R319). The “supporting” exhibits consisted of three deeds which were recorded (in Orange County, Florida) in 1973, 1975, and 1982. (R319). The newest of these deeds was recorded more than 20 years before the successive motion was filed, and the other two

were recorded before Zeigler committed these murders.[22] The sub-claim is successive as a matter of law, and the trial court properly refused to consider it.

With respect to the other matters set out in Zeigler's brief, each of those matters had been raised and decided in previous proceedings, as Zeigler admitted. Each matter (with one exception) had been held procedurally barred by this Court on at least one occasion.[23] These claims are procedurally barred, and the trial court properly declined to consider them.

The Order in *Hitchcock* does not Compel Reversal.

The other component of this claim is Zeigler's claim that because this Court held in *Hitchcock v. State* SC03-2203 (Fla. May 3, 2005)(in an unpublished order) that certain claims were not procedurally barred, that he is "entitled" to the same

[22] Further, Zeigler's successive motion did not comply with *Florida Rule of Criminal Procedure* 3.851(e)(2) with regard to the contents of a successive motion to vacate because, *inter alia*, the motion did not contain the required explanation for the failure to raise the claim previously.

[23] The exception is the claim, on page 62 of the *Initial Brief*, that the toes of Williams' shoes were not scuffed from climbing a fence. This component of this claim is raised for the first time on appeal from the denial of post-conviction relief. (R318). Florida law is settled that claims cannot be raised for the first time on appeal from the denial of relief. *Weaver v. State*, 894 So. 2d 178, 196 (Fla. 2004)(quoting *Farinas v. State*, 569 So. 2d 425, 429 (1990)); *Anderson v. State*, 863 So. 2d 169, 180-81 (Fla. 2003).

result.[24] That argument ignores the fundamental differences between the two cases, overreads the holding in *Hitchcock*, and is, when stripped of its pretensions, an attempt to put a square peg in a round hole.

In his brief, Zeigler has not identified what evidence he believes should have been, but was not, considered. Because that is so, the State presumes that the "evidence" at issue is that set out on pages 62-64 of the *Initial Brief*. That discussion contains no record citation of any sort, and is set out in connection with sub-claim 2 to Zeigler's brief. The true facts are that (with two exceptions) those claims have previously been litigated and found procedurally barred for various reasons.[25] *See, post*. That is a critical difference between this case and *Hitchcock*, and is why the unpublished decision in that case has no bearing on Zeigler's case.

Despite Zeigler's efforts, the facts are that his conviction and sentence became final on March 22, 1982, when the United States Supreme Court denied his petition for writ of certiorari. *Zeigler v. Florida*, 455 U.S. 1036 (1982). Zeigler's death sentences were set aside in April of 1988, based on *Hitchcock v. Dugger*, 481 U.S. 393 (1987), error. *Zeigler v.*

[24] Zeigler assumes that an unpublished order has the same precedential value as a published decision of this Court. That issue does not need to be decided in this case.

[25] The two exceptions have never been raised before at all.

*Dugger*, 524 So. 2d 419 (Fla. 1988). Zeigler was again sentenced to death, and the United States Supreme Court denied certiorari on November 4, 1991. *Zeigler v. Florida*, 502 U.S. 946 (1991). The death sentence became final on that date, but the conviction had **been** final since 1982.

With respect to the specific claims, the matter relating to Edward Williams has been rejected by this Court twice. 452 So. 2d at 539; 632 So. 2d at 51. The claim by Johnnie Beverly that a bullet was "planted" by law enforcement has been found incredible. 632 So. 2d at 51. The claim concerning Kenneth and Linda Roach has been held procedurally barred by this Court two separate times. 452 So. 2d at 539; 494 So. 2d at 959. With respect to the Jellison component, this Court has previously held that claim procedurally barred. 632 So. 2d at 50. This claim has nothing to do with *Hitchcock*, and everything to do with claims that have already been decided on procedural bar grounds by this Court. Zeigler is not entitled to preferential treatment, and is not entitled to yet another bite at the appellate apple on claims that he lost on long ago.

A "Newly Discovered Evidence" Claim does not Trump the Procedural Bar Rules.

The second component of this claim is easily disposed of because Zeigler's claim is contrary to the settled precedent of this Court. Contrary to Zeigler's claim, Florida law is long-

settled that a claim of newly discovered evidence does not open the door to relitigation (or reconsideration) of claims that are procedurally barred. *Kight v. State*, 784 So. 2d 396, 402 (Fla. 2001); *Jones (Leo) v. State*, 709 So. 2d 512, 522 n.7 (Fla. 1998) ("We reject Jones' argument that we must consider all testimony previously heard at the 1986 and 1992 evidentiary hearings, **even if the testimony had previously been found to be barred** or not to qualify as newly discovered evidence. We consider only that evidence found to be newly discovered.") (emphasis added).[26] This component of Zeigler's claim is foreclosed by binding precedent, and is not a basis for relief.

**III. THE "DENIAL OF FURTHER TESTING" CLAIM**

On pages 65-68 of his *Initial Brief*, Zeigler argues that the trial court erred in denying his motion for "additional DNA testing" of "all of the spots on Zeigler's outer shirt." (R6109). This motion was filed along with Zeigler's motion for rehearing, which was denied on June 8, 2005. (R6082; 6118). No order on the motion for additional testing was entered, and nothing in the record indicates that Zeigler did anything to insist on a ruling on that motion. Notice of appeal was filed on July 1, 2005, and the trial court lost jurisdiction. (R6122).

[26] Zeigler has ignored this plain language (which is directly contrary to his position) in favor of a citation to the dissent in *Jones* which was concerned with a different aspect of the case.

Because there is no ruling on the motion for additional testing, it appears that the filing of the notice of appeal (which was filed after the denial of the motion for rehearing) has the effect of abandoning the motion for additional testing. Rule 9.010(h)(3), *Fla. R. App. P.* Florida law is clear that:

> "the filing of a notice of appeal constitutes an abandonment of a then-pending post-judgment motion which simultaneously confers sole jurisdiction over the cause in the appellate court and deprives the trial court of authority to consider the motion." 578 So. 2d at 727. The district court also explained:
>
> > There can be no question that the rule that a party abandons a post-final judgment motion by filing a notice of appeal to review that very judgment is a long and firmly established one. *State ex rel. Faircloth v. District Court of Appeal, Third Dist.,* 187 So. 2d 890, 892 (Fla. 1966); *State ex rel. Owens v. Pearson*, 156 So. 2d 4 (Fla. 1963); *State v. Florida State Turnpike Auth.*, 134 So. 2d 12 (Fla. 1961*); Allen v. Town of Largo,* 39 So. 2d 549 (Fla. 1949*); In re One 1979 Chevrolet Blazer Bearing Florida Tag No. WFF-202, VIN No. CKL 189202370,* 436 So. 2d 1087 (Fla. 3d DCA 1983).
>
> *Id.* at 727-28.

*In re Forfeiture of $104,591 in U.S. Currency,* 589 So. 2d 283, 284 (Fla. 1991). This Court went on to say:

> We emphasize that the rule that a party abandons a post-trial judgment motion by filing a notice of appeal is the proper rule, and we hold that the abandonment doctrine still applies in this state.

*In re Forfeiture of $104,591 in U.S. Currency,* 589 So. 2d at 285. Zeigler's motion for additional testing was abandoned, and is not properly before this Court.

Alternatively and secondarily, without waiving the foregoing, Zeigler's brief consists of much hyperbole and little substance (and totally ignores his abandonment of this claim). The true facts are that the "reddish-brown spots on [Zeigler's] red outer shirt" have been known at all times, and were discussed by various witnesses at trial. (TT. 112-13, 114, 121, 123-35, 199, 202, 205, 383, 1029-31, 1456). Given that Mays was beaten to death, and was surrounded by a "blood halo," Zeigler's claim that the State "coined" a "new interpretation" of the blood evidence proves too much. There was no reason not to test the blood unless Zeigler was concerned about what it might show. (And, after all, Zeigler's original theory about the blood was that it came from someone **other** than Mays or Edwards -- his most recent theory was developed after the evidence did not cooperate.) *See Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003) (Scalia, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief"). Despite the protestations contained in Zeigler's brief, the fact remains that the

defendant is the master of his case at this point -- regardless of his reasons for not having this testing done originally, he cannot claim surprise at this late date. He is certainly not entitled to further delay based upon his own inaction.

## CONCLUSION

WHEREFORE, for the reasons set out herein, the lower court should be affirmed in all respects.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Dennis H. Tracey, III**, Esq., HOGAN & Hartson, LLP, 875 Third Avenue New York, NY 10022 and **John Houston Pope, Esq**., EPSTEIN BECKER & GREEN, P.C., 250 Park Avenue, New York, NY 10177 on this ____ day of July, 2006.

Of Counsel

## CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
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