SC05-1333

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

- against -

STATE OF FLORIDA,

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

APPELLANT'S INITIAL BRIEF

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NOTE ON CITATIONS TO RECORD

Citation to materials set forth in the "Transcript of Record" filed with this Court by the Clerk of the Circuit Court of the Ninth Judicial Circuit (including the transcript of the evidentiary hearing held on December 20 & 21, 2004) appears in the format "(R #.)," where "#" corresponds to the page number in the Transcript of Record, as prepared by the Clerk.

Citation to the transcript of the original trial of this case appears in the format "(TT #.)," where "#" corresponds to the page number in that transcript.

ISSUES PRESENTED FOR REVIEW

1. Did the court below err in denying the relief of a new trial to appellant based on the record before it?

2. Did the court below err in limiting the presentation of evidence by appellant in support of his claim for a new trial?

3. Did the court below err in denying appellant the opportunity to conduct additional testing of the evidence in the case to resolve the uncertainties that the court identified as influencing its decision to deny relief?

STATEMENT OF THE CASE

This appeal challenges the trial judge's denial of Zeigler's motion to vacate convictions pursuant to Fla. R. Crim. P. 3.850 and 3.851. In August 2001 Zeigler obtained permission from the Circuit Court (Hon. Donald Grincewicz) to perform testing on various pieces of evidence from his trial using DNA technologies. In 2003 the test results were authorized *nunc pro tunc* by the Circuit Court (Hon. Reginald Whitehead) under Fla. R. Crim. P. 3.853. In an evidentiary hearing held on December 20 and 21, 2004, Zeigler presented the test results, together with the expert testimony of a forensic criminologist. In an Order dated April 19, 2005, Judge Whitehead denied relief.

Zeigler is an inmate under a sentence of death who has languished for nearly thirty years on death row while his protests concerning his innocence have

gone unheeded. On Christmas Eve 1975 Zeigler's wife (Eunice Zeigler) and his in-laws (Perry and Virginia Edwards) were brutally murdered in the W.T. Zeigler Furniture Store in Winter Grove, Florida. A fourth person (Charlie Mays) also died in the store that night.

The pain from the loss of his wife had not begun to subside when prosecutors incredibly indicted Zeigler for four first-degree murders. The case tried in June, 1976, in Jacksonville, Florida, after a change of venue necessitated by the rampant pretrial publicity. The jury returned guilty verdicts on July 3, 1976, two for first-degree murder (for the deaths of Eunice Zeigler and Charlie Mays) and two for second-degree murder (for the deaths of Perry and Virginia Edwards). The jury subsequently returned life recommendations on the capital offenses. The trial judge overrode the jury's recommendation and sentenced Zeigler to death on July 16, 1976. Five years later, this Court affirmed the convictions and sentence. *Zeigler v. State*, 402 So. 2d 365 (Fla. 1981) ("*Zeigler I*").

Zeigler's first motion for post-conviction relief failed in the circuit court. This Court affirmed on all ground but one, concerning bias of the original trial judge, which was remanded for an evidentiary hearing. *Zeigler v. State*, 452 So. 2d 537 (Fla. 1984) ("*Zeigler II*"). Following the hearing, the circuit court denied relief and this Court affirmed. *Zeigler v. State*, 473 So. 2d 203 (Fla. 1985) ("*Zeigler III*").

Zeigler's second post-conviction motion resulted in an order by the trial court for evidentiary hearing on a sentencing issue, which the State successfully appealed. *State v. Zeigler*, 494 So. 2d 957 (Fla. 1986) ("*Zeigler IV*"). This Court's view on that sentencing issue, however, was subsequently overturned by the United States Supreme Court in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Zeigler accordingly petitioned for a writ of habeas corpus, which this Court granted and remanded the case for a new sentencing determination in which the sentencing court would use the jury's original recommendation. *Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988) ("*Zeigler V*"). Following a resentencing proceeding in August 1989, Zeigler was again sentenced to death, contrary to the jury's original recommendation of life, and this Court affirmed. *Zeigler v. State*, 580 So. 2d 127 (Fla. 1991) ("*Zeigler VI*").

Zeigler's third post-conviction motion, which had been originally filed in September 1988 while the new sentencing proceedings were pending and focused solely on guilt-innocence issues, came up for determination in 1992. An evidentiary hearing was held on one claim, which concerned inmate-trustee testimony that sheriff's deputies had planted an important piece of evidence against Zeigler. The circuit court denied relief after hearing and this Court affirmed. *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993) ("*Zeigler VII*").

Zeigler's fourth post-conviction motion, which focused solely on issues arising from the new sentencing proceeding in 1989, was heard in 1994, together with Zeigler's original request to engage in DNA testing of the evidence in his case. The circuit court denied relief and this Court affirmed. *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995) ("*Zeigler VIII*").

Shortly thereafter, Zeigler commenced federal habeas proceedings in the United States District Court for the Middle District of Florida. Five years later, in June 2000, the federal district judge denied relief on all claims. He also refused to grant a certificate of appealability ("COA") that would permit an appeal to the United States Court of Appeals for the Eleventh Circuit. Zeigler applied directly to the federal appellate court for a COA in November 2000.[1]

Concerned that federal proceedings soon might be at an end and he would be facing consideration of clemency by the Governor, Zeigler filed a request in the circuit court in January, 2001, to obtain access to the evidence in his case for DNA testing.[2] Over the virulent opposition of the State Attorney's Office, the

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[1] The Eleventh Circuit issued a COA for eleven issues in November 2001. The appeal ultimately was unsuccessful. *See Zeigler v. Crosby*, 345 F.3d 1300 (11th Cir. 2003), *cert. denied*, 543 U.S. 842 (2004).

[2] The sensibilities of the State of Florida had been shaken only a few months earlier when DNA tests exonerated that Frank Lee Smith, a death row inmate who died of natural causes before the test results were reported. Governor Bush thereafter publicly announced his interest in obtaining the results of any DNA tests that might be relevant to clemency applications. The Governor opened formal clemency proceedings into Zeigler's case on his own initiative, while federal court

circuit court granted Zeigler's application. The State thereafter turned about in position and insisted that it receive an equal opportunity to engage in testing, which the final order authorizing testing granted to it.

Initial test results were orally reported back in early 2002. Zeigler requested additional sampling in response to that oral report. A written report of the results issued on June 20, 2002.

On January 15, 2003, Zeigler filed a motion to vacate his convictions based on newly discovered evidence. (R 314-75.) The original motion cited the DNA test results and several other pieces of evidence that had come to light after the original trial. The additional evidence raised in the motion included:

> (1) A detailed report prepared by Oakland Police Chief Robert Thompson, not disclosed to the defense prior to or at trial, in which Thompson describes Zeigler's wounds as "not bleeding" and covered in dried blood. (R 329-42.) This contradicts Thompson's trial testimony and corroborates Zeigler's testimony about events.
>
> (2) A report of an examination of the pants of Edward Williams for traces of gunpowder and/or metal residues that would have been present if Williams were testifying truthfully that he took a recently

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proceedings were still in progress. In connection with the Governor's initiative, Zeigler's counsel here received an appointment as clemency counsel on or about March 7, 2003. (R 258, 5924-25.)

fired gun from Zeigler's hands and placed it in his pants pockets. (R 344.) The report finds no such traces, which objectively impeaches Williams' testimony.

(3) The prospective testimony of Jim Jellison, an eyewitness to events outside the Zeigler Furniture Store on December 24, 1975, as recorded on tape, in a conversation with an investigator for the prosecution, Jack Bachman. (R 346-74.) Mr. Jellison's description of events contradicts the State's theory and Mr. Bachman's side of the conversation reveals a blatant attempt to influence Jellison's testimony.

(4) The prospective testimony of Linda Roach and Kenneth Roach, eyewitnesses to events outside the Zeigler Furniture Store on December 24, 1975, which contradicts the State's theory of events. (R 351-59.)

(5) The testimony of Johnny Beverly, an inmate-trusty who was involved in the search for a bullet in a citrus grove that was introduced as evidence to corroborate the testimony of Felton Thomas. (R 361-68.) Mr. Beverly witnessed the planting of the bullet by a Sheriff's deputy. Although the late Judge Gary Formet refused to grant relief on the basis of Beverly's testimony, it is for a reasonable jury to draw

its own conclusions about Beverly's credibility, as explained *infra* Point I of Zeigler's argument. This testimony, therefore, is part of the "total picture" that the Court must evaluate.

(6) Three documents that evidence an undisclosed close, personal relationship between two trial witnesses, Edward Williams and Mary Stewart. Although it was known by the defense at trial that Williams and Stewart were friends, it turns out they were, in fact, ex-spouses who had engaged in a curious real estate transaction shortly before the murders. The documents are: (a) a warranty deed, dated June 1, 1973, evidencing the purchase of property by "Edward Williams and Mary Ellen Williams, his wife" (R 370); (b) a quitclaim deed, dated October 22, 1975, evidencing the transfer of ownership of the interest in the same property of "Edward Williams, a single man," to "Mary Ellen Stewart" (R 372); and (c) a mortgage deed, dated August 24, 1982, recording a mortgage taken on the same property by "Mary Ellen Stewart a/k/a Mary Ellen Williams and William Stewart, her husband" (R 374).

Zeigler also filed motions to obtain funding for an expert (R 376) and to have the testing authorized pursuant to Fla. R. Crim. P. 3.853 *nunc pro tunc* (R 379-90).

The circuit court heard arguments on the motions and preliminarily indicated, in a unsigned order dated August 11, 2003, that it would hold an evidentiary hearing on Zeigler's motion. The State immediately moved to limit the presentation of evidence at the hearing "to subjects directly related to the DNA test results," which it argued excluded all other post-trial evidence listed in Zeigler's motion. (R 5927-32.) After additional briefing and argument, on December 31, 2003, the circuit court issued orders granting the State's motion (R 5942-43) and Zeigler's motions to fund an expert (R 5946) and to authorize the testing pursuant to Rule 3.853 (R 5947).

Following a period of discovery, the evidentiary hearing was held on December 20 and 21, 2004. Three witnesses testified. Sean Weiss of Labcorp presented the DNA test results. Stuart James, a forensic criminologist, placed the results in context amidst the crime scene. H. Vernon Davids, one of Zeigler's trial counsel, testified concerning an aspect of the trial theatrics by the State Attorney at the original trial.

The circuit court issued its Order Denying "Motion To Vacate Convictions Based Upon Newly Discovered Evidence" After Evidentiary Hearing on April 19, 2005. (R 5972-87.) Zeigler timely filed a motion for rehearing (R 6082-6108), with a request to engage in additional testing (R 6109-17). On June 8, 2005, the circuit court summarily denied the motion for rehearing (R 6118-

19) and, although it did not mention the request for additional testing in its order, it appears that the denial embraced it as well. Zeigler thereafter timely noticed this appeal. (R 6122-25.)

STATEMENT OF FACTS

On direct appeal from the original trial in this case, this Court set forth its understanding of the facts upon which it based its decision to affirm the convictions:

> 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 tossed 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 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 have found no significance in the other substantial evidence.

….

The defendant was arrested in his hospital room on December 29, 1975, a preliminary hearing was held

January 16, 1976, and the grand jury returned indictments on March 26, 1976. One indictment charged defendant with three counts of first degree murder for the shooting deaths of Eunice Zeigler, Perry Edwards and Virginia Edwards. Another indictment charged defendant with one count of first degree murder for the beating death of Charles Mays, Jr.

….

Defendant testified that he was attacked by unknown assailants. He related how he fought with his attackers, how he fought with his attackers, how he was in and out of consciousness and how he suffered a gunshot wound and heard the unknown voice directing that Charles Mays or someone be killed. The jury rejected this defense and the evidence, as previously discussed, was ample to sustain the verdict of the jury.

By its verdict, the jury found proof beyond a reasonable doubt that defendant had committed four murders within the course of two hours. He killed Eunice quickly and for her, unexpectedly. She was shot from behind. With Eunice dead, defendant then shot his in-laws. Perry struggled with the defendant. Defendant subdued Perry, rendered him harmless then went in search of Virginia, found her and shot her in the head. The evidence shows that these people were killed prior to 7:30 P.M.

By 9:00 P.M. he had murdered Mays in furtherance of a crafty design to focus attention on others as the murderers. Defendant could not persuade Thomas to enter the store so Thomas survived. He got Williams partially inside the back hallway, turned on him and tried to shoot him in the chest. The gun failed to fire, so Williams survived.

By this time, defendant was very desperate. He had four bodies in the store, and little, if anything, to support the appearance of a surprise robbery and massive shootout.

> He would not appear to be involved if he happened to be one of the victims. Accordingly, he shot himself and called the police for help.

Zeigler I, 402 So. 2d at 367-68, 374-75.

For purposes of these proceedings, however, the facts take on a greater complexity. The various conclusions drawn from the evidence depend on subsidiary inferences developed in the course of the investigation, which shaped and defined the trial testimony and tactics. The jury's decision to convict Zeigler can be traced directly back to certain aspects of the evidence from which the inferences tilt against him. The DNA test results (and other new evidence) raised in this proceedings below directly challenge those aspects of the evidence and the inferences they otherwise might permit.

The lead investigator – Detective Don Frye – and the State's blood spatter expert at trial, Herbert MacDonell, developed hypotheses about how the murders occurred. Their theories were literally painted in blood; the blood spatter and bloodstain at the crime scene provided their guide. Their reports, which did not go into evidence at trial, deserve brief mention because those pretrial statements defined and limited the ground that these two witnesses would cover at trial. They also outlined the State's theory of events and explain some of the prosecution's actions at trial.

The Frye and MacDonell Reports

Frye focused instantly on Zeigler as the perpetrator (TT 1768) and developed a case to convict him, rather than to solve the murders. Frye felt that "blood droplets" and "blood smears on the terrazzo floor" indicated that a "struggle occurred between [Perry] Edwards and defendant Zeigler." (R 3366.) Frye looked at what he described as a "very heavy concentration of blood on and underneath the left arm of [Mr. Zeigler's] shirt." and hypothesized that "[t]his would be consistent with defendant Zeigler holding Mr. Edwards in a headlock and beating him on the top of his head." (R 3365.) He speculated that the "crank utilized to unroll the linoleum" must have been the tool used to beat both Edwards, and later Mays. (R 3366.) Frye additionally noted that "in further observation of the bloodstains, it could be determined that Mr. Mays had been beaten after the struggle with Mr. Perry Edwards had been concluded. Blood splatters from Mays were observed on the top of the suspected blood smears made by Mr. Edwards and Zeigler's struggle." (R 3366.) Frye brought Professor MacDonell into the case; MacDonell soon came to second Frye's theories.

MacDonell conducted an examination of the crime scene on January 7, 1976. He concluded that Eunice Zeigler was probably killed first and that she "was probably unaware she was about to be shot as her left hand remained inside her coat pocket." (MacDonell report at 2nd unnumbered page).

MacDonell further conjectured that Perry and Virginia Edwards were next to die. Based solely on the blood spatter, MacDonell concluded that Perry Edwards suffered a gunshot somewhere in the rear of the store but was not killed or incapacitated. (R 4683.) Rather, MacDonell speculated, Edwards fought his assailant along the east, north and west walls of the store, leaving a trail of bloodstains, finally suffering a beating and a fatal gunshot wound. (R 4683-84.) The assailant turned to Virginia Edwards, and shot her in the head at or very near the spot where she was found. (R 4684.)

MacDonell observed that Charlie Mays had been severely beaten on the floor where he was found. (R 4685.) He inferred that "Mr. Mays was not in the store at the time [Perry Edwards was killed]" and that "the basis for this conclusion is the fact that, when Mr. Mays was beaten, his blood spatters did not mix with the already dried, swipe blood patterns that resulted from Mr. Edwards' movement throughout the rear of the store." (R 4687.) MacDonell further tried to rule out Mays as perpetrator because, while "shoeprints made with blood . . . in several areas of the . . . store could have been made by Mr. Edwards's shoes[,] . . . no bloody sneaker prints similar to Mr. Mays' sneakers were detected." (*Id.*) He thus concluded "had Mays been the perpetrator, his bloody sneaker prints should have been detected after he had beaten Mr. Edwards so badly." (*Id.*)

Key Trial Testimony

At the trial held in June and July 1976, Zeigler testified that he did not kill his family, nor beat Mays to death (TT 2421), but that his wife and his parents-in-law apparently were killed during the course of a robbery that almost claimed Zeigler's life as well. He stated that, on Christmas Eve after 7 p.m., he went to the furniture store with Edward Williams, a man Zeigler had known for at least ten years and who often did work for him. (TT 2357, 2393, 2398.) About a week before Christmas, Zeigler had asked Williams to help him deliver several large gifts on Christmas Eve for his parents and in-laws. (TT 2358.) When Zeigler and Edwards arrived at the store, the light was off. While Williams remained in his truck, Zeigler entered the back of the store and tried to switch on the lights.

When he reached the main body of the store, he was hit over the head, from the right side. (TT 2401-04, 2418.) He fell to the floor and lost his glasses. In the dark store, without the glasses he needed to see clearly, he saw two "blurs" coming at him. (TT 2404-06.) He drew the gun he had in his trousers and tried to fire. The weapon jammed and he threw it at his attackers. (TT 2406.)

Now under physical assault, Zeigler started "flying through the air and bouncing off the walls, shelves and refrigerators" that were in this area. (TT 2407.) When he landed on a desk where his .357 magnum handgun was located, he took that gun out of the drawer. (TT 2408, 2420.) As the fight continued, he

tried to fire the gun. He also used the gun as a club, swinging it at every part of his assailant's body, as hard as he could. (TT 2409.) He was thrown against the linoleum racks and hit the floor again. (TT 2410.)

Zeigler then was shot as he attempted to get up off the floor. (TT 2410.) Wounded, on the floor, he recalled hearing a voice say: "Mays has been hit. Kill him." (TT 2411.) His assailants subsequently left. (TT 2412.)

Zeigler later regained consciousness. He tried to find his glasses, and as he was crawling around the floor, he crawled on to and over a body in the back area of the store. He could not identify it, however, because he could not see anything. (TT 2413.) Badly injured, Zeigler got up and went to the front office where he located another pair of glasses. (TT 2414.) He telephoned for help from the service counter. (TT 2415, 2430.) Chief Robert Thompson of the Oakland Police Department arrived first on the scene and transported Zeigler to the hospital for treatment of his gunshot wound.

Set against most of the evidence, Zeigler's account of events rings true and provides a reasonable hypothesis of innocence. Two witnesses, Felton Thomas and Edward Williams, provided the State's best testimonial rebuttal to Zeigler's account, but both witnesses were subject to substantial impeachment at

trial[3] (and impeaching evidence has only grown in quantity and quality since). The prosecution needed – and found – a contention on which the jury could convict because Zeigler could not provide an innocent explanation. That contention involved the bloodstain on the underarm of Zeigler's inner and outer shirts. The prosecution went to great lengths to persuade the jury that the bloodstains came from a beating administered to Perry Edwards, an inference that was permissible

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[3] Thomas, for example, told a fanciful story. Thomas claimed that Mays told him that Mays was going to get a television set for his wife from Zeigler's store. (TT 1148.) Mays' van, however, was parked around the side of the store (TT at 1149-50), in a location hidden from the street and from which it would be impossible to load a TV. Thomas' description of the route they allegedly took, through the parking lot of neighboring motel (TT 1154-61), would have required the van to traverse a three foot high concrete wall. Thomas' description of Zeigler driving a light-colored Cadillac did not match the care Zeigler drove, Curtis Dunaway's two-tone Oldsmobile. (TT 147-48.) Thomas told a story of driving with Mays and Zeigler to a citrus grove to fire the guns, purportedly in order to place Mays' and Thomas' fingerprints on the guns, yet those guns had no identifiable fingerprints and had been wiped clean. (TT 1136.)

As for Williams, he actually possessed a gun that was used as a murder weapon, a highly suspicious fact in itself. Adding to this, Williams turned in clothes to the police, that he claimed were the ones he wore at the crime scene, which do not jibe with the evidence. His shoes were brand new and still had a price tag on the sole. (TT 2584.) Their appearance did not reflect the physical activity in which he claimed he engaged, such as climbing a chain-link fence and running across an asphalt parking lot. Those clothes included a black cardigan sweater and dark green pants, but witnesses who saw Williams on Christmas Eve observed him in different attire. (TT 1314-15, 1842-44.) The location of Williams' truck (TT 2402) did not match his story that he had pulled in to help Zeigler load gifts. And, significantly, two witnesses observed an individual matching Williams' description in the Kentucky Fried Chicken store across from the crime scene, asking to use the telephone, at or about the time that the police arrived on the scene. (TT 1885-86, 1894.) Their testimony directly contradicts and impeaches Williams on this point.

from the evidence because the blood in the stains had been typed at the level of the four major groupings (A, B, AB, O), but not subtyped. Edwards and Mays shared the "A" blood type.

Thus, during its case in chief, the State elicited testimony from the medical examiner concerning Edwards' multiple head trauma wounds (TT 291-93) and from its blood splatter expert about the nature of the stains on Zeigler's shirt (TT 1027-30). The point of the latter testimony was to tie the stains to the hypothesis that Zeigler held someone in a headlock and beat him.

On the last day of testimony, the prosecutor cross-examined Zeigler. In a dramatic confrontation, the following exchange occurred:

> Q: I want you to me, if you can, sir, how you got all the blood under the armpit of your clothing, Type A blood?
>
> A: The only thing I can tell you is that during the fight I was grabbing everything I could grab ahold to and swinging with everything that I had. That's the only thing that I can you.
>
> Q: <u>You can't tell me how you held Perry Edwards around the neck and clubbed him with your right hand as you held him with your left</u>?
>
> A: No, sir, because I did not do it.

(TT 2425 [emphasis added].) As he questioned Zeigler, the prosecutor held the alleged instrument used in the beating – a linoleum crank – in his hand and swung it for effect. (R 197-98.)

The next day, in closing, the prosecutor drove home his point. He said to the jury:

> You will see a soaked area of blood under the left armpit of those shirts. That 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?

(TT 2553 [emphasis added].) Thus the jury was told: the bloodstains under Zeigler's arm came from Perry Edwards and he can't explain that, can he? That proposition landed a hard blow on the defense case.[4]

[4] In the early part of the proceedings below, the State asserted that the prosecutor may not have been claiming that the bloodstains were attributable to Edwards. That proposition appears to have been abandoned, but in an abundance of caution the Court should be apprised why it holds no water. In his opening statement, the prosecutor contended that "the cause of [Mays'] death was as he was lying there on the floor his head was beaten in with a large metal crank . . . ." (TT 26.) In other words, the State did not contend that Mays was under Zeigler's arm – where he would have to be in order to be the victim referred to in the above-quoted portion of the closing – but rather on the floor. Indeed, defense counsel understood and responded directly to the prosecutor's accusation in the closing. Defense counsel referred to the accusation outright: "[T]he State said that Tommy beat Mr. Edwards, yet there was none of Mr. Edwards' hair on the shirt. Remember the State said he put Mr. Edwards' head in a lock and beat him. That's how the State says he got that blood on his shirt. He was laying on the floor mauling him around. * * * Not one hair was found on Tommy Zeigler's shirt, not one. Yes, there was one on Charlie Mays." (TT 2661-62.) The prosecutor did not object that he had been mischaracterized, and he did not retreat in any respect in his rebuttal closing.

The Evidentiary Hearing On The Results Of The DNA Testing

On December 20-21, 2004, the trial court held an evidentiary hearing on Zeigler's Motion to Vacate his Convictions Based upon Newly Available Evidence. Three witnesses testified.

Shawn Weiss, an associate technical director of the forensic identity department for Laboratory Corporation of America ("Labcorp") testified that he conducted the DNA testing on various pieces of evidence in the case. For Charlie Mays' trousers, DNA testing was conducted on cuttings taken from the back of Mays' pants near the cuff area, and from the front of the pants near the zipper, belt, and left knee area. (R 31-33.) Cuttings from the cuff and the knee area of the pants produced findings that were consistent with Perry Edwards' DNA profile. (R 34-36.) For Zeigler's shirts, he confirmed that a cutting from the pocket area on the left pocket of Zeigler's red outer shirt revealed genetic markers that excluded Edwards; they were consistent to twelve alleles with the genetic profile of Mays. (R 38.) Additionally, cuttings from the left armpit of Zeigler's white t-shirt revealed only one genetic marker, which was consistent with Charlie Mays and excluded Perry Edwards, barring a highly speculative and hypothetical differential degradation of the genetic material. (R 40.)

Stuart James ("James"), a forensic scientist, specializing in bloodstain pattern analysis, testified that he had examined Zeigler's red outer shirt (R 71-72,

75), and stated that the shirt contained many "contact" stains[5] in the areas of the left underarm and left pocket, and several saturated stains[6] on the sleeves. (R 75-78.) He declined to opine that the stains from Zeigler's shirt pocket area were consistent with holding someone's bloody head in a headlock because he "would need more critical features like bloody hair swipes or something to tell [him] that it was a bloody head that was involved in that contact." (R 80-85.) However, he testified that "if it was the case that Perry Edwards' [bloody head] was held in a headlock under [Zeigler's] arm," then you would expect Perry's Edwards blood on the shirt's pocket area. (R 82, 84.) As to the stains on the upper left sleeve area and upper left chest area of Zeigler's white t-shirt, James concluded that they were the result of the blood that was on the underarm area of the red outer shirt that soaked through to the t-shirt. (R 86-87, 89.) In addition, he testified that the saturation stains on the left arm area of the red outer shirt could have been the results of Zeigler climbing over Mays' body, and especially over Mays' abdominal area, since Mays' blue long-sleeved sweatshirt had large saturated areas of blood that could have easily been transferred to Zeigler's shirt and created a soak-through type stain on Zeigler's shirt. (R 92-94.)

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[5] "Contact stains" refer to stains which are produced by a wet blood source making contact with a previously nonbloody surface. (R 77.)

[6] "Saturated stains" refer to stains that have gone through a material as opposed to simply accumulating on a nonporous surface. (R 78.)

Over the objection of Zeigler's counsel, the State elicited testimony from James concerning dark stains on Zeigler's red outer shirt, although those spots had not been the subject of any substantive argument or testimony at the original trial, and they had not been tested to determine whether or not they were indeed blood spatters.[7] The State hypothesized that the reddish-brown spots were blood from Charlie Mays. James hypothesized three scenarios that would explain these spots on Zeigler's clothes, if they were in fact blood spatters[8] from Mays, two of which did not implicate Zeigler in any criminal activity: (a) blunt force trauma to May's head while he was on the floor (R 183); (b) expiratory blood[9] that could have occurred when Mays had some teeth loosened by blows to his face, which would be consistent with Zeigler's statement that he swung his handgun at his assailant (R 172); and (c) blood from another confrontation spattered at a prior time (R 183).

According to James, the bloodstains on the legs of Mays's trousers that DNA tests tied to Perry Edwards, which saturated both sides of the material, reflected Mays having contact with a significant amount of Edwards' blood.

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[7] At trial, MacDonell refused to say whether these dark sports were "definitely blood" because he had not conducted any tests on them. (TT 1029.)

[8] "Spatter" is defined as the random distribution of small droplets of blood as the result of some force or impact. (R 79.)

[9] Expiratory blood can be produced by any expiration of air when there is blood in someone's mouth.

(R 95-99.)[10] This type of stain on Mays' pants required sufficient contact between Mays' pants and a significant quantity of Edwards' blood.[11] (R 95-99.) James testified that it "could not be the result of blood spatters flying through the air and impacting on Mays' pants." He added: "It's much more than that and it requires a contact." (R 98.) James viewed Edwards' body and the pooling of blood around Edwards' head as the only likely sources for that quantity of blood. (R 99.)

H. Vernon Davids, one of Zeigler's trial counsel, also testified. He confirmed that, during questioning of Zeigler, the prosecutor dramatized the alleged headlock beating of Edwards in front of the jury to make a huge impression. (R 192-98.)

SUMMARY OF ARGUMENT

The determination of the court below should be reversed because that court erred in denying Zeigler's motion based on the record before it and, in the alternative, that court erred by restricting Zeigler's presentation of evidence and

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[10] The State, at the hearing, contended that Mays could have stepped through Edwards' blood and that would explain the saturated stain on his pants. However, Professor MacDonell testified at trial that there was no pattern in the blood in the store corresponding to Mays' shoes. (TT 1046.) If Mays had simply stepped in and out of the pool of Edwards' blood, in the course of a struggle, such shoeprints surely would be present.

[11] The State's assertion that "at some point [Mays'] pants [accidentally] came in contact with some amount of blood of Perry Edwards" (R 13) does not square with MacDonell's trial testimony that the blood of Perry Edwards, as spattered elsewhere, was dry by the time Charlie Mays was beaten. (TT 985-87.)

denying Zeigler's application to engage in further tests to address the State's speculative theory concerning the meaning of certain reddish-brown spots on the red outer shirt worn by Zeigler when he was attacked.

The record already developed provides a firm and persuasive basis to grant relief to Zeigler. The circuit court erred as a matter of law because it applied the wrong standard to the evidence. The correct standard is set forth in the probability test adopted by this Court. It requires that the judge hearing a claim based on newly discovered evidence must assume the perspective of a reasonable juror confronted with that evidence, in light of the trial record, and determine if the new evidence probably would produce an acquittal at a new trial. The court below erroneously applied a standard that effectively reinstated the discredited and abandoned conclusiveness test and it evaluated the evidence in the role of a thirteenth juror, rather than assuming the objective perspective required by the probability test. The court also erred in relying on speculative conclusions coaxed from the expert that would not be admissible at a new trial. On this argument point, this Court should find that the circuit court erred, reverse its denial of relief, vacate Zeigler's conviction and sentence, and order a new trial

The record below additional was improperly truncated by the circuit court's pre-hearing ruling excluding any of the evidence proffered by Zeigler other than the DNA test results themselves. This error repeats a similar error upon

which this Court granted relief in *Hitchcock v. State*, SC03-2203, and Zeigler should be conferred equal treatment. Moreover, the probability test itself contemplates the broader scope of evidence proffered by Zeigler and the court below independently erred by not recognizing this. On this argument point, Zeigler is entitled to a remand to the circuit court to have all of his proffered evidence considered as part of his motion.

Finally, Zeigler seeks review and reversal of the circuit court's refusal to approve additional DNA testing, in response to the State's speculative contentions about the significance of certain reddish-brown spots on Zeigler's red outer shirt and about the alleged inadequacies of the tests previously performed. The principles of justice and truth-finding that underlie the criminal justice in general, and the new regime ushered in by section 925.11, Fla. Stat., and Rule 3.853 in particular, demand more inquiry into the evidence when plainly it would be productive. Here, the shirt in question has yielded high quality, unambiguous results thus far. To permit the State to exploit untested areas of the shirt to engage in unsupported speculation about the state of the evidence and what it means for Zeigler's guilt or innocence is to abandon the responsibilities assumed by the judiciary under the new regime. On this argument point, Zeigler is entitled to a remand to the circuit court to conduct the additional tests and have the results considered as part of his motion.

ARGUMENT

I. THE COURT BELOW ERRED IN DENYING THE MOTION TO VACATE CONVICTIONS BASED ON THE RECORD BEFORE IT

Zeigler's presentation in the court below should have warranted the grant of the relief he requested – vacating of his convictions and the order of a new trial. That the court failed to grant this relief may be traced to three errors: (1) misapplication of the relevant law; (2) misapprehension of the facts; and (3) prejudicial speculation about facts not in evidence (or admissible). Separately and taken together these errors require reversal of the order entered below.

To place these errors in context, it is worthwhile to give an overview of the effect that the new evidence has on the prosecution's case against Zeigler. The DNA test results yielded important findings relative to two significant pieces of evidence.

First, the test results from Zeigler's clothing undermine a central tenet of the State's case. The State argued that a bloodstain under the left arm of Zeigler's shirt demonstrated that Zeigler held Perry Edwards in a headlock and beat Edwards on the skull with a blunt instrument. DNA test results reveal no sign of Edwards' blood; Mays' blood is present, as Zeigler's counsel argued to the jury it would be.

Second, the test results from Mays' clothing corroborate a central tenet of the defense. Zeigler argued that Mays perpetrated or participated in the

murders of the other three victims. Large bloodstains appear on Mays' trousers; until testing occurred, they were known only to be Type A. With testing, those stains have been identified as Perry Edwards' blood, located in places and deposited in a manner that inculpates Mays in Edwards' murder.

A reasonable jury, presented with physical evidence that disproves one central tenet of the State's case and corroborates a central tenet of the defense, probably would reach a different verdict. Factor into the analysis that the State's case was far from overwhelming. Indeed, on direct appeal this Court recognized the existence of some weaknesses in the State's case, but still upheld the convictions.[12] Three testimonial witnesses were key to the prosecution – Felton Thomas, Edward Williams, and Frank Smith. Evidence inculpating Mays, however, also logically inculpates Thomas, since Thomas provided statements and testimony that tied him closely to Mays at all relevant times. The State's case unravels quickly if any of its important threads receives too strong of a tug.

The likely effect on a jury also can be gauged by the jury's level of certainty in the first instance. The initial vote of the trial jury in the guilt phase equally divided between six to convict and six to acquit. *See Zeigler IV*, 494 So. 2d at 960 (Barkett, J., dissenting). At the guilt phase the jury returned what

[12] "In some instances defendant has been able to show certain inconsistencies in the evidence. However, when one considers the magnitude of this case, all facts could not be expected to match perfectly." *Zeigler I*, 402 So. 2d at 377.

bears the marks of a compromise verdict. The case as laid out by the State, if accepted openly and fully by the jury, would have been expected to produce four verdicts of first degree murder. Instead, the jurors agreed on two convictions for first degree murder and two convictions for second degree murder. This compromise continued at the sentencing stage. As this Court has twice concluded in upholding the death sentence, the State's case, if accepted openly and fully by the jury, would have been expected to produce a death sentence recommendation, but the jury recommended life imprisonment. *See Zeigler VI*, 580 So. 2d at 131; *Zeigler I*, 402 So. 2d at 377. The only factor that rationally accounts for the life recommendation is the jury's nagging uncertainty about Zeigler's guilt.

The balanced opening vote and the compromises in the verdicts at the guilt and sentencing phases demonstrate that the addition of significant evidence in support of the defense would be expected to tilt the scales decisively toward acquittal. Yet Judge Whitehead did not grant relief. His error lies in the three areas noted above, the first of which we now turn.

A. The Court Below Misapplied The Law

The results of the DNA testing that formed the basis of the presentation below constitute newly available evidence concerning Zeigler's innocence. Those results are properly analyzed under the legal framework for analyzing "newly discovered evidence" claims. *See* Fla. R. Crim. P. 3.853(d)(2)

(directing that motion under Fla. R. Crim. P. 3.850 or 3.851 based on DNA test results obtained under Rule 3.853 "shall be treated as a claim of newly discovered evidence"). That framework involves two steps, the first concerning diligence in discovering the evidence and the second measuring the impact of the evidence. The first step does not concern the Court here because the court authorization of DNA testing altered that step of the analysis. *See Moore v. State*, 903 So. 2d 238, 239 (Fla. 2d DCA), *rev. denied*, 914 So. 2d 954 (Fla. 2005).

To merit relief, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) ("*Jones I*"). Known as the "probability test," this Court adopted the standard directly out of federal court precedent, *see id.*, and it is used by many other state courts as well.[13] *See, e.g., Heaton v. State*, 542 So. 2d 931, 933 (Ala. 1989); *Bowden v. State*, 296 S.E.2d 576, 577 (Ga. 1982); *State v. Hammons*, 597 So. 2d 990, 998 (La. 1992); *Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992); *State v. Boppre*, 503 N.W.2d 526, 536 (Neb. 1993); *State v. Carter*, 426 A.2d 501, 508 (N.J. 1981). The test asks whether it is more likely than not

[13] According to the Louisiana Supreme Court, "[t]hese concepts concerning the scope of the trial court's duty toward the motion for new trial based on newly discovered evidence have withstood the test of time, having been stated, almost verbatim, by the United States Supreme Court Justice Felix Frankfurter over 70 years ago." *State v. Watts*, 835 So. 2d 441, 447 n.5 (La. 2003) (citing Felix Frankfurter, *The Case of Sacco & Vanzetti: A Critical Analysis for Lawyers & Layman* 103 (1927)).

that the new evidence, had it been added to the evidence at trial, would produce an acquittal by a reasonable jury. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984) (considering and rejecting the probability standard for use in ineffective assistance of counsel claims); *Trepal v. State*, 846 So. 2d 405, 437-38 (Fla. 2003) (Pariente, J., specially concurring) (also contrasting standards for various claims).[14] By its very nature, the probability test must take account of the strength of the State's original case and it must assess the ways – contradictions with important prosecutorial evidence, impeachment of significant witnesses, etc. – in which the new evidence creates (or fails to create) reasonable doubt in the case.

The probability test superseded the "conclusiveness test" enunciated in *Hallman v. State*, 371 So. 2d 482 (Fla. 1979). *See Wood v. State*, 750 So. 2d 592, 594 n.2 (Fla. 1999) (acknowledging the change). Under the conclusiveness test, "the alleged facts must be of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment [of conviction]." *Hallman*, 371 So. 2d at 485; *see, e.g., Darden v. State*, 521 So. 2d 1103, 1105 (Fla. 1988) (applying conclusiveness test). In *Jones I*, this Court "concluded that the *Hallman* standard is simply too strict. The standard is almost impossible to meet and runs the risk of thwarting justice in a given case." 591 So. 2d at 915. The probability test does not demand as much as proof as the

[14] The Court endorsed Justice Pariente's description in *Guzman v. State*, 868 So. 2d 498, 506 n.8 (Fla. 2003).

former test because a newly discovered evidence claim asks to vacate convictions and obtain a new trial; it does not request an acquittal as a matter of law. "If a petitioner could provide evidence so overwhelming that no rational person could continue to believe that he or she were guilty of a crime, then a new trial would not even be necessary." *Summerville v. Warden*, 641 A.2d 1356, 1378 (Conn. 2004) (Berdon, J., dissenting).

The probability test requires examination of the full and complete picture of the evidence that would be heard at a new trial. As this Court most recently explained:

> 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. 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.

Rutherford v. State, 31 Fla. L. Weekly S59, S61 (Fla. Jan. 27, 2006) (internal quotations and citations omitted); *see also Jones v. State*, 709 So. 2d 512, (Fla. 1998) ("*Jones II*"). This includes, as more fully developed *infra* Point II, the consideration of all evidence discovered post-trial and presented in prior post-

conviction proceedings, even if procedural bars were then imposed, if a *prima facie* case for relief based on newly discovered evidence is raised by the present application.[15] *See Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002) (directing trial court to consider, in the cumulative analysis, evidence from *Brady* claims that had been previously denied as procedurally barred if the court found testimony offered in current motion to be credible).

An important aspect of the application of the probability standard is the use of the reasonable jury as the yardstick by which to measure the impact of the new evidence. As Louisiana's high court has admonished, "The scope of the trial judge's duty toward the motion for new trial based upon the new evidence must be kept in mind. It was not for him to determine the guilt of [another alleged suspect] or the innocence of [the defendant]; it was not for him to weigh the new evidence as though he were a jury, determining what is true and what is false. The judge's duty was the very narrow one of ascertaining whether there was new material fit for a new jury's judgment." *State v. Talbot*, 408 So. 2d 861, 885 (La. 1981). This perspective requires a broad, thoughtful analysis:

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[15] Zeigler additionally observes that the adjudication of his claims of newly discovered evidence presented prior to 1991 occurred under the now discarded conclusiveness test, *see Zeigler IV*, 494 So. 2d at 960 (Barkett, J. dissenting) (advocating abandonment of the conclusiveness test used therein and evaluation of Zeigler's claims under the probability test), and therefore they cannot be considered res judicata, in any sense of the concept, to this proceeding.

> [W]ill honest minds, capable of dealing with evidence, probably reach a different conclusion, because of the new evidence, from that of the first jury? Do the new facts raise debatable issues? Will another jury, conscious of its oath and conscientiously obedient to it, probably reach a verdict contrary to the one that was reached on a record wholly different from, the present, in view of the evidence recently discovered and not adducible by the defense at the time of the original trial?

Id. at 885. "The test is objective in that the trial judge does not sit as the ultimate arbitrator of the resolution of the case once the new evidence is considered, that is, the trial court does not weigh the evidence. The role of the trial court is to review the evidence constituting the State's case, not to determine the sufficiency of the evidence, but to evaluate the effect of the newly discovered evidence." *Watts*, 835 So. 2d at 447; *see also Brewer v. State*, 819 So. 2d 1169, 1174 (Miss. 2002) (trial judge's task "is to make a determination as to whether or not the newly discovered evidence is sufficient so that if a reasonable fact finder knew said information then that reasonable fact finder may have reached a result different from the previous result reached").[16]

[16] Although not articulated as such in prior cases, this describes well how the probability test actually has been applied in Florida. *See, e.g.*, *Rutherford*, 31 Fla. L. Weekly at S62 (rejecting claim because "a reasonable juror's determination of [defendant's] guilt would not be shaken by" the newly discovered evidence); *Light v. State*, 796 So. 2d 610, 617 (Fla. 2d DCA 2001) (in the analysis for newly discovered evidence, "the judge is not examining simply whether he or she believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it."). In all candor, the application has not been consistent. *See, e.g.*,

The court below correctly described some of the controlling legal principles but it added its own gloss and additionally erred in applying the principles. It, in effect, applied the probability test in a manner that stealthily reinstated the conclusiveness test.

For example, the Order quotes at length from *Jones II* on the two steps involved in evaluating a claim of newly discovered evidence and it refers to further explanations of the process in *Roberts* and *Lightbourne.* (R 5977.) The court below did not acknowledge its obligation to look at all evidence that would be admissible at a new trial – it already had limited the scope of the proceedings in a pretrial order (R 5944-45) that made such a proper evaluation impossible. Moreover, the court below did not acknowledge that its perspective was limited to a determination of what a reasonable jury might decide. Instead, it seems clear that Judge Whitehead adopted the role of a thirteenth juror, determining the effect of the evidence on himself, not (as the law demands) its probable effect on a reasonable jury.

Roberts, 840 So. 2d at 972 (trial judge had to assess personally credibility of recanting witness); *Zeigler VII*, 632 So. 2d at 51 (affirming trial judge ruling based on his personal assessment of witness credibility rather than considering affect on reasonable juror). *Roberts* is explainable as the application of a higher threshold that this Court applies to motions based on the testimony of recanting prosecution witnesses, *see, e.g., Lightbourne v. State*, 841 So. 2d 431, 439 (Fla. 2003); *Zeigler VII*, however, is not. Clarification of this confusion in this appeal would be helpful to the courts below.

Confusingly, the court below blended the analysis of the new evidence with the standard set forth in Rule 3.853 for authorizing testing (which the court had approved *nunc pro tunc* sixteen months earlier (R 5947)). Referring to the Rule and *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004), a case explaining the standards for granting an application under Rule 3.853, Judge Whitehead stated that "it is a defendant's burden to explain, with reference to specific facts about the crime, how DNA testing results will exonerate him or mitigate his sentence." (R 5977.) This confusion ultimately colored the court's disposition of Zeigler's motion. After summarizing the testimony, Judge Whitehead first set forth his general conclusion:

> 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 that his blood, as well as the blood of the four victims, was present at the scene. Although the 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.

(R 5984 (emphasis in original).) The Order thereafter finds reasons to reconcile various parts of Zeigler's evidence with the original verdict of guilt (which will be

addressed *infra* point I.B.), but without any consideration whether a reasonable juror (or jury), in light of the close and inconsistent evidence at the original trial, would probably find the new evidence significant enough to change the verdict. Instead, Judge Whitehead inexplicably closed his Order by stating:

> Based on the foregoing, the Court finds the Defendant has not shown that the DNA testing results would exonerate him or mitigate his sentence. See Robinson, 865 So. 2d at 1265-65 [sic].

(R 5986.)

The court below erred by relying on *Robinson* and grafting parts of Rule 3.853 into the probability test that governs Zeigler's motion. Rule 3.853 standards ceased to be relevant when the court ordered, in December 2003, that the DNA tests performed by Zeigler would be treated as having been authorized thereunder.[17] *See Moore*, 903 So. 2d at 239 (Rule 3.853 proceeding ends when the request for testing is ruled upon); *Dedge v. State*, 832 So. 2d 835, 836 (Fla. 5th DCA 2002); *see also State v. Bronson*, 672 N.W.2d 244, 252 (Neb. 2003) (construing Nebraska's DNA testing law similarly, with the standards for obtaining DNA tests having no bearing on whether the new evidence warranted a new trial). The court's sole focus should have been on the *Jones* line of cases and the reasonable juror's perspective on the outcome under the probability test.

[17] Indeed, under Rule 3.853(f), an order granting or denying testing is immediately appealable. The State did not take an appeal here. The lower court's ruling accordingly became res judicata on the issues involved in the ruling.

More importantly, by setting the bar for Zeigler as proof that "conclusively eliminate[s]" him as the perpetrator of the crime, Judge Whitehead erroneously reverted to the discredited conclusiveness test. The probability test, as this Court recognized when adopting it, does not demand the same level of proof. In *Brewer*, for example, the Mississippi Supreme Court ordered a remand to consider a new trial motion based on DNA evidence, under the probability test, even though the court agreed that "[t]he DNA evidence does not prove conclusively that [the defendant] did not murder the victim." *Brewer*, 819 So. 2d at 1174. On remand, the trial court found that the new evidence satisfied the probability test and ordered a new trial. *See DNA Wins Inmate New Trial,* The Clarion-Ledger, Sept. 6, 2002 (available online at http://orig.clarionledger.com/news/0209/06/m06.html). The probability test, by its very nature, does not demand the certainty that Judge Whitehead did. *See State v. Ways*, 850 A.2d 440, 455 (N.J. 2004) (granting new trial under probability test because "there is a probability – not a certainty – that a new jury would find [the defendant] not guilty" based on newly discovered evidence); *see also Young v. State*, 739 So. 2d 553, 557 (Fla. 1999) ("The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.").

As mentioned above, another flaw in Judge Whitehead's analysis lay in his failure to scale the task of judging the impact of the new evidence

proportionate to the weaknesses in the State's original case. Courts uniformly agree that the probability test adjusts to the strength of the State's original case. When evidence of guilt is overwhelming, a higher threshold to obtain relief holds. *See, e.g., Kokal v. State*, 901 So. 2d 766, 776-77 (Fla. 2005). When evidence of guilt "contains significant contradictions and discrepancies, newly discovered evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Watts*, 835 So. 2d at 447 n.6; *accord Ways*, 850 A.2d at 453 (the court "cannot ignore . . . that the State's proofs were far from overwhelming"); *Santiago v. State*, 779 A.2d 868, 870 (Conn. Supp. 1999) (granting new trial on newly discovered evidence, observing that "this was not a strong case for the state and the evidence was replete with inconsistencies), *aff'd*, 779 A.2d 775 (Conn. App. 2001). The court below did not engage in any such analysis, despite the presence of many contradictions, inconsistencies, and discrepancies in the proof at trial and other indicators showing that the trial jury had problems with the State's case (including its apparent compromise guilt verdict and recommendation that Zeigler receive life sentences for convictions that this Court has twice held cannot be reasonably based on the evidence). We will turn to the specifics of this issue momentarily, in Point I.B.

Zeigler's motion was not adjudicated under the proper legal standards. The Order stands in error and should be reversed for that reason alone.

B. The Court Below Misapprehended The Facts

The court below not only framed the legal analysis incorrectly, it also botched its interpretation of the results and the integration of the factual records.

The significant test results involve Zeigler's shirts and Mays' pants. Judge Whitehead discounted the test results showing an absence of Perry Edwards' blood on Zeigler's shirts on the grounds that "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." (R 5986.) Based on these assertions, he concluded that "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." (*Id.*) With no argument to be made about the source of the blood on Mays' pants, Judge Whitehead rejected its significance on a different basis:

> 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 pants 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 bloodied body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation.

(R 5984-85.) These various conclusions are riddled with factual and analytical errors and do not account for important testimony from the original trial.

Absence of Perry Edwards' blood on Zeigler's red shirt

Judge Whitehead appears to have recognized the importance of a finding that Perry Edwards' blood is not on Zeigler's clothing – that finding eviscerates an indispensable building block in the State's case. The court erred by dismissing the absence of Edwards' blood on Zeigler's shirts as a fluke, a mixed stain, or an issue arising from the degradation of DNA or the mishandling of evidence.

First, the red shirt yielded a finding that runs to twelve alleles – a solid test result that does not suggest the biological material on the red outer shirt suffered any significant degradation. Was it a fluke? No evidence gives any reason to suppose so. The sample tested came from a contact stain (R 77-79) – not a spatter – and the State offered at trial only one source for a contact stain on the shirt, the purported headlock beating of Perry Edwards. The State's theory of the case allows for spatter stains from Mays, but does not provide any explanation why there would be a contact stain with Mays' blood. (The defense theory, in contrast, explains a source for a contact stain with Mays' blood – Zeigler's encounter with Mays' lifeless body of the floor.)

In fact, the State's theory for the reddish-brown stains on the red outer shirt (*see infra* Point I.C.) affirmatively excludes the notion that Mays contributed a contact stain to the shirt. The State described its hypothesis as placing Zeigler kneeling on the floor, swinging a crank with two hands to inflict the fatal blows on Mays. (R 11-12.) That position is pivotal to finding the reddish-brown stains in particular positions on the shirt that the State contends are incriminating. Yet it is not physically possible to perform that act while also holding Mays in a headlock to acquire the contact stains on the red shirt. The State cannot have it both ways. Notably, the State's expert at trial, Professor MacDonell, clearly tied the splatters radiating from Mays' head to a beating administered at or near floor level. (TT 1082.)

Second, the notion of a mixed stain on the red outer shirt does not jibe with the state of the evidence. The DNA expert at the hearing, Sean Weiss, provided no testimony that supported the hypothesis that the red outer shirt may have involved a mixed stain; he simply opined about that possibility for the white t-shirt, where the test results returned only one allele. Mixed stains ordinarily do not conceal one source or the other. Rather, all of the alleles show up and the technician must sort out the results. *See* David L. Faigman, *et al.*, MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY, at § 25-2.4.3, n.93 (2001) ("Studies in which DNA from different individuals is combined in

differing portions show that intensity of the bands reflects the proportions of the mixture. Thus, if bands in a crime-scene sample have different intensities, it may be possible to assign alleles to major and minor contributors.").

The only hypothesized source of degradation relates to the handling of the evidence (either at the time of the crime or in the last thirty years) and it is a source that should apply equally to all of the material on the shirt. (No evidence to the contrary was offered by the State.) There is no reason, placed in evidence or deducible by logic, to suppose that biological evidence from Edwards' blood would degrade at a substantially different and greater rate than biological evidence from Mays' blood, yet that is the only way that the DNA results on the red outer shirt could be so strong for Mays while showing no sign of any biological material sourced to Edwards. The court below erred when it disregarded the results on the red outer shirt based on its perception of a possible mixed sample or degradation of biological material.

More importantly, the court below erred by not considering how a reasonable jury would interpret the test result evidence. How would a reasonable jury react to this more full picture of the evidence: (a) the bloodstains on the red outer shirt are Type A blood, which is shared by Mays and Edwards; (b) DNA testing reveals the presence of Mays' blood in the contact stain area, but not the presence of Edwards' blood; (c) while there is always a theoretical possibility that

undetected blood is present but masked by the blood of another, there is no plausible explanation why that would be the case in this set of facts; (d) the State's theory of events does not explain why Mays' blood would be present in a contact stain on the red outer shirt; and (e) the defense theory does account for the presence of a contact stain of Mays' blood.[18] Based on this new evidence (which must be judged with the remainder of the evidence as well), a reasonable jury would be moved toward acquittal.

Absence of Perry Edwards' blood on Zeigler's t-shirt

Judge Whitehead also focused on the possibility that Zeigler's white t-shirt revealed only an allele consistent with Mays because the biological material differentially degraded, with the possibility that Edwards' blood might have been present but simply no longer registered distinctly from Mays. This contention, however, ignores the definitive testimony of Professor MacDonell (who examined the shirt in 1976, when it was "fresh") that the bloodstain in the armpit on the t-

[18] While Judge Whitehead recognized that James "opined that the bloodstain on the upper left arm of the red shirt could have been transferred from Mays' bloody long-sleeved sweatshirt," (R 5983), the judge found this unconvincing because, according to James, "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." (R 5985) What Judge Whitehead fails to consider is that Zeigler crawled across the floor after being beaten and shot. Lying across Mays' torso for some period of time, or even struggling to crawl across it, does not seem either unlikely or unreasonable in the circumstances. Zeigler testified that he did not know how long he was on the floor or moving about after he was shot. (TT 2412-24.)

shirt did not have an independent source, but rather came about as a saturation stain created by the soaking through of blood from the red outer shirt. (TT 1028-31, 1053.) For Edwards' blood to be deposited on the t-shirt, it must first have saturated the red outer shirt and soaked through to the underneath. That requires a huge deposit of Edwards' blood on the red outer shirt that is not present.

Further, the State does not have a viable theory to explain how Mays' blood was deposited on the red outer shirt in the place and the quantity necessary to produce a bleed-through of his blood to the t-shirt, particularly in the underarm. If the "spatter"-based theory of Mays' death is entertained (*see infra* Point I.C.), then Mays' blood landed on Zeigler's shirt as spatter, which James described as a type that produces stains inherently different from the kind of contact (or passive) stains that produced the bleed-through to the t-shirt. (R 78-79.) Additionally, the hypothesized beating would place Zeigler's underarms outside of the spatter zone in this theory; indeed, the State pointed to reddish-brown spots on the outer portion of the arms of the red outer shirt as part of the alleged spatter in their theory, which confirms that Zeigler's underarms would not be exposed.

And, as noted above, the viability of a DNA reading in a biological sample is going to reflect the relative proportions of the sources. This means that Mays would have to be a greater contributor to the t-shirt stain than Edwards in order for his DNA to have survived more robustly in a mixed sample. There is

nothing here to suggest a plausible hypothesis that yields that result. To the contrary, under the State's trial theory, the contact stain in Zeigler's underarm came from the alleged headlock beating of Edwards. Theoretically, it would be conceivable, if that theory were true and a mixed sample had occurred, that a DNA test result would identify Edwards without identifying Mays, since Edwards would be far and away the greater contributor to biological material in that area. That the results came out just the opposite thoroughly refutes the State's trial theory.

A jury confronted with the test results for Zeigler's two shirts would not reasonably find that Perry Edwards' blood "must have been on there somewhere." Rather, a reasonable jury would conclude that the State has no evidence to connect the bloodstains on Zeigler's clothing to Perry Edwards. The tectonic shift in the landscape of the evidence caused by that conclusion cannot be overstated. A reasonable jury would probably acquit and therefore Zeigler is entitled to a new trial.

Perry Edwards' Blood on Mays' Pants.

The court below goes the furthest astray by hypothesizing a struggle between Zeigler and Mays near Edwards' body and concluding that "it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation." (R 5985.) First, this represents an improper attempt to resolve an important factual issue to the judge's preference rather than considering what a

reasonable juror probably would do with the additional information concerning the presence of Edwards' blood on Mays' pants. Second, it resolves that issue inconsistent with the other evidence in the case.

At trial the defense argued that the physical evidence, limited as it was to the definition of blood types at the four major group level, reflected Mays involvement in the killing of Perry Edwards. (TT 2612-13.) Mays had Type A blood on the soles, sides and tops of his shoes (TT 2301-02) – the blood on bottom thick with cat hairs and other flotsam within the blood (TT 2281, 2994, 2229, 2300) – and type A blood on his pants (TT 2302). The DNA testing now adds confirmation of the source of the blood on Mays' pants, and it places that blood at interesting places – on the backside of a leg in the midst of a sizeable stain and high on the thigh in the midst of another substantial stain. The stains are not swipes, smears or spatters – they reflect the transfer of a considerable amount of blood to Mays' clothing. James testified that Mays would need to be in close contact with a substantial quantity of Edwards' blood, such a standing next to or on Edwards' bleeding corpse. (R 95-99.)

To meet James' standard, the court below speculated that Mays stepped into and out of the bloody area around Perry Edwards while struggling with Zeigler in a fight that ultimately ends in Mays' demise in a location fifteen

feet to the north of Edwards' body, on the other side of several obstructions.[19] The physical evidence, however, forecloses this activity. Mays' shoes, having been dipped into the blood pool,[20] would leave a bloody footprint trail from Edwards' body to (at least) the area fifteen feet away where Mays died (with a variety of sidesteps to be expected, if he was engaged in a struggle). At trial, however, Professor MacDonell testified that, based on his personal examination of the store and the crime scene photographs, the pattern on the bottom of Mays' shoes could not be found in blood anywhere in the furniture store. (TT 1046, 1056-57.) It seems inconceivable that Mays could step into a pool of Edwards' blood, collect materials on the bottom of his shoes in the sticky blood, and end up in death fifteen feet away without leaving a single identifiable shoeprint. The explanation for the blood on Mays' pants hypothesized by the court below does not fit with these facts.

Moreover, the floor between Edwards' body and Mays' body is littered with the spatter produced when Edwards was murdered, distinctly overlaid with the subsequent spatter from the slaying of Mays. (TT 985-87, 992-93.) If Mays had struggled with Zeigler near Edwards' body – especially with bloody

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[19] Contrary to the circuit court's suggestion, Mays and Edwards were not killed "within a few feet of each other." The trial record indicates that their corpses were found 10 to 15 feet apart.

[20] The physical appearance of Mays' shoes, with blood covering the sole, up the sides of the sole rubber piece and spilling on to the top, would suggest that he indeed stepped into the pooled blood.

soled shoes – would not distinct, pervasive disturbances in the pattern of spatter on the floor document that activity? Such smears appear in the area where Mays died (smearing Mays' own blood, from the initial bullet wounds he suffered) but not near Edwards.

Further, how did this hypothesized struggle create the Edwards' bloodstain both so high and so low, front and back, on Mays' pants in a saturation stain pattern? Professor MacDonell could not explain the higher stain; when offered the opportunity to attribute it to a smear pattern on the floor he refused.[21] (TT 1075.) The quantity of blood on the floor – other than that pooled around Edwards' body – cannot explain the saturation of Mays' pants.

In contrast to the lower court's hypothesis, one set of events does fit with the physical evidence. If Mays were standing next to Perry Edwards, in the pooling blood, before the final shots or blows killing Edwards occurred (perhaps administering those blows, kneeling on Edwards' body to create the stain on Mays' pants), and turned from Perry Edwards to the carpeted portion of the store to pursue and kill Virginia Edwards (who was cowering amidst the furniture), then

[21] It is illuminating that, in his pretrial deposition, MacDonell could not explain the likely source of the heavy bloodstains on the lower portion of Mays' pants. He said: "If he had been partially incapacitated by some kind of blow or gunshot and had, in fact, gone in the direction which it appears he likely did go, it's difficult to determine." (R 6101.) He added: "If he went that way and this blood underneath his leg as he went, it's not the left side – you'd wonder why he isn't face down rather than face up. I don't know." (R 6102.)

Mays would acquire all of the known blood on his shoes and pants, would pick up the cat hairs and other matter on his shoes as he crossed the carpet (*see* TT 2298, for testimony on the presence of these materials in the carpet), and the excess blood that might otherwise leave shoeprints on the tile would be removed by his walking on the carpet. Additionally, the spatter emanating from Perry Edwards' head would be undisturbed, as Mays would not have walked through it, instead having turned to hunt Virginia Edwards.

The probability test, of course, does not ask how the judges themselves would resolve the conflicts among such hypotheses. The judicial task on this motion is to determine whether a reasonable jury could, faced with the new evidence, accept and adopt the defense hypothesis and thereby probably acquit. If so, a new trial must be ordered. Plainly Zeigler has carried his burden to warrant that relief.

The Big Picture

The combined impact of the test results obtained from the various pieces of evidence stand larger than the sum of the individual parts. It alters the context of the circumstantial evidence and dubious testimony from compromised witnesses who are, in all likelihood, confederates in the killings. A jury looking at the new evidence would see a markedly different palate of physical evidence that colors the credibility of the State's main witnesses to the point of probably

producing an acquittal. The court below did not integrate and analyze the evidence in this fashion. It did not ask what a reasonable jury probably would do. The answer is that a reasonable jury, given the new evidence in addition to the marginally acceptable case that the State presented in 1976 (as reflected in the original jury's close votes and compromise verdicts), would probably acquit.

C. The Court Below Engaged In Prejudicial Speculation

The court below additionally erred in hearing and relying on an argument made by the State, entirely hypothetically, that evidence of Zeigler's guilt in allegedly beating Mays to death could be derived from untested reddish-brown spots on Zeigler's red outer shirt. In doing so, the court below departed from its own order setting limits on the hearing, as the reddish-brown spots were not subjected to and did not involve the DNA test results. The entire theory spun around those reddish-brown spots is based on speculation that the spots are blood, that they are Mays' blood, and that they were deposited by one event rather than two, or several, events. No substantive evidence, however, provides a basis for the crucial underlying factual assumptions.[22]

At issue is the following conclusion reached by Judge Whitehead:

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[22] Notes made by the State's trial expert, turned over in preparation for the hearing below, show that he made his own observations about the presence of the spots that never made it into evidence. One deduces that those observations were apparently insufficiently inculpatory of Zeigler to prompt testing of the spots either in 1976 or 2001.

> Testimony was given at both 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,[23] 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.[24]

(R 5985.) Judge Whitehead summarized the testimony on which he reached his conclusion about the spots as follows:

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[23] Zeigler has not "claimed" this at all. Defense counsel has hypothesized that, if the reddish-brown stains are in fact Mays' blood, the floor might explain some of them, or they have been aspirated on the shirt during a fight between Zeigler and his unknown assailant (who may have been Mays), or they may be cast off spatter from other person engaged in a beating of Mays, or they may have come about in hospital when the shirt was removed and subject to many exogenous influences. Of course, in the absence of testing to confirm the nature and source of the spots, any explanation is, at best, a guess.

[24] It is unclear how Zeigler should have known to present such "findings" or could have done so. The court had already ruled, at the State's instigation, that evidence unrelated to the DNA testing would not be heard. (R 5944.) The reddish-brown spots had not been tested and the State did not place Zeigler on notice prior to or during the testing of the evidence that the spots would be at issue, so he did not test them. (The State also did not order any tests on the spots, even though it had equal rights under the testing order to designate any part of any evidence for testing.) The State did not ask to designate James as an expert in support of its case until the eve of the evidentiary hearing. Zeigler was left unable to effectively rebut this highly speculative theory, which deprived him of a full and fair opportunity to litigate his motion. It violates Zeigler's rights to due process of law under the Federal and Florida Constitutions, as well as his right to trial by an impartial jury under the Federal and Florida Constitutions, to continue his confinement and sentence of death, despite otherwise showing an entitlement to vacate his convictions, based on the speculative conclusions derived from the spots where those conclusions were never presented to a jury.

> When asked if the spatter on the shirt, other than in the arm and collar areas, could have been deposited while Defendant was not moving, i.e., while he was lying on the floor, James stated that although it was theoretically possible, he didn't see any place on the floor where Defendant would have been able to get hit by the spatter. ([R] 189.) . . . James stated that while castoff blood on the ceiling caused by Mays' beating would not cause all the spatter on Defendant's clothes, close proximity to Mays while he was beaten on the head would account for all of it. ([R] 182, 183, 189, 190.) James opined that there were at least three possible scenarios which would explain all the spatter on Defendant's clothing: blunt force trauma to Mays' head while he was on the floor; expiratory blood; and blood from another confrontation spattered at a previous time. ([R] 183.) James admitted that all of the spatter evidence would be explained if Defendant was the killer. ([R] 149, 150.)

(R 5983.) Judge Whitehead also noted that James stated that he did not know whether the reddish-brown stains were, in fact, bloodstains and, if so, whose blood it was. (R 5982 n.10 [citing R. 130, 164, 165].)

In short, Judge Whitehead reached a conclusion prejudicial to Zeigler based on the opinion of an expert that *if* the stains are blood and *if* that blood came from Mays, then *one* satisfactory explanation – *out of three* possible explanations that assume that the stains are Mays' blood (and the multitude of unconsidered explanations if the stains are something other than blood or Mays' blood) – is that Zeigler killed Mays as Mays laid on the floor. A conclusion drawn on such tenuous inferences and without a sound evidentiary foundation, however, cannot stand. *See, e.g., Autrey v. Carroll*, 240 So. 2d 474, 476 (Fla. 1970) ("There must

be competent, substantial evidence in the record tending to prove each of the basic facts set forth in the hypothetical question."); *Schindler Elev. Corp. v. Carvalho*, 895 So. 2d 1103, 1107-08 (Fla. 4th DCA 2005) (expert testimony inadmissible where no underlying evidence bore out expert's assumption regarding why escalator malfunction occurred); *Ruth v. State*, 610 So. 2d 9, 12 (Fla. 2d DCA 1992) (expert's conclusion that plane was used for smuggling drugs "was pure speculation and, as such, inadmissible"); *D'Avila, Inc. v. Mesa*, 381 So. 2d 1172, 1173 (Fla. 1st DCA 1980) (expert opinion that asthma resulted from unsafe concentration of particles in the air cannot stand where no evidence of air contamination introduced); *see also* Charles W. Ehrhardt, FLORIDA EVIDENCE § 704.1, at 690-91 (2005 ed.) ("Section 90.704 does not change the rule that expert's opinion is inadmissible when it is based on insufficient data. The opinion is excluded as conjecture or speculation.").

The court below apparently felt that it could overlook the absence of underlying facts because it deduced the existence of those facts from the expert's opinion itself. In effect, the court decided the spots must be Mays' blood because the spatter of Mays' blood was one way to explain the existence of the spotting. This method of analysis does not create admissible evidence. A longstanding rule of evidence promulgated by this Court holds:

> It is elementary that the conclusion or the opinion of an expert witness based on facts or inferences not supported

> by the evidence in a cause has no evidential value. It is equally well settled that the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion.

Arkin Construction Co. v. Simpkins, 99 So. 2d 557, 561 (Fla. 1957) (emphasis added).

As noted above, the probability test considers all *admissible* evidence that would be part of a potential new trial. Judge Whitehead's consideration of the State's argument about hypothetical evidence of guilt derived from untested reddish-brown spots on the red shirt thus violated the admissibility criteria and should not have been part of his consideration. Zeigler was prejudiced accordingly and deserves consideration of his motion without the speculative and prejudicial contentions based on the reddish-brown stains.

II. THE COURT BELOW ERRED IN LIMITING THE SCOPE OF EVIDENCE CONSIDERED AT THE EVIDENTIARY HEARING

The Court below independently erred when it stripped Zeigler's motion of all grounds not "directly related" to the DNA test results. As this Court recently ruled in James Hitchcock's case, the examination of guilt-related evidence cannot be so narrowly focused. Zeigler deserves the same consideration given to Hitchcock, given the commonality between their cases. Moreover, the proper

application of the probability test requires a broader view of the evidence than Judge Whitehead allowed.

A. The Court Below Repeated The Error For Which It Was Reversed Recently By This Court In Hitchcock v. State

After the court below decided Zeigler's motion, this Court took an extraordinary step in the case of James Hitchcock and remanded the case for more expansive post-conviction proceedings than had been permitted by the circuit judge – the very same circuit judge who presided over Zeigler's post-conviction proceedings at issue here. In both cases, Judge Whitehead, at the State's urging, limited the scope of the evidentiary hearing on newly discovered evidence. In *Hitchcock* this Court recognized the error of this approach and directed:

> The Court has determined that the circuit court erred in holding that guilt phase issues were procedurally barred. In order for this Court to review the guilt phase issues on the merits, the jurisdiction of the above case is hereby relinquished to the circuit court for an evidentiary hearing and decision on the merits of all guilt phase claims raised by petitioner in petitioner's 3.851 motions. This includes all claims raised as to the guilt phase trial held in 1977 and all newly discovered evidence claims. In contemplation of these claims, the circuit court shall permit the parties to present additional evidence. Any additional evidence shall be considered together with evidence previously presented at the evidentiary hearing held in support of petitioner's claims. Based on this evidence, the circuit court shall prepare and file an order making specific findings on the merits of each guilt phase issue. In respect to petitioner's newly discovered evidence claim concerning witnesses who have come forward to testify that a third person has confessed to the

> crime, the circuit court shall determine and express in the order among the issues determined whether such evidence would be admissible at a new trial applying section 90.804(2)(c), Florida Statutes (statement against interest hearsay exception), and Jones v. State, 709 So. 2d 512 (Fla. 1998). The evidentiary hearing and order should be filed in no more than 180 days and the circuit court shall upon the filing of its order return the case to this Court. Counsel for the parties are hereby directed to file Status Reports with this Court every sixty (60) days as to the progress of the relinquishment proceeding.

Hitchcock v. State, No. SC03-2203 (Fla. May 3, 2005) (order relinquishing jurisdiction over case to Circuit Court, as entered on court's online docket) (emphasis added). Because Zeigler's case is not materially distinguishable from *Hitchcock* on this issue, Zeigler is entitled to the same relief.

In the brief ruling in favor of further proceedings for James Hitchcock, this Court did not explain its rationale for lifting the procedural bars to hearing other evidence of guilt-stage issues, but a review of the briefs and the oral argument transcript suggests that the grounds apply equally to Zeigler. The State primarily relied on a timeliness argument against Hitchcock – that his claims should have been raised in prior post-conviction motions. Hitchcock argued that his time to bring those claims could not expire until the time had run on review for both his convictions and sentence. With intervening relief against his sentence, a final judgment as to convictions and sentence did not occur before 2000. This

preserved and protected all of Hitchcock's prior claims that the circuit court had treated as procedurally barred.

Here, the State's argument to limit the presentation of evidence "not directly related to the DNA test results" rested on the same foundation that this Court rejected in *Hitchcock*. The State objected to hearing evidence that had been part of claims that had been deemed procedurally barred in prior proceedings. The same judge accepted those arguments, to the same detriment of a criminal defendant seeking to demonstrate that newly discovered evidence warranted a new trial.

This Court, as it did in *Hitchcock*, should overturn the circuit court's decision to limit the presentation of evidence erroneously based the procedural bars applied to prior claims in which the evidence first had been raised. Hitchcock and Zeigler are similarly situated in all material respects. As in *Hitchcock*, the finality of Zeigler's convictions and sentence were disrupted and postponed when his sentence was vacated – based, in fact, on the U.S. Supreme Court's *Hitchcock* decision. Zeigler's claims are not properly considered untimely, under the *Hitchcock* rationale because they were originally asserted well before the then-applicable two-year deadline of Rule 3.850 had run, in 1993.

Were this Court to refuse to extend to Zeigler the same treatment as it granted Hitchcock, it would violate Zeigler's rights under the Equal Protection and

Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution and their counterparts in the Florida Constitution. Principles of equal protection forbid the State from applying or enforcing an admittedly valid law with an "unequal hand, so as practically to make . . . discriminations between persons in similar circumstances." *Shock v. Tester*, 405 F.2d 852 (8th Cir. 1969) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)); *see, e.g., State v. Lagares*, 601 A.2d 698, 705 (N.J. 1992) (explaining that the federal Equal Protection Clause "seeks to protect against injustice and against the unequal treatment of those who should be treated alike") (citations and internal quotes omitted). Arbitrary distinctions between similarly situated criminal defendants constitute precisely the type of irrational exercise of governmental power that the Fourteenth Amendment forbids. *See McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987). Moreover, arbitrary distinctions independently offend the principles of reliability in capital adjudication imposed by the Due Process Clause and the Eighth Amendment. *Cf. Robertson v. California*, 498 U.S. 1004, 1007 (1990) (Eighth Amendment safeguards capital defendants against the risk that a death sentence will be imposed arbitrarily and capriciously).

For these reasons, the Court should summarily remand this case to the circuit court for further and additional proceedings, as in *Hitchcock*, based on

consideration of all additional evidence and claims that had been previously declared procedurally barred.

B. The Probability Test Requires The Consideration Of An Integrated Whole Of All Evidence That Would Be Heard At A New Trial To Accomplish Its Purpose Of Preventing Miscarriages Of Justice In Individual Cases

Independent of the detrimental treatment accorded Zeigler relative to the proper treatment accorded James Hitchcock, the court below erred by limiting the presentation of evidence. This Court's precedents applying the probability test and the principles for the consideration of newly discovered evidence clearly establish that, where a defendant has stated a colorable basis to be heard on a claim of newly discovered evidence, that defendant should receive the benefit of consideration of all new evidence that would be heard if a new trial were ordered.

As noted above, the probability standard requires an evaluation of the case as a whole – trial evidence and new. *See, e.g.*, *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994). A court must consider "all newly discovered evidence which would be admissible at trial," *Roberts*, 840 So. 2d at 972, and "the cumulative effect of the post-trial evidence." *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999). A court "cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." *Id.* at 247.

Any question about the necessity of hearing the whole of the evidence was put to rest in *Roberts*. Dealing with the special case of the recantation of

testimony by a prosecution witness, this Court directed that the circuit court first had to decide if the recantation was credible. If it did, this Court said, then evidence from *Brady* claims that had been previously denied as procedurally barred also would have be heard as part of the defendant's motion *See Roberts*, 840 So. 2d at 972. This result only makes sense. If a new trial seems possible based on the newly discovered evidence properly before the case, the court must complete the task of asking what prospects a new trial would hold. It does not do so with eyes averted from evidence that plainly could and would change the outcome of the case. *See Lightbourne*, 742 So. 2d at 247; *see also Rutherford*, 31 Fla. L. Weekly at S62 (refusing to view newly discovered criteria through "narrow lens"); *Swafford v. State*, 828 So. 2d 966, 984-85 (Fla. 2002) (Quince, J., dissenting) (examining "cumulative impact of all of the evidence" and considering defendant's hindered ability to investigate other aspects of case); *Jones II*, 709 So. 2d at 535-36 (Shaw, J., dissenting) (noting that "[t]he case that stands against [defendant] today is a horse of a different color from that which was considered by the jury in 1981. '[F]airness, reasonableness and justice' – and indeed, the integrity of Florida's capital sentencing scheme – dictate that a jury consider the complete case.").

With its ruling limiting the presentation of evidence, the circuit court consciously blinded itself to a wealth of important evidence that the jury did not

hear. As noted above, the DNA test results corroborate Zeigler's contention that Mays must have been one of the perpetrators of the crimes, whose death came at the hands of his confederates. As that finding unwinds the State's case, the additional evidence accelerates its downward spiral. Consider the three testifying "witnesses" who this Court previously identified as important to the case: Felton Thomas, Edward Williams, and Frank Smith. *See Zeigler VII*, 654 So. 2d at 1164. Thomas's testimony tied his own movements closely to Mays; the DNA evidence, by implicating Mays, thus compromises Thomas' credibility and implicates him as a perpetrator or confederate. Johnnie Beverly's testimony also directly impeaches Thomas' elaborate and fanciful story about visiting a citrus grove to fire a grocery bag full of handguns.

Williams – who possessed one of the murder weapons – turned in his clothes to police to "prove" his lack of involvement. Problem is, the pants Williams claimed he wore, according to a laboratory report that Zeigler sought to offer below, show no signs of the contaminants that should have been present in his pocket had he, as he claimed, obtained the murder weapon from Zeigler and placed it in his pocket. (This confirms what a visible inspection of his shoes reveals – no signs of the scuffing in the toe area that would be expected if, as he claimed, he climbed the chain-link fence at the furniture store to "escape" from Zeigler.)

Evidence impeaching this portion of Williams' story forces the jury to scrutinize not only his credibility, but his culpability. After all, the simplest explanation for the absence of the residue in Williams' pants' pocket is that he did not turn over the clothes he wore, and the simplest explanation for his withholding of the clothes, given that he possessed one of the murder weapons, is that his clothes would have tied him to the murders. Ruling out that possibility was so important to the prosecution that it was addressed as the first words out of the State Attorney's mouth when he rose to make his final (rebuttal) closing argument. (TT 2664-65.)

Both Williams' and Smith's credibility come under attack from the deed and mortgage documents. They demonstrate that Williams and another prosecution witness, Mary Stewart, were once married and cohabitated in the residence in which Stewart lived at the time of the crimes and of trial. In fact, Williams had, only two months prior to the murders, quit-claimed his interest in the property to Stewart. Yet throughout pre-trial discovery and trial Williams and Stewart went to lengths to place distance between each other. This certainly suited the State Attorney's case, since Frank Smith, another prosecution witness, was Stewart's son-in-law. The suggestion that Williams was more than a mere friend to either Stewart or Smith, and that Stewart and Williams sought to conceal this

connection, could and would suggest unseemly collaboration among witnesses to the jury.

Three other witnesses identified in Zeigler's motion – Jon Jellison, Kenneth Roach, and Linda Roach – provide a description of events on the night of December 24, 1975 that directly contradicts Thomas and Williams. All three saw vehicles and persons in the furniture store parking lot that suggest the presence of persons other than the ones the State contended entered the Store that night. This supports Zeigler's testimony and undermines the evidentiary basis of the convictions.

The tape recording of a conversation between Jon Jellison and Jack Bachman, an investigator for the State Attorney's Office, has independent significance as well. Bachman is revealed as manipulative in his approach to witnesses. He coaches Jellison on what the "facts" are and urges Jellison to change his testimony to conform accordingly. Since Bachman held a significant role in handling key witnesses such as Williams and Thomas, his conduct in that conversation provides a clear explanation for a jury as to why the witnesses were able to testify as they did.

In sum, Zeigler offered a coherent body of evidence, in addition to the DNA test results, in connection with his motion. The circuit court erred when it ignored that evidence. This provides a second and independent basis for a

summary remand to the circuit court, to direct that court to consider the whole picture of all the new evidence before rendering a judgment on Zeigler's entitlement to a new trial.

III. THE COURT BELOW ERRED IN DENYING ZEIGLER'S REQUEST TO CONDUCT FURTHER TESTS

As noted *supra* Point I.C., the court below prejudicially drew conclusions of guilt adverse to Zeigler from untested reddish-brown spots on his red outer shirt. In response, Zeigler requested the opportunity to test those spots and, to clarify other concerns raised by the court below, to test further in the areas of the shirts which that court found insufficiently conclusive. The court below refused the additional testing request. It erred in doing so.

In post-conviction proceedings, the historical touchstone of due process has been meaningful access to the judicial process. *See State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998); *Murray v. Giarrantano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). In 2001, however, the public policy of this State expanded the focus. The Legislature enacted section 925.11, Fla. Stat., and this Court promulgated Rule 3.853. *See In re Amendment to Fla. R. of Crim. P. Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633 (Fla. 2001) (hereinafter "*In re DNA Testing Amendment*"). "[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred

and DNA testing may resolve the issue.' " *Zollman v. State*, 820 So. 2d 1059, 1061 (Fla. 2d DCA 2002) (quoting *In re DNA Testing Amendment*, 807 So. 2d at 636 (Anstead, J., concurring)); *accord Block v. State*, 885 So. 2d 993, 994 (Fla. 4th DCA 2004).

The concern for averting injustice through DNA testing creates responsibilities within the judicial system that did not previously exist. The courts, every bit as much as the litigants, must ensure that the process thoroughly and completely answers the questions raised by testing. *See Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980) ("A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics."); *accord Scipio v. State*, No. SC04-647, slip op. at 10-11 (Fla. Feb. 16, 2006); *cf. Ballard v. State*, No. SC03-1012, slip op. at 24 (Fla. Feb. 23, 2006) ("it is . . . the duty of the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk"). Notably, a high threshold guards entry into the DNA testing area. This reflects the heavy responsibility that falls upon all involved once that threshold is crossed.[25]

[25] "[D]ue process principles that require a prosecutor to disclose exculpatory evidence to accused defendants before conviction extend appropriately to access to DNA evidence that could determine innocence after conviction." Seth F. Kreimer

The State here proffered a hypothesis about the reddish-brown spots that plainly can be tested and potentially will be resolved through such testing. Zeigler had no reason to test the spots prior to the State's coining of this new "interpretation" of the evidence. It was not presented at trial as a theory of guilt; in fact, the State's expert, Professor MacDonell, steered clear in his testimony of drawing any conclusions from the spotting because he had no information concerning the nature of the spots. Indeed, had the State's theory been raised prior to the testing of the evidence, the defense unquestionably would have tested the spots.

Prior testing from Zeigler's red outer shirt, moreover, produced high quality results, with twelve alleles registering. There is every reason to believe additional tests likewise would yield high quality and conclusive results.

Accordingly, it was incumbent on the court below, as a matter of due process, fundamental fairness, and in the interest of learning and knowing the truth, to authorize the further and additional testing that Zeigler requested.[26] In failing to

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& David Rudovsky, *Double Helix, Double Bind: Factual Innocence And Postconviction DNA* Testing, 151 U. PA. L. REV. 547, 576 (2002).

[26] We do not contend, and the Court should not hold, that a defendant is entitled to limitless testing simply because the threshold of Rule 3.853 has been satisfied. Rather, the issue here is more narrow. The court below accepted argument and testimony on testable material that was not tested and which testing would assist in interpreting the evidence. Moreover, the court below expressed hesitation to accept some of defendant's evidence based on what the court perceived as insufficiently exhaustive testing of the evidence. Rather than allow

follow through on this request, it left unfilled its responsibility to avert injustice and "to ensure the credibility and constitutionality of [Florida's] death penalty process . . . ." *Kenney*, 714 So. 2d at 408. The Court should reverse and order the additional, requested tests.

CONCLUSION

For the reasons stated herein, Zeigler seeks relief based on the arguments raised in Point I of the Argument in the form of reversal of the order of the circuit court, grant of his motion to vacate convictions, and remand for a new trial. Zeigler alternatively seeks relief based on the arguments raised in Points II and III of the Argument in the form of a remand and relinquishment of jurisdiction to the circuit court to conduct further proceedings on Zeigler's motion, with additional DNA testing performed on the evidence and the consideration of the additional evidence and such additional claims as this Court deems consistent with its treatment of the *Hitchcock* case and other relevant precedents.

Dated: February 28, 2006.

Respectfully Submitted,

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the life-and-death decision to stand based in light of such resolvable uncertainties, this Court should recognize the judicial duty to direct a more complete record.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished of the foregoing brief to Kenneth Nunnelley, Esq., Office of the Attorney General, 444 Seabreeze Blvd., 5th Fl., Daytona Beach, Florida 32118, by U.S. MAIL on February 28, 2006.

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John Houston Pope

CERTIFICATE OF COMPLIANCE

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

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John Houston Pope