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

REPLY BRIEF OF APPELLANT

Dennis H. Tracey, III, Esq.
Laurence Robin-Hunter, Esq.
HOGAN & HARTSON, LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000

John Houston Pope, Esq.
(Fla. Bar No. 968595)
EPSTEIN BECKER & GREEN P.C.
250 Park Avenue
New York, NY 10177
(212) 351-4500

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES

FEDERAL CASES

OTHER STATE CASES

ARTICLES & TREATISES

STATUTES & RULES

PRELIMINARY REPLY STATEMENT

When Joseph Heller coined the term "Catch-22," he used it to describe the inanity of military rules that employed circular bureaucratic reasoning to prevent a soldier from ever obtaining relief from the horror of combat. The State's brief here takes Catch-22 to a new level, in which circular reasoning prevents an innocent man from litigating the horror of his unjust imprisonment – under sentence of death – for similarly bureaucratic reasons.

In the State's view, any argument asserted before the jury in 1976, based on the then ambiguous evidence (made so, it should be added, through the State's inadequate use of the tests then available), forecloses relief today, when definite evidence now resolves the ambiguities against the State's arguments of thirty years ago. That is not the law. Newly discovered evidence is not rendered irrelevant because it finally confirms what the defense has argued all along (and the State denied). Indeed, as part of the Catch-22, the State argues here that if the evidence raises a new hypothesis, that's procedurally barred. The law does not countenance such absurdities. The court below made its share of errors, but it did not buy into the State's Catch-22 mentality. Neither should this Court. An examination of the evidence already developed calls for the grant of relief to Zeigler. Further, any weaknesses in the case in the court below may be traced to errors of that court in regulating the scope of the proceedings. If this Court feels

more evidence is needed, it should reverse and remand to ensure the development of the case. Justice should not be bureaucratically curtailed.

REPLY ARGUMENT

I. THE STATE PERPETUATES AND COMPOUNDS THE ERRORS OF THE COURT BELOW IN DENYING THE MOTION TO VACATE CONVICTIONS BASED ON THE RECORD BEFORE IT

The State's brief emphasizes invective over analysis. In the first few pages of arguments that brief tells the Court that Zeigler and his counsel engage in "histrionic" arguments and "a misleading and inaccurate discussion of the law and the facts applicable to the DNA evidence." Without a trace of irony, the brief's pages accuse Zeigler of "*ad hominem* abuse directed toward the collateral proceeding trial judge and the prosecutors."[1] When it comes to analysis, however, the State's brief advances generalities that the record shows are demonstrably wrong when the specifics argued by Zeigler call for this Court to reverse the court below.

Most notably, the State essentially boils its view of the evidence down to "it was a bloody crime scene" and asks this Court to find that the conclusions to be drawn from the evidence are insignificant in light of this fact. Setting aside the

[1] We have examined our initial brief and been unable to find any instances where the character of the judge or opposing counsel has been called into question. It is not *ad hominem* argument to argue, as we have, that the arguments pressed or accepted lacked adequate factual support or resulted in reversible legal error. Indeed, the purpose of an appeal is to identify the reversible errors committed below.

careful analysis posited in Zeigler's brief, the State simply cannot shrug its shoulders in this way. The State's case in 1976 carefully dissected the blood spatter evidence at the crime scene and argued very particular conclusions could be drawn from it. Those conclusions gave the State its tangible corroboration to the testimony of shaky and well impeached witnesses (Felton Thomas, Edward Williams and Frank Jones) whom the jury otherwise likely would have disbelieved. The State told the jury how particular blood types (associated with particular persons) turned up in particular places. The DNA tests results demonstrate that the conclusions that the State advanced simply were factually wrong. The heart of the State's prosecution no longer beats. The State cannot ignore that fact by pretending that the case never had a pulse.

A. The Legal Errors

The State seeks to dismiss most of Zeigler's legal arguments by claiming that the initial brief engages in "a lengthy discussion of foreign precedent" that the State finds unenlightening. Of course, the cases discussed and applied in the initial brief are not foreign in the sense that Zeigler would ask this Court to look to courts in France, North Korea or Iran; rather, the cases come from Louisiana, Georgia, Alabama, and other American jurisdictions that apply the same "reasonable probability" standard that this Court adopted in 1991 – with a full acknowledgement that the standard was widely applied and used by other

jurisdictions. These cases illuminate aspects of the application of the reasonable probability standard which, as the initial brief points out, cases from this court and the lower courts in Florida seem to have endorsed in principle.

The most important aspect of the reasonable probability standard that these "foreign" cases explain is the necessity of evaluating newly discovered evidence from the perspective of the reasonable juror and the error of evaluating the evidence from the judge's own perspective, the so-called thirteenth juror perspective. The State does not contest the indisputable: Judge Whitehead assumed the thirteenth juror perspective and thereby erred as a matter of law in his evaluation of the DNA evidence.

The State also refuses to acknowledge the reasonable juror perspective in its brief. Notable in this respect is the State's contention that a highly deferential standard of review applies here. This Court has applied deferential review to the threshold determination that a lower court must make whether a reasonable juror *could* reasonably believe the proffered evidence. *See, e.g., Melendez v. State*, 718 So. 2d 746, 747-48 (Fla. 1998); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). That part of the reasonable probability test is not at issue here, however, because the court below did not reject any proffered evidence on credibility grounds. The key issue here, the likelihood that the new evidence would impact the verdict that a reasonable jury would reach, is a legal

determination that employs an objective perspective. As with other objective conclusions of law (or mixed questions of law and fact) reached in a trial court, appellate review of such conclusions come before this Court for de novo review. *See, e.g.*, *Raleigh v. State*, 932 So. 2d 1054, 1062-63 (Fla. 2006) (de novo review required of performance and prejudice prongs of ineffective assistance of counsel claim); *Stephens v. State*, 748 So. 2d 1028, 1034 & n.4 (Fla. 1999) (criticizing *Grossman v. State*, 708 So. 2d 249, 250 (Fla. 1997), for applying *Blanco* to prejudice prong of ineffective assistance of counsel claim); *see also Johnson v. State*, 921 So. 2d 490, 507 (Fla. 2005) (application of law to facts in *Brady* claims reviewed de novo); *State v. Comey*, 845 So. 2d 120, 133-34 (Fla. 2003) (mixed question of law and fact subject to de novo review); *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002) (applying de novo review to motion for judgment of acquittal because it uses an objective standard); *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir. 1999) (for *Brady* errors, appellate court "review[s] de novo the [lower] court's determination as to whether a reasonable probability exists that the suppressed evidence would have change the outcome" of the trial).

The State defends the legal correctness of the order below based on the lower court's accurate recitation of the certain of the applicable legal standards. Stating the correct legal standard is not enough – the court also had to apply that standard. It did not. Instead, Judge Whitehead applied a higher threshold, the

conclusiveness test, to reject Zeigler's application for a new trial. The use of such terms as "conclusively establish" (R 5984) and "exonerate" (R 5977, 5986) to describe his evaluation of the evidence says as much.[2] Moreover, we note that the State does not contest the failure of the court below to calibrate its examination of the evidence in accord with the relative strength of the State's case. As Zeigler noted in the initial brief, many factors indicate the jury's belief that this case was close, from its initial 6-to-6 vote, its compromise verdict that found Zeigler guilty of second-degree murder for the murders of the Edwards,[3] and its recommendation of life in circumstances that this Court twice held cannot be reasonably be based on factors other than concerns over the strength of the evidence.

The legal errors are pervasive and call for reversal of the order below by this Court. Zeigler deserves to have his evidence evaluated in the proper legal framework under the proper legal standard.

---

[2] As the U.S. Court of Appeals for the Fifth Circuit recently held, "[s]omething is 'conclusive' when, by virtue of 'reason,' it 'put[s] an end to debate or question,' usually because of its 'irrefutability.'" *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 592 (5th Cir. 2006) (quoting Webster's Third New Int'l Dictionary Unabridged (2002)) (construing the term "conclusively established" in elections statute). That is a far higher threshold that the probability standard sets.

[3] The State's Attorney argued strenuously at trial that "[i]f [this isn't] a first degree murder case, it's no case at all." (TT 2539) The jury answered him with its compromise, split verdicts.

B. The Factual Errors

The State's argument that Zeigler has changed his theory of the case does not withstand scrutiny. Of course, as new evidence has emerged, the views of the parties have changed. But Zeigler's sworn testimony – given in 1976 – is as true today as it was then. The State, on the other hand, has reversed itself many times, including its abandonment of the fictitious "headlock" beating of Perry Edwards.

Zeigler's request to the court below for permission to conduct DNA testing – the basis of the State's argument – followed every punctilio of truth and accuracy. Zeigler did not know, before testing the evidence, whether the blood on various pieces of clothing belonged to the persons known to have bled at the scene of the crime or other persons not yet identified. The evidence handed to him in 1976 by the State's investigators defined the bloodstains only at the level of the four major blood types, and confirmed that two of those four types were present. That left enormous room for the possibility of other contributors.

As Zeigler testified at trial, he fought with someone, but did not know the identity of the person. Zeigler has concluded, by the facts presented to him before and after the DNA testing, that the person with whom he struggled was Charlie Mays. And, as defense counsel hypothesized at trial, the evidence then available made Mays the most likely source of the blood on Zeigler's shirt, in the

course of the struggle and in the course of crawling across the floor of the furniture store. These conclusions, drawn as they were on the state of the evidence before Zeigler and its counsel at various points in time, do not diminish or change the honesty of the statements that Zeigler made to the court below in seeking DNA testing: the blood stains could have been from persons as yet unidentified.[4]

The bottom line, however, is that Zeigler stands by and for thirty years has stood by his trial testimony. The DNA test results corroborate him. In contrast, those test results undermine the central premises of the State's case. The arguments in the State's brief try to avoid this inescapable fact by changing – as they say, *post hoc* – the State's theory of the case.

Thirty years after the State's Attorney himself closed the trial against Zeigler with dramatic accusatory questioning – mimicking a headlock and demanding that Zeigler admit he beat Perry Edwards in that headlock – and told the jury that they could convict Zeigler because Perry Edwards' Type A blood stained Zeigler's shirt, the DNA evidence says that the State's Attorney's belief in that theory – and the jury's – does not withstand scientific scrutiny. The State's brief argues that the State's Attorney had, in fact, argued that the blood on the shirt

[4] Of course, none of this frolic and detour changes the facts underlying the decision by Judge Whitehead to treat this case as one proceeding under Fla. R. Cr. P. 3.853. The request for Rule 3.853 treatment proceeded on the basis of the test results already obtained. Judge Whitehead agreed that those test results met the Rule's standards.

sourced to Mays. We urge the Court to read the trial record citations (TT 2559-60[5]) the State offers as proof of its argument. Those pages concern the State's argument at trial that Zeigler was sprayed in the face with blood when he allegedly beat Mays as Mays laid on the floor. That would explain spatter evidence on Zeigler's shirt, but not the contact, or saturation, stain that is at issue. In fact, if (as the experts testified) Mays was laying on the floor when he was beaten, there is no inculpatory evidence to explain how Zeigler obtained the contact stains. The headlock hold that allegedly explained the contact stains under Zeigler's arm did not occur with Mays. How did the Mays' blood get on Zeigler's shirt under his arm? The defense explanation from trial – from contact with Mays' body while Zeigler was crawling on the floor after Mays' death – explains the stain, and it is exculpatory, not inculpatory.

The State cannot seriously contend that the Court should ignore or diminish the State's Attorney's dramatic presentation because it was, in the State's terms, only one question. (Ans. Br. at 18 n.13.) It occurred on the last day of testimony[6] and was calculated to impact the jury dramatically. The State accepts

---

[5] The State also cites page 250 of the trial transcript, but the citation does not make any sense. It is proffered testimony that was heard outside of the presence of the jury (see TT 222 [jury excused], 257 [jury returns]) and it merely describes the cause of death for Mays and the Edwards.

[6] The transcript for June 29, 1976, starts on TT 2315. Zeigler testifies on TT 2335 through 2441; the offending questioning occurs on TT 2425. Summations

the Edwards' headlock "argument would be a wholly legitimate inference from the evidence presented that no way misstated the facts or overplayed the evidence." (*Id*. at 29.) How, then, does the State logically conclude that the jury ignored this explicit accusatory question, followed a day later by the State's Attorney's statements in closing that "[y]ou will see a soaked area of blood under the left armpit of those shirts" which "could have gotten there only by [Zeigler] having someone in his arm who was Type A blood. . . . Who was bleeding Type A blood?" (TT 2553) Especially when the State's Attorney subsequently separately addressed the method by which Mays allegedly was killed?[7] (TT 2559-60) Rewriting history will not do. The State's Attorney believed that Perry Edwards was beaten by Zeigler in a headlock and that the bloodstains on the shirts traced to that event. He communicated his belief to the jury. However reasonable it may have seemed at the time, it no longer is an acceptable conclusion from the evidence. As noted in the initial brief, this contention was damning to Zeigler, in the extreme. Zeigler has never pretended that there is a set of facts under which he is innocent and the blood under the underarm of his shirts belongs to Perry Edwards. Obliging the jury to reject that contention, as the DNA evidence does, significantly improves Zeigler's likelihood of acquittal.

---

commenced on June 30, 1976; the transcript for that date starts on TT 2518, with the State's Attorney's First Closing Argument commencing on TT 2537.

[7] This followed the structure and explanation of events set forth in the State's Attorney's opening statement. (TT 20-21, 26)

In a similar vein, thirty years after the State backhanded the defense contention that pervasive, saturating Type A blood stains on both sides of Charlie Mays' pants reflected Mays' role as a perpetrator in the murder of Perry Edwards, the DNA evidence says the State's (and jury's) rejection of the defense argument, built on ambiguous facts, does not follow the science. The State's argument here deserves repetition and dissection. The State says:

> [T]he DNA testing shows nothing other than the rather unremarkable fact that blood from one murder victim is present on the clothing of another – considering the bodies were found in close proximity, and that the floor between the bodies was "littered with the [blood] spatter" produced by the two killings. It should come as no surprise that Edwards' blood was on Mays.

(Ans. Br. at 30) Unfortunately for the State, the expert testimony presented by it at trial forecloses this cavalier approach to the evidence. Close proximity? The bodies were separated by approximately fifteen feet ("five meters") and many fixtures and obstacles. (TT 264) Blood spatter? The State's expert testified that the spatter from Edwards had dried before Mays died. (TT 985-87) He could tell as much because the respective spatter overlaid and did not mix. (TT 986) Further, Mays' pants have contact, saturation stains front and back; they did not come from spatters. (R 95-99) Mays' body wasn't flipped – how could he get such stains casually, as the State suggests? As noted in the initial brief, the absence of any bloody footprints by Mays on the floor (TT 1046, 1056-57)

forecloses the hypothesis of the court below that Mays stepped in and out of a pool of Perry Edwards' blood. Unremarkable? The State's expert at trial admitted he could not explain the large stain on the front of Mays' pants (TT 1075) that it is now known to be Edwards' blood (R 34-36), and the State's expert at trial refused to attribute it to blood transferred from the floor. (TT 1075)

Mays did not obtain bloodstains from Perry Edwards innocently. The most plausible hypothesis to explain the evidence is that Mays knelt on Edwards' chest, from which blood was freely flowing, while beating or shooting Edwards on the floor.[8] If Mays thereafter stood up and pursued Virginia Edwards in the front of the store, Mays would have stepped out of the blood pool around Perry Edwards' head and on to the carpeting, which would explain the cat hair and carpet fibers lodged in the dried blood in Mays' shoes and would explain why sufficient excess blood was removed from Mays' shoes that he did not leave any identifiable footprints later when he walked on the linoleum tile. The State cannot offer any explanation which accounts for all of the observed physical facts at the crime scene.

Once the evidence inculpates Mays, the State's case crumbles at an accelerating pace. Felton Thomas cannot be telling the truth if Charlie Mays is a

[8] At his pretrial deposition, the State's expert conceded that the stains on Mays' pants could have been the result of Mays kneeling in a bloody area. (R 6100-02)

perpetrator. Edward Williams obviously invented testimony about observing bloodstains on Zeigler that were not present because Zeigler did not kill Perry Edwards.

The bottom line on the facts is that thirty years ago a close case involved much evidence that could be read either as supporting the defense or the prosecution. Dubious witnesses carried the day for the State, since the physical evidence left their testimony unchallenged. Now we know better. DNA test results clarify the ambiguities in Zeigler's favor, with the consequential effect of impeaching those dubious witnesses. A reasonable jury likely would acquit Zeigler when the DNA test results are added to the trial evidence.

C. The Reliance On Prejudicial Speculation

The State's brief does not refute with Zeigler's argument about the conclusion about the reddish-brown spots on Zeigler's outer shirt that Judge Whitehead selectively adopted from James' testimony. It is inadequate to argue, as the State does, that the Court "accurately recounts" James' testimony on the subject. As Zeigler argued in the initial brief, and the State does not deny, the caveats that James placed on his opinion render it legally insufficient to support the conclusion that the court below adopted.[9] It was reversible error for the court

[9] The State tries to equate the speculation inherent in the conclusion by James adopted by the court below with the hypotheses that Zeigler offers with respect to the DNA test results. The two cannot be compared because the DNA test results

below to base any part of its decision on the speculative and insufficient testimony that the State elicited from James on this subject.

II. THE STATE FAILS IN ITS ATTEMPT TO JUSTIFY THE LIMITATIONS PLACED ON THE SCOPE OF EVIDENCE CONSIDERED AT THE EVIDENTIARY HEARING BY THE COURT BELOW

The State invited and led the court below into error by placing unjustified and inconsistently enforced limitations on the scope of the evidence permitted at the evidentiary hearing.[10] The State contends in its brief that the limitations simply followed binding precedent. The cases suggest otherwise. In contrast to the State's contention that *Jones v. State*, 709 So. 2d 512 (Fla. 1998), sets a hard and firm rule, Zeigler directs the Court to its later decisions in *Rutherford v. State*, 926 So. 2d 1100, 1111-12 (Fla. 2006), *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002), and *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999), all of which encourage a broader perspective in which all newly discovered

---

present an independent factual source from which to draw conclusions. The conclusion by James is speculative and legally insufficient because it has not independent factual basis, but rather assumes a portion of its conclusion (that all of the untested reddish brown spots on Zeigler's outer shirt are Mays' blood) in order to reach the conclusion (that if all of the spots are blood and if that blood all is Mays' blood, then they are consistent with the conclusion that Zeigler's participation in a certain pattern of beating). Like Catch-22, it is circular and therefore adds nothing probative.

[10] The State's eliciting of testimony from James concerning the reddish-brown spots on Zeigler's shirt cannot be squared with the limitation placed on the hearing by the court below that the presentation of evidence would be limited to evidence related to the DNA test results. No DNA tests were conducted on those spots. The court below thus allowed the State to go outside of the limitations of its order but held Zeigler within its confines.

evidence is considered together when a *prima facie* case is established with regard to the most recently discovered of the evidence.[11] (These cases are discussed in more detail in the initial brief.)

Zeigler urges the Court to clarify this area of the law and adopt a commonsense approach that considers all admissible evidence discovered since trial as a whole together when determining if the threshold for warranting a new trial has been reached. After all, if a new trial is ordered, all of that evidence will be part of the proceeding. It makes little sense to arbitrarily exclude some portion of it simply because it came to light earlier and was not, on its own, sufficient to merit relief at that earlier date.[12]

The State's approach leads to absurd results. For example, the State complains that Zeigler's reference to the "unscuffed shoes" of Edward Williams

---

[11] This Court's summary order in *Hitchcock* is another such case. The State's response to Zeigler's plea for treatment on par with James Hitchcock asserts, in conclusory fashion, that Hitchcock is differently situated. That assertion does not clash in any respect with Zeigler's explanation, in his initial brief, of the material similarities that make the two cases indistinguishable for these purposes. The State seems to be asking for this Court to bail it out without stating why. The State persuaded the same trial judge to make the same mistake in two similar cases. Faced with the unfairness of perpetuating that mistake on Zeigler when Hitchcock received relief, the State merely repeats the unsuccessful arguments it raised before this Court in *Hitchcock.* Zeigler deserves equal treatment.

[12] Or, as in Zeigler's case, the newly discovered evidence came to light when the threshold for relief was set much higher. *See, e.g., Zeigler v. State*, 494 So. 2d 957, 959 (Fla. 1986) (denying writ of error coram nobis); *id*. at 960 (Barkett, J., dissenting) (arguing to grant writ because "newly discovered evidence" raised in it should be subjected to "probability test" rather than "conclusiveness test" that this Court rejected five years later in *Jones*).

raises a new, procedurally barred claim that must be excluded. In fact, the point is nothing more than a legitimate comment on the evidence admitted at trial (the shoes themselves were an exhibit) that integrates with the remaining evidence. Further, the arbitrary exclusion of evidence raised in previously decided post-conviction claims allows the State to escape the import of evidence that has been discovered since trial. For example, the State's argument about further testing of Zeigler's outer shirt includes a citation to the trial testimony of Chief Robert Thompson about "dried and damp blood" on Zeigler's shirt. (TT 383) One of the items that Zeigler seeks to add to his presentation, however, is Chief Thompson's suppressed report in which he describes all of the blood on Zeigler's shirt as dried. (R 329-42) How fair is the process if the State can hide behind "facts" known to be in dispute, or contradicted by other evidence, while ignoring the contrary evidence?

Zeigler submits that Rule 3.853 proceedings particularly lend themselves to this more expansive view of the evidence to be considered. The motivating factors that created Fla. Stat. § 925.11 and Rule 3.853, and led to the recent modifications to remove any deadline date for testing, suggest that the Legislature and this Court embrace the search for truth and justice as the highest value. The finality concerns that underpin procedural bar rules have been expressly overruled when advanced scientific techniques can shed new light on the

validity of convictions. Imposing a set of blinders on the Court's examination under that new light does not advance the policies of the Rule. To the extent that this Court's past precedents might be read more restrictively than we have described herein, the Court should modify them for Rule 3.853 proceedings, as here, and endorse the search of truth and justice.

III. ZEIGLER'S REQUEST TO CONDUCT FURTHER TESTS IS PROPERLY BEFORE THIS COURT AND SHOULD HAVE BEEN GRANTED

The State denies that this issue can be decided on this appeal and contends that Zeigler should have anticipated the need to conduct the testing. On both counts the State is wrong.

A. Zeigler Has Not Forfeited Appeal Of His Testing Request

The State argues that this Court should not decide Zeigler's entitlement to additional testing.[13] The request for further testing was set forth in a separate motion from Zeigler's motion for rehearing, although the two motions are expressly linked to each other. A separate order of denial was not entered for the motion for further testing. The State asserts this appeal forfeited the right to appeal the testing motion because the failure of the court below to enter a separate order leaves the motion undecided and therefore not ripe for appeal.

[13] Of course, if the Court grants relief and remands for further proceedings for other reasons, the grant of relief on this issue should be uncontroversial. Additional testing can only enhance the quality of additional proceedings and further the search for truth and justice.

The State's argument ignores the doctrine of ruling by implication, which this Court expressly embraced in *City of Plant City v. Mann*, 400 So. 2d 952 (Fla. 1981):

> If the relief sought by a pending motion is inconsistent with the final judgment of the Court, the motion is deemed denied. On the other hand, if the relief sought by the pending motion is consistent with the Court's final judgment, the motion may be deemed to have been impliedly granted.

Id. at 954. "While it is certainly the better practice to specifically rule on all pending motions, the determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with the granting of the relief sought." *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 277 (6th Cir. 1966).[14]

It can hardly be disputed that a ruling by the court below granting the motion for further testing would be inconsistent with its order denying Zeigler's motion for rehearing. One express ground of the motion for rehearing called for the court to order the testing and then consider the results as part of rehearing. The court below obviously believed that it clearly expressed its view on granting

[14] This rule is widely followed. *See, e.g., Frase v. Barnhart*, 840 A.2d 114, 116 (Md. 2003); *Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635, 638 (Colo. 1987); 60 C.J.S. *Motion & Orders* § 38, at 46 (2002) ("entry of final judgment in a cause is an effective overruling of all motions pending in the case"); *see also Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994); *Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co.*, 753 F.2d 66, 68 n.5 (8th Cir. 1985); *Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 939 n.8 (4th Cir. 1980); *Mosier v. Federal Res. Bank of N.Y.*, 132 F.2d 710, 712 (2d Cir. 1942).

further testing when it refused to grant rehearing. Indeed, the order denying rehearing expressly advises Zeigler to file his notice of appeal within thirty days. (R 6118) The testing motion, then, is ripe for consideration by the Court.

B. The State's Argument Against Further Testing Perpetuates Injustice

The justification for granting Zeigler's motion for additional testing, of course, is two-fold. The first is to end the uncertainty about the evidence that has not been tested, or about which doubt has been cast based on the nits that have picked at the tests that have already been conducted. The second is related – to end the game-playing approach to this evidence that the State seems to prefer.

The one area in which new tests should be conducted involves the reddish-brown spots on Zeigler's outer shirt. The State asserts that these spots were extensively discussed at trial and should have alerted Zeigler to the need to test in advance of the evidentiary hearing. Of the twenty-five transcript pages to which the State cites, however, only three *might* have relevance. Seventeen pages (TT 112-13, 114, 121, 123-35) involve the testimony of Lynn Ellen Churchill, an emergency room nurse, about the handling of Zeigler's clothes in the ER. Three pages (TT 199, 202, 205) continue the chain of custody testimony with Deputy Harry Park, who collected the clothes from Nurse Churchill. One page (TT 383) reflects Chief Thompson's observations of the blood on the clothes when he

arrived at the scene. One other page (TT 1456) records the testimony of FBI agent William Gavin about the cuttings he took from the shirts.

Not one of these twenty-two pages mentions the spotting in question. Interestingly, Nurse Churchill testified that the blood was dry when she cut the clothes from Zeigler's body in the ER (TT 128-29) while Deputy Park testified that the clothes were wet with blood and needed to be hung out to dry when he subsequently received them (TT 205). These facts certainly give pause to any conclusion about the source of the spotting on the clothes, even if it is blood.

That conclusion is the one that counts and the one witness to testify about the spotting, Professor Herbert MacDonell, described them as "dark stains" (TT 1029) on which he had "not conducted chemical tests to determine if these are blood." (TT 1030) He pointed to areas that had been cut to test for the presence of blood (TT 1030), but apparently he was not referring to the spots at issue here since it is conceded by all parties that they have not been tested. How this limited testimony placed Zeigler on notice that he should test these previously untested spots is unclear, to say the least.

Moreover, the order that authorized testing was bilateral. The State had as much right as Zeigler to designate items for testing and to direct the selection of parts of the clothing for testing. If, as the State contends, this evidence is so important – but has never been proven to be blood – why didn't the State

conduct testing on those spots when it was specifically invited to make its own designations for DNA testing? Did the State avoid conducting the tests precisely because it knows they will not yield any supportive data? Is the State exploiting an uncertainty that it knows (or at least suspects) will not assist it when certainty is obtained? The fact that the State opposes additional testing when Zeigler wants it both answers the accusation against Zeigler and raises these questions about the State's intentions.

The notion of treating DNA testing like a game, in which a defendant's choices are picked apart by the State without regard for the truth that might be uncovered by a more cooperative and productive approach toward the evidence, cannot be squared with the revolution that the Legislature and this Court unleashed with Section 925.11 and Rule 3.853. Those legal reforms were not implemented as window-dressing. This State faced up to a serious injustice, the demonstrated presence of innocent men sitting on death row and in other cellblocks. All of the branches of government have joined together to create an infrastructure designed to do what we can to prevent and remedy this injustice. The State's approach is repugnant to this unified effort.

CONCLUSION

For the reasons stated herein and in his initial brief, Zeigler seeks relief from this Court reversing the judgment of the court below, as more fully detailed in the conclusion of his initial brief.

Dated: September 25, 2006.

Respectfully Submitted,

John Houston Pope, Esq.
Fla. Bar No. 968595
EPSTEIN BECKER & GREEN, P.C.
250 Park Ave.
New York, New York 10177
(212) 351 – 4500
FAX: (212) 878 – 8741

- and -

Dennis H. Tracey, III, Esq.
Laurence Robin-Hunter, Esq.
HOGAN & HARTSON, L.L.P.
875 Third Ave.
New York, New York 10022
(212) 918 – 3000
FAX: (212) 918 – 3100

Attorneys for Appellant

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 September 25, 2006.

_____
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.

_____
John Houston Pope