IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-696

WILLIAM THOMAS ZEIGLER, JR.

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

THE FACTUAL AND PROCEDURAL HISTORY

In his last appearance before this Court, the factual and procedural history was summarized in the following way:[1]

> "In 1976, Zeigler was convicted of the first-degree murders of Eunice Zeigler, his wife, and Charlie Mays, a friend, and the second-degree murders of his in-laws, Perry and Virginia Edwards." *Zeigler v. State*, 654 So. 2d 1162, 1163 (Fla. 1995). In Zeigler's 1995 postconviction appeal, this Court explained the procedural history of Zeigler's numerous state proceedings as follows:
>
> > The trial judge overrode the jury's recommendation of life imprisonment and imposed two death sentences. [This Court] in *Zeigler v. State*, 402 So. 2d 365 (Fla. 1981), *cert. denied*, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982), ... affirmed Zeigler's convictions and sentences of death.
>
> Zeigler subsequently pursued postconviction relief. *See Zeigler v. State*, 452 So. 2d 537 (Fla. 1984) (remanded for an evidentiary hearing on claim of judicial bias); *Zeigler v. State*, 473 So. 2d 203 (Fla. 1985) (affirmed trial court's denial of judicial bias claim); *State v. Zeigler*, 494 So. 2d 957 (Fla. 1986) (reversed trial court's order which had granted an evidentiary hearing on claim that the trial judge did not consider nonstatutory mitigating circumstances). Zeigler then petitioned this Court for habeas corpus relief. We ordered resentencing, holding that the trial judge did not realize that the nonstatutory mitigating evidence was pertinent. *Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988).
>
> Resentencing occurred in August of 1989. The trial court (presided over by a different judge because the original trial judge was unavailable) again overrode the jury's recommendation of life and imposed two

[1] Zeigler's brief contains no citation at all to any of Zeigler's prior decisions.

death sentences. We affirmed the sentences on appeal. *Zeigler v. State,* 580 So. 2d 127 (Fla. 1991), *cert. denied,* 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991). Thereafter, we affirmed the denial of a postconviction motion which had been pending during resentencing. *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993), *cert. denied*, 513 U.S. 830, 115 S.Ct. 104, 130 L.Ed.2d 52 (1994). This motion only addressed issues arising out of the conviction phase.

Zeigler then filed [another] postconviction motion seeking to vacate the death sentences imposed on resentencing....

At the hearing on the 3.850 motion, Zeigler also filed a motion for release of evidence and appointment of an expert, which requested that the bloodstain evidence introduced at his trial be re-examined utilizing modern DNA testing procedures.

Id. In 1995, we affirmed the trial court's denial of Zeigler's postconviction motion as well as the trial court's decision that Zeigler's DNA claim was procedurally barred. *Id*. at 1164-65.

However, in 2001, the trial court granted Zeigler's motion for release of evidence for DNA testing. Zeigler's motion had stated a desire to test the evidence for clemency proceeding purposes. In 2003, after the testing was completed, Zeigler filed a motion to authorize (*nunc pro tunc*) DNA testing and the instant motion to vacate convictions based upon newly available evidence. In April 2005, after holding a two-day evidentiary hearing, the trial court denied Zeigler's motion, concluding 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."**

Although this Court has set forth the facts of this case in prior opinions, we restate the following facts from the direct appeal that are relevant to our evaluation of Zeigler's newly discovered evidence claim:

> 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 *128 defendant around 7:30 P.M. The store was closed around 6:25 P.M.

Mays left his home around 6:30 P.M. He went to an Oakland beer joint and saw a friend, Felton Thomas, who accompanied Mays to the Zeigler Furniture Store.

The theory of the state's case is that defendant had two appointments on Christmas Eve, one with Mays and one with Edward Williams. Prior to these appointments he took his wife to the store and in some manner arranged for his parents-in-law to go there. He killed his wife, Eunice, quickly,

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

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

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

Defendant was successful in getting Williams partially inside the back hallway. Defendant put a gun to Williams' chest and pulled the trigger three times, but the gun did not fire. Williams said, “For God's sake, Tommy, don't kill me,” and ran outside, refusing to return to the store. The state says that the empty gun was as much a surprise to defendant as it was to Williams. The state

> says that in all probability defendant thought he was holding the gun that Mays had shot in the orange grove and which defendant told Mays to reload.
>
> When he was unable to get Williams into the store, the defendant became desperate and conceived the idea that he would appear uninvolved if he happened to be one of the victims. Accordingly, he shot himself and then called Judge Vandeventer's residence where he knew the police officers would be.
>
> The defendant denies that he had any contact with Smith or purchased any guns from him. He says that the increase in the amount of the insurance policy [on his wife's life] was pursuant to advice on an estate plan. Defendant says that his wife, Perry, and Virginia were killed during the course of a robbery; that Mays was involved in the robbery but was killed by his confederates; that he was shot by the burglars and left to die. The jury obviously did not believe the testimony of the defendant. To have believed his story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams and would have had to have found no significance in the other substantial evidence.

Zeigler v. State, 402 So. 2d 365, 367-68 (Fla. 1981).

Zeigler v. State, 967 So. 2d 125, 126-129 (Fla. 2007). (emphasis added).

THE DISPOSITION OF THE EARLIER DNA CLAIMS

In resolving Zeigler's previous DNA/newly discovered evidence claims, this Court said:

> We find that the trial court applied the proper standard for the second prong of the newly discovered evidence test, the only prong contested in this case. Applying the proper legal standard, the trial court

listed the following findings in its thorough order denying relief:

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

contradicted this testimony.[2]

> Patterns made by smeared blood were present on Mays' sweatshirt and on top of those patterns were stains from force consistent with a beating. The blood patterns had dried for fifteen to thirty minutes before the spatter landed on top of them. Testimony at the evidentiary hearing indicated that while the bloodstains could have been transferred from Mays' sweatshirt to Defendant's shirt, merely crawling over the shirt, as Defendant claims he did, would not be sufficient; instead, Defendant would have to lie across Mays' torso in order to achieve those particular stains.
>
> **Finally, the fact that only Mays' blood was found on the left arm of Defendant's t-shirt does not exonerate Defendant or even tend to exonerate Defendant.** As Weiss stated at the evidentiary hearing, it was possible to miss blood on the shirt, due to deterioration and improper storage. It was also possible to have a mixed stain, from multiple contributors, in the same area. **Thus, the presence of Mays' blood, and the absence of Perry's, on Defendant's t-shirt does not conclusively show that Defendant did not hold Perry in a headlock and beat him.**

The trial court's findings of fact are supported by competent, substantial evidence in the record, particularly the evidentiary hearing testimony of the blood stain expert and the DNA testing analyst as well as the 1976 trial testimony of Zeigler and the original blood stain expert. **In fact, the bloodstain expert who testified during the evidentiary hearing after examining the evidence presented at the 1976 trial indicated that all of the blood spatter evidence on Zeigler's clothing would be explained if Zeigler was the perpetrator. Moreover, in 1995 this Court came to the same conclusion as the trial court while**

[2] Unsurprisingly, the blood on the back of Zeigler’s shirt is regarded by the defense as irrelevant to anything. That position is incredible.

> **assuming that the DNA evidence would prove more favorable to Zeigler than it actually did.** [FN2] This Court stated "that even if the DNA results comported with the scenario most favorable to Zeigler, he still would not have been able to show that the evidence would have probably produced an acquittal." *Zeigler v. State*, 654 So. 2d at 1164. We explained that "[t]he State's case was not entirely circumstantial, and in order to accept Zeigler's theory of the case, the jury would have had to disbelieve at least three witnesses who testified at the trial." *Id*. Given the above, we affirm the trial court's order denying relief.
>
> > [FN2] **Zeigler originally argued "that DNA testing may rebut the State's hypothesis that the type 'A' bloodstains found on Zeigler's clothing originated from a struggle with Mays or [Perry] Edwards." *Zeigler* 654 So. 2d at 1163-64. However, the DNA testing of portions of Zeigler's shirts revealed genetic markers consistent with Mays. Thus, the DNA results did not rebut a struggle with Mays.**[3]

Zeigler v. State, 967 So. 2d 125, 130-131 (Fla. 2007). (emphasis added).

THE EVIDENTIARY HEARING FACTS

An evidentiary hearing was held December 1, 2011. (V4, R656-735).[4]

Zeigler called one witness, Paul Kish, a forensic

[3] This Court has already recognized that Zeigler's theory shifts to "comport" with the evidence. Inculpatory evidence is merely explained away or ignored, no matter how implausible those "theories," like this example, may be.

[4] Citations to the record on appeal are by volume number, followed by the Bates stamp number, *i.e.*, V _, R _.

consultant and blood stain pattern analyst.[5] (V4, R666). In addition to teaching classes on bloodstain pattern analysis, Kish has worked with the Laboratory of Forensic Science in Corning, New York, an independent consulting laboratory, and, in 2000, formed his own forensic consulting business. (V4, R668, 670, 671, 675). Kish has contracted with government forensic laboratories but was not hired as a full-time employee.[6] (V4, R675-76).

In February 2011, Kish reviewed photographs, forensic reports, and prior transcripts from Zeigler's case. He examined physical evidence that included the clothing Zeigler was wearing at the time of the murders. (V4, R679, 680, 681-82). Kish independently selected areas of the clothing that should be further tested. (V4, R698). In Kish's opinion, various stains on Zeigler's clothing should have been subjected to further DNA testing in order to link Zeigler "to the deaths of ... Perry Edwards and ... the other deaths through bloodstain pattern

[5] Kish earned a Bachelor of Science Degree in Criminal Justice followed by a Master of Science Degree in Education and additional credit hours in various sciences and math. He completed two 40-hour bloodstain pattern analysis classes and attended bloodstain pattern analysis conferences. He also co-authored several laboratory manuals on bloodstain pattern analysis and forensic science. (V4, R667, 669-70).

[6] The trial court qualified Kish as an expert in bloodstain pattern analysis. (V4, R678). He is not, and did not purport to be, a "DNA expert."

analysis.” (V4, R680). In Kish’s opinion, the “spatter stains, and other type of stain patterns which could be produced during a violent event, which, if Mr. Zeigler was lying in indicating that he was not near these people during the events, then the bloodstain patterns that I am locating would conflict with what he has stated happened.” (V4, R680).

Subsequent to his examination of Zeigler’s clothing, Kish prepared a report in August 2011. (V4, R683). Kish identified several areas of Zeigler’s shirt in which he recommended further DNA testing: 1) left sleeve; 2) spatter stains on the front; 3) right front shoulder; and 4) right cuff. (V4, R686, 687, 688, 703).

In Kish’s opinion, further DNA testing on the left sleeve “ ... on this particular region would be the result of looking at the scenario of Mr. Zeigler potentially having someone in a headlock and having blood saturate on to the arm region.” Further testing **might** “identify the source of that particular blood.” (V4, R686). Kish said the **untested** spatter stains on the front of Zeigler’s shirt were the result of “some type of force being applied to the blood ... an impact or an expiration.” Kish said, “Looking at these stains in and of themselves, it’s not possible to determine whose blood it actually is on the garment, therefore, by identifying the DNA of whose blood that actually is, then it would place that garment in close proximity to that

particular person while their blood was airborne." (V4, R687). Kish said that by examining the shoulder region, "we can hopefully obtain a representative sampling of the entire garment of the spatter-type stains ... because we have multiple victims that could have potentially produced blood spatter." (V4, R688). Kish said the blood spatters on the right cuff "of an accused's shirt can be significant ... it's another representative location of the overall garment ... on a region which would be associated to being closer to a particular individual if blood spatter is being emanated back toward somebody who is wearing this garment." (V4, R688-89).

Kish also examined the blood stains and saturation stains on the trousers Zeigler was wearing the night of the murders. (V4, R690). Kish recommended further testing on two regions of the pants: 1) lower left pant leg; and 2) upper left thigh area. (V4, R692, 693, 705).

Kish said that evidence indicated victims Mays and Edwards "were assaulted while they were down near to the ground, and therefore, spatter stains that would be low [on] the pants would be a prime region for registering those particular stain patterns on the particular garment." (V4, R692). Kish also recommended testing a blood saturation stain on the upper left-hand thigh region of the pants. (V4, R693).

In Kish's opinion, further DNA testing would produce

evidence as to where Zeigler was located in relation to the airborne blood spatter and other blood of the victims. (V4, R694). In Kish's opinion, "the lack of bloodstain pattern evidence -- on the particular garments would not be confirmatory evidence to place [Zeigler] in close proximity to Mr. Edwards during spatter producing events ... given the totality -- of the injuries to Mr. Edwards as well as the amount of blood spatter that was produced from his overall injuries, I would find it highly unlikely that, if you're there while blood was flying through the air, for Mr. Edwards' injuries, that some would not be registered on his clothing." (V4, R696). Further testing would reveal if Zeigler lied at trial, when he stated that he did not commit the murders. (V4, R696).

Kish was not aware if DNA testing had previously been conducted in the areas he recommended. (V4, R700-01, 702). However, he was aware the left-front pocket region has been previously been tested for DNA. (V4, R703). **There is no reason that the areas he "suggested" could not have been previously tested.** (V4, R703). In Kish's opinion, stains on the back of Zeigler's shirt would not be probative for DNA testing, "relative to ... reconstructive value." (V4, R704).[7] He did not explain why that is so.

[7] Earlier in the case, those stains were considered to be very important. Now, apparently, they are not.

In Kish's opinion, after reviewing the case file and information he received from Zeigler's attorneys, other than the "six different independent regions" on Zeigler's clothing that Kish believed had probative value, he would not recommend "anything" else for additional DNA testing. (V4, R705, 706, 707, 715-16, 719). There is no way to be sure that all DNA has been identified without testing every single blood stain. (V4, R711). Kish said that his recommendations for additional testing are "representative samples throughout the overall garment." (V4, R718). Finally, in Kish's opinion, additional DNA testing would yield a determination of victim Edwards' blood on Zeigler's shirt, "depending upon the DNA testing." (V4, R720).[8] While Kish claims expertise in blood stain pattern analysis and the relationship of those stains to crime scene reconstruction, he said that it is not important to him whether Zeigler is left- or right-handed (which can influence the location of blood stains). (V4, R713). And, if the blood on Zeigler's shirt is airborne blood from Mays, it puts Zeigler "in close proximity to a spatter producing event of Charlie Mays." (V4, R713). At the end of the day, if Edwards' blood is not found in any of the selected samples, it means no more than that Edwards' blood was not present in the samples Zeigler selected. (V4, R718).

[8] If none of Edwards' blood is found on Zeigler's clothes, it does not prove anything "either way." (V4, R712).

THE CIRCUIT COURT ORDER

On March 12, 2012, the trial court entered an order denying further testing. (V5, R736-39). in pertinent part, that order reads as follows:

> On August 28, 2009, Defendant filed, through counsel, the instant Petition seeking testing of various articles of clothing and asserting that some of them have not previously been tested while other items have been tested, but particular areas of those items were omitted during testing. On January 12, 2010, the State filed a Response arguing, *inter alia*, that Defendant failed to explain why he failed to request testing of these items in his original request.
>
> During the evidentiary hearing, defense witness Paul Kish ("Kish"), a forensic consultant and bloodstain pattern analyst, testified that he reviewed Mays' clothing, Defendant's clothing, crime scene photographs, trial transcripts and other forensic reports, as well as the testimony concerning blood spatter analysis previously given in the case. In August 2011, he prepared a report recommending additional testing in various areas of Defendant's red shirt and trousers. **According to Kish, no other items needed to be tested and there was no reason that the crucial areas that he identified on Defendant's shirt could not have been previously tested.**
>
> Having reviewed the Petition, file, and record of the case, and the State's Response, and having carefully considered the testimony presented at the evidentiary hearing, the Court finds that no additional DNA testing is warranted wherein: (1) **Defendant is merely seeking to retest some of the same items that have already been tested**, and (2) **any items which were not previously tested could have been tested prior to the time that he filed his January 2003 motions to authorize testing and/or to vacate his convictions based upon newly available evidence.**

(V5, R737-38). (emphasis added).

SUMMARY OF THE ARGUMENT

Zeigler is merely asking to retest items that have already been the subject of DNA testing or could have been testing in connection with the January 2003 DNA litigation. There is no showing at all that the newly-identified blood spots could not have been tested before had Zeigler merely asked. Moreover, as this Court found, Zeigler abandoned his previous request for "additional" DNA testing. He has advanced no reason for this Court to set that ruling, and its preclusive effect, aside at this late date. Finally, Zeigler is collaterally estopped from litigating the DNA testing issue for a second time since that claim has already been litigated to conclusion. There is a time for finality to litigation, even in capital cases. There is no justification for continually re-opening claims that have already been decided, and this Court should not interpret the DNA testing provisions in a manner that encourages spot-by-spot testing.

ARGUMENT

ZEIGLER'S PRIOR DNA CLAIMS

Zeigler has raised DNA-based claims, in one form or another, since 1995. A summary of those various claims is useful in evaluating the latest proceedings.

In the 1995 proceedings before this Court, Zeigler's argument in favor of allowing DNA testing was that the type A

blood on Mays' clothing might be from either Eunice Zeigler or Perry Edwards, and that "DNA testing **may rebut** the State's hypothesis that the type "A" bloodstains found on Zeigler's clothing originated from a struggle with Mays or Edwards."[9] *Zeigler v. State*, 654 So. 2d at 1163-64. (emphasis added).

In the January 2001 motion for DNA testing (which was ultimately granted), Zeigler's theory was that the blood on **Mays**' clothes could have come from Mrs. Zeigler or from Mr. Edwards,[10] and that testing of Zeigler's shirt "could cast doubt upon the State's suggestion that Zeigler had the blood of victims on his shirt." (SR3-4).

Finally, in the January 2003 post-conviction relief motion (which was filed **after** testing had been done), Zeigler argued that he was entitled to relief because Edwards' blood was not on his shirt (even though Mays' blood was), and because the blood found on Mays' pants probably came from Edwards. (R316). As to the first claim, it is clearly inconsistent with Zeigler's prior

[9] Once the DNA results were available, Zeigler modified his claim to fit them. Once Mays' blood was identified on Zeigler's shirt, he re-wrote the State's theory (from his earlier version of it) to be that it was absolutely Perry's blood on Zeigler's shirt. Rule 3.853 does not allow the defendant to force-fit his "theory" into the DNA results by waiting until the test results are in before formulating that theory. Zeigler has undertaken the sort or "fishing expedition" condemned in *Lott v. State*, 931 So. 2d 807, 821 (Fla. 2006).

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

claim that the blood on his shirt came from someone **other** than Edwards **or** Mays. The claim for relief as to this component is clearly a *post hoc* argument that, while styled as a basis for relief, is actually nothing more than an attempt to explain away evidence that points toward Zeigler's guilt and is consistent with (and supportive of) what Zeigler claimed the State's theory was when he was before this Court in 1995.

As to the presence of Perry Edwards' blood on Mays' pants, the fact remains that this Court found, in 1995, that "even if the DNA results comported with the scenario most favorable to Zeigler, he still would not have been able to show that the evidence would have probably produced an acquittal." *Zeigler v. State*, 654 So. 2d at 1164.[11]

ZEIGLER HAS ALREADY ABANDONED THE "ADDITIONAL TESTING" ONCE

In footnote 1 to its prior DNA decision, this Court said:

> Zeigler also claims that the trial court (1) erroneously limited the scope of the evidentiary hearing to the DNA test results; and (2) **erroneously denied Zeigler's request to conduct further DNA**

[11] Zeigler claimed, without elaboration, that these stains were "located in places and deposited in a manner that inculpates Mays in Edwards' murder." *Initial Brief*, at 28. (Case No. 84066). How those stains are inculpatory is the subject of yet another "theory" by Zeigler in his ongoing efforts to fit his theory to the facts. Since the location of those stains has been known since the murder in 1975, and the fact that those stains were type A blood has been known since 1976, it stands reason on its head to claim that the evidence is as important as Zeigler claims it is. That strategy seems to be one born of a desperate attempt to confuse clear evidence of guilt.

> **testing**. However, we find that these claims are without merit. First, the claims that the trial court excluded from consideration at the evidentiary hearing are procedurally barred. *See Jones v. State*, 709 So. 2d 512, 522 n. 7 (Fla.1998). **Second, Zeigler abandoned the DNA testing motion when he filed a notice of appeal before the trial court ruled on the testing motion.** *See In re Forfeiture of $104,591 in U.S. Currency,* 589 So. 2d 283, 285 (Fla. 1991).

Zeigler v. State, 967 So. 2d 125, 129 (Fla. 2007). (emphasis added). The "further DNA testing" at issue in 2007 is the same for legal purposes as the "further DNA testing" sought now. If further DNA testing can be foreclosed by abandoning the motion, and that is what this Court held, it makes no sense at all to wipe out that bar by simply filing another motion for testing. This Court could have allowed "further testing" at the time of the prior proceedings had it been inclined to ignore the procedural bar, which, if the law were as Zeigler says, this Court would have done. The fact that this Court enforced its procedural rules demonstrates that the "right" to DNA testing is not unlimited.

THE MOTION WAS PROPERLY DENIED

There is no question but that the newly designated blood stains could have been subjected to DNA typing in connection with the proceedings that ended with this Court's 2007 decision. Zeigler's own expert witness said just that. The only reason that testing was not done is that Zeigler did not ask for it (for reasons unknown to the State) until after the previous

post-conviction relief proceedings were concluded and the circuit court had no jurisdiction to entertain the motion.

Florida Rule of Criminal Procedure 3.853(b)(2) requires that the motion for testing include, *inter alia*:

> 2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive **and** that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime.

Zeigler cannot make either showing. There is no suggestion that there have been any "subsequent scientific developments" -- that avenue is simply unavailable. Likewise, there can be no argument that the blood spots on Zeigler's shirt that were previously tested were not the spots Zeigler specifically selected. The only reason other spots were not tested is because Zeigler did not ask (and, when he did, later abandoned that request). And, if the "evidence" referred to in Rule 3.853(b)(2) is the **shirt** itself instead of the spots on the shirt, it has clearly already been "tested for DNA" and the results litigated. As to the late-in-the-day request to test specific blood spots on Zeigler's pants, he did not even seek that testing until two previous rounds of litigation concerning DNA had concluded. That, simply put, is an abuse of process since there is no reason advanced (nor can there be) for not asking for testing sooner.

In his last appearance before this Court, Zeigler's claim was that it was error for the trial court to deny his motion for "additional DNA testing" of "all of the spots on Zeigler's outer shirt." *See, Answer Brief*, at 36, SC05-1333. The trial court did not rule on that motion, and lost jurisdiction to do so when the notice of appeal was filed. Notably, Zeigler now wants to test specified "spots" on his "outer shirt" as well as spots on his pants.[12] He has already lost on his request to test the shirt some more, and could have made the same request about the pants in 2005, but did not.

This is not a circumstance in which some "new and improved" DNA test procedure has been developed, nor is it a circumstance where the "new" DNA sample (blood, in this case) was not previously known. Simply put, the same DNA test procedure has existed and been in use at all times pertinent, and the DNA samples have, at all times pertinent, been available on Zeigler's clothing from the night of the murders. Zeigler could have timely sought testing of these items in 2003 and did not. This Court refused to allow Zeigler to avoid his failure to obtain a ruling on his motion for additional testing, and that

[12] It appears that Zeigler's theory has changed again, since he now wants to carefully select the "spots" to be tested. However, since he has already lost on his motion to test every spot on his shirt, that denial carries over into the piecemeal testing he now wants. No further testing should be allowed since Zeigler has already had his chance, and has shown no reason at all that this testing was not done before.

ruling is consistent with a requirement that DNA testing not be conducted in a piecemeal fashion. If the law were as Zeigler would have it, a defendant could literally test a bloody shirt (for example) one blood drop at a time, followed by a post-conviction relief motion based on the results from the testing of each individual blood drop, which would then, in turn, necessarily be followed by appellate review of each post-conviction relief motion. That result would make no sense at all, but it is exactly what Zeigler would have this Court hold.

COLLATERAL ESTOPPEL BARS FURTHER TESTING

Zeigler has, on two prior occasions, litigated the issue of post conviction DNA testing. While the rule does not contain an explicit prohibition on successive motions, the notion that such a prohibition is contained within the principles of collateral estoppel is suggested in *dicta* in the opinion of the Fifth District Court of Appeals in *Olvera v. State*, 870 So. 2d 927 (5th DCA 2004). In *Olvera*, the defendant was convicted of sexual battery and murder in 1994 based partially upon DNA testing of evidence taken from the body of the victim. In 2002 he petitioned pursuant to Rule 3.853 for additional DNA testing to support a theory (which was asserted at trial) that samples were switched. That motion was denied and affirmed.

In 2003 Olvera filed a second petition requesting DNA testing of **other items related to the case espousing a different**

theory of relevance. Though the Court affirmed the denial of relief on other grounds, the Fifth District did address the "procedural bar as to successive petitions" argument:

> We pretermit for now the argument made by the State that a convicted person may not file more than one rule 3.853 motion for DNA testing, **although we are inclined to agree with the State. Certainly, this case offers no good reason to allow successive motions.** There is **no argument made that the relief sought in the second motion and the arguments on which it is based could not have been asserted at the time of the first motion.** Olvera's argument basically is that because successive motions are not expressly prohibited, they must be permitted. Applying the reasoning of the Florida Supreme Court in *State v. McBride,* 848 So. 2d 287 (Fla. 2003), we think the high court would not allow successive rule 3.853 motions except pursuant to rule 3.853(d)(1)(B).

0lvera v. State, 870 So. 2d at 930. (emphasis added). This is the same factual scenario as Zeigler's, and there is no reason to allow successive, piecemeal, DNA testing.

In *McBride,* the issue was the ability of the Defendant to file and argue successive motions to correct sentence pursuant to Rule 3.800:

> McBride entered a plea of *nolo contendere* to charges of attempted first-degree murder with a firearm, possession of a firearm by a convicted felon, and robbery with a firearm....The court sentenced him as a habitual felony offender to concurrent thirty-year terms of imprisonment on each of the three counts. *Id*. In May 1990, however, when he committed the attempted first-degree murder, which is a life felony, life felonies were not subject to sentence enhancement under the habitual offender statute.

State v. McBride, 848 So. 2d at 288. McBride had filed a Motion

to correct illegal sentence in 2000 pointing out the status of the law at the time his offense was committed. The Motion was denied and was not appealed. In 2001 he filed his second Motion to correct sentence reasserting the argument made in the first motion. The court denied the second motion as successive which was appealed to the Fifth District Court of Appeals. That Court reversed the ruling of the trial court on the theory that its decision was based upon the mis-application of the doctrine of Law of the Case and remanded the matter for a full consideration of the issue. The court also certified the question to this Court, which accepted the case for review. This Court agreed with the Fifth District in its opinion that the trial court has mis-applied the doctrine of Law of the Case, and went further to find that successive Rule 3.800 motions were prohibited under the related doctrine of collateral estoppel.

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health & Rehabilitative Services v. B.J.M.*, 656 So. 2d 906, 910 (Fla. 1995). Under Florida law, collateral estoppel, or issue preclusion, applies when "the identical issue has been litigated between the same parties or their privies." *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998). In addition, the particular matter must be fully litigated and determined in a contest that

results in a final decision of a court of competent jurisdiction. *See B.J.M.,* 656 So. 2d at 910. *City of Oldsmar v. State,* 790 So. 2d 1042, 1046 n.4 (Fla. 2001). Although collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them, applies in the postconviction context. As explained above, under the principles of *res judicata* a defendant would be prohibited from filing any successive 3.800 motion on any issue that was or could have been raised. Collateral estoppel, on the other hand, only precludes a defendant from rearguing in a successive rule 3.800 motion the same issue argued in a prior motion.

Rule 3.853 and 3.800 are comparable in that neither contains the explict exclusion of successive motions that is found in Rule 3.850. However, the principles espoused in *McBride* apply with even greater force in the context of Rule 3.853 by virtue of the very nature of that rule. The potential for abuse (for the purpose of delay by piecemeal litigation) is obvious. While Rule 3.853 and *Florida Statute* § 925.11 were enacted for the laudable purpose of allowing defendants to establish their innocence at any time by the use of new technology, that propose is perverted when applied as a tactic to delay execution of a lawful sentence. The proper case for allowing serial DNA testing

may exist, at least as a theoretical possibility. However, speculation is neither necessary nor appropriate here -- the only reason that the “new” testing was not requested earlier is that Zeigler did not ask for it.

The question then turns to whether the issues Zeigler attempts to litigate have been "fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction". The issues in controversy as set forth in F.S. 925.11 and Rule 3.853 are: (1) Whether the sentenced Defendant has shown that the physical evidence exists; (2) Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and (3) Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

As to the first two issues, they were fully litigated in the 2001 motion and resolved in favor of testing, **which was conducted, and the results were litigated**. As to the last issue (the “reasonable probability of acquittal or lesser sentence” component), that matter has now been fully litigated twice. In *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995) this Court fully addressed the issue and found unequivocally against the

defendant. And, as set out above, this Court found that even the hypothetical results most favorable to the Defendant would not "probably result in an acquittal." In similar fashion, in a full evidentiary hearing, after the Defendant had been given *carte blanche* to DNA test any of the evidence, the court once again found, affirming the opinion of the Florida Supreme Court a decade earlier, that there was no evidence that would probably produce an acquittal in this case. In the penultimate paragraph of *McBride*, this Court said:

> Based on the foregoing, the trial court correctly denied McBride's successive rule 3.800 motion, **which raised the identical claim raised in his earlier motion, the denial of which he did not appeal. The prior judgment on the merits is thus final with regard to all matters addressed by the trial court in that order.** Accordingly, we quash the decision of the Fifth District Court of Appeal, and answer the certified question in the negative.

State v. McBride, 848 So. 2d at 292 (Fla. 2003). Zeigler's case is absolutely no different. There can be no doubt that this issue has been fully litigated to conclusion resulting in a final determination by a court of competent jurisdiction -- further litigation is barred under the principles of collateral estoppel.

CONCLUSION

Zeigler has established no reason for allowing him yet another round of DNA testing. When his brief is stripped of its pretensions, the argument contained in it is simply that Zeigler

should be allowed to conduct DNA testing on terms of his choosing, and that he is entitled to (literally) test the blood evidence one spot at a time. Zeigler has shown no reason for not seeking this DNA testing in the initial round of litigation, and his own evidence is crystal clear that the now-vital testing could have been done years ago if Zeigler had simply asked. His piecemeal requests for DNA testing are an abuse of process, and this Court should not endorse such a practice. Under the facts of this case, where some items have already been tested and any that were not could have been, there is no legal basis for allowing serial DNA testing. The statute and rule do not contemplate testing the "bloody shirt" one blood spot at a time -- that is what Zeigler would have this Court hold, and that result is contrary to any concept of orderly litigation that eventually comes to a conclusion. The lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Dennis H. Tracey, III. Esq., Joanna F. Wasick, Esq., Hogan Lovells, US LLP, 875 Third Ave., New York, New York, 10022, and John Houston Pope, Esq., 250 Park Ave., New York, New York, 10177 on this _____ day of July, 2012.

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CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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