ORIGINAL

SC12-696

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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PRELIMINARY STATEMENT

In May 2012, the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law released the most complete list of exonerations that has ever been compiled. According to their findings, in the past 23 years alone, over 2,000 people who were falsely convicted of serious crimes have been completely exonerated.[1] Based on these figures, researchers estimate that as many as one million felony convictions *each year* have resulted in innocent persons being held responsible for crimes they did not commit. Among the most compelling findings from this study is its reminder of the significance and the power of DNA evidence. DNA testing led to exoneration in nearly one third of the 416 homicides and in nearly two-thirds of the 305 sexual assaults included in the figures.

The Florida State Legislature and this Court have reacted to similar statistics by enacting section 925.11 of the Florida Statutes ("Section 925.11") and Rule 3.853 of the Florida Rules of Criminal Procedure ("Rule 3.853")[2], which allow for individuals who have been convicted of crimes – even individuals who even have entered guilty pleas – to obtain DNA testing where it can be shown likely to result

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[1] *See* Pete Yost, "Study: 2,000 convicted then exonerated in 23 years," *Associated Press*, May 21, 2012, *available at* http://news.yahoo.com/study-2-000-convicted-then-exonerated-23-years-040242436.html (last accessed June 25, 2012).

[2] Rule 3.853 provides the procedural mechanism for setting seeking relief under Section 925.11.

in their exoneration or a mitigation of their sentences. *See* § 925.11 Fla. Stat.; Fla. R. Crim. P. 3.853. In combination, these rules operate as a critical safety valve that, when used properly, not only serves justice and due process, but saves innocent Floridians from being included in the foreboding statistics described above.

William Thomas Zeigler is not a statistic. He is a human being who has served over thirty years' imprisonment for crimes he avers he did not commit, but of which he was convicted based on inferences the State asked a jury to make from bloodstain evidence that had not been tested for DNA. In 2001, Zeigler was finally permitted, through a last-ditch request for testing in support of clemency proceedings, to test the bloodstain evidence used to convict him. *The results of that limited DNA testing completely contradicted the theory the State used at trial to convict.* But rather than agree to a new trial, the State, at a 2004 hearing on a motion Zeigler brought for postconviction relief based on the testing results, instead invented an entirely different account of the crimes, using inferences from other stains (which the expert could not even definitively identify as bloodstains) that had never before been used to show Zeigler's alleged guilt and (as a result) had never been tested.

In the petition here, all Zeigler sought was a chance to test this evidence. The circuit court found that his petition was facially sufficient and called for an evidentiary hearing. At the hearing, a blood spatter expert affirmatively stated that

the requested testing *would prove, according to the theory of the case the State advanced at trial, whether or not Zeigler was guilty of the murders for which he was convicted.* Three and a half months after that hearing, the circuit court denied the request. The court made no determination as to whether any of the three prongs of Rule 3.853 were met – despite the Rule's clear language that such findings must be explicitly made. Instead, the circuit court, *without citing any law*, stated that Zeigler's request for testing was precluded as successive or previously litigated. That is not true. The material Zeigler seeks to test here has never before been tested. Nor has any court ruled on the merits that Zeigler is not entitled under the law to test this material. And even if Zeigler's petition was successive, which it is not, there is simply no bar to bringing a successive petition for DNA testing under Florida law. Further, it simply cannot be the case – especially in light of the strong public policy preferences in favor of testing set forth by Section 925.11 and Rule 3.853 – that justice is served when a court denies a motion to conduct DNA testing of the very same evidence the State relied on, with the aid of abject speculation, to bootstrap a new theory of guilt *where that testing would prove or disprove that theory definitively.*

The circuit court's order below is incorrect on the record and the law, and allowing it to stand without evaluating Zeigler's request on its merits would be

manifestly unjust. This Court should reverse the order and mandate that the petition be granted in full.

STATEMENT OF THE FACTS AND OF THE CASE

A. Background on the Nature of the Case

Despite being quite young at the time, by December 1975, Zeigler had established himself as a prominent member of his community in Winter Garden, Florida. (R.00001; R.00028; R.00244.) As the owner a prosperous family-run furniture store, Zeigler had never been in trouble, had no criminal record, and had no propensity for violence. (R.00001; R.00028; R.00244.) He was active in his church and happily married to his wife, Eunice. (R.00001.) On December 24th of that year, however, everything dear to Zeigler was suddenly, and irrevocably, destroyed.

That night, Winter Garden Chief of Police Don Ficke received a desperate phone call from Zeigler, whom he had known for many years as a friend and had plans to see later on that evening. (R.00002; R.00233-34.) But rather than the social call Ficke may have expected, when he answered the phone Zeigler was struggling for his breath and clearly in pain. (R.00002; R.00208.) He had been shot at his store and needed help immediately. (R.00002.) Law enforcement raced to Zeigler's aid, and on their arrival encountered a horrific crime scene. (*Id.*)

Zeigler was found with a gaping bullet hole through his lower abdomen. (*Id.*)

He was, however, still alive. (*Id.*) Zeigler was rushed to the hospital and into surgery to repair his punctured torso. (*Id.*) The four other people the police later found within the store were not so lucky. Eunice, her parents, and a man named Charlie Mays had been shot to death. (*Id.*) Perry Edwards, Zeigler's father-in-law, had also been beaten severely, and Mays had been struck in the head. (*Id.*)

Five days later, the State, relying on blood stains at the crime scene, would accuse Zeigler of being responsible for these four deaths. (*Id.*; R.00003.) While he was still recovering in his hospital bed, he was arrested. (R.00003.) Later he would be charged with two counts of first-degree murder (for his wife and Mays) and two counts of second-degree murder (for Eunice's parents). (*Id.*) He would spend the next thirty years fighting for justice and to save himself.

B. The Trial

1. Zeigler's Testimony

On July 2, 1976, Zeigler was tried by a jury in Jacksonville, Florida convened before the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. (R.00820.) Pleading not guilty to all counts, Zeigler maintained from the start that he was not the perpetrator of the devastating attack on his family, but was instead a victim of a brutal ambush during a robbery gone awry that was committed by Mays and at least two of his associates. (R.00002; R.00209.)

The primary dispute at Zeigler's trial was the identity of the individual or individuals who committed the murders in the furniture store that night. (*Id.*) Although he had no legal obligation to do so, Zeigler took the stand to prove his innocence affirmatively. (R.00299, *et seq.*) He recounted under oath that on Christmas Eve 1975, he and his wife Eunice had plans to attend a Christmas party, where they would meet several of their friends, including the Winter Garden Chief of Police. (R.00001; R.00233-34.) Before the festivities began, he averred, he stopped by the family-run store. (R.00001.)

Upon arriving, Zeigler went inside the store and tried to turn on the lights, but they were not working. (R.00300.) As he walked through the store, in the dark, he was hit over the head from behind – suddenly, hard, and with enough force to send his glasses flying from his face and to cause him to fall to the ground. (R.00301-02.) Reeling from the blow, and unable to see clearly with the lights out and without his glasses, Zeigler picked himself up and attempted, disoriented, to fight off his attackers – scared to death and striking his assailant as hard as he could with a heavy magnum he had managed to reach. (R.00002; R.00302; R.000304-08.) In the middle of this struggle, however, Zeigler was incapacitated; shot in his stomach. (R.00002.) He blacked out. (*Id.*)

When he came to sometime later, he crawled across the floor, dragging himself over what would turn out to be Mays' dead body, looking for his glasses.

(R.00309-10.) He ultimately would reach the store telephone and call his friend Don Ficke, the chief of police, to save him. (R.00002; R.00312-13.)

2. The State's Case

The State presented an entirely different account. (R.00002.) The prosecution argued that it was Zeigler who had killed his wife, in-laws, and Mays. (*Id.*) The sole motive the State advanced at trial was that, despite Zeigler's wealth, Zeigler masterminded the four murders and the two attempted murders in a plot to cash in on Eunice's life insurance. (*Id.*)

According to the State, Zeigler began by luring his wife and in-laws to the store. (*Id.*) The State argued that Eunice and her mother, who showed no signs of a struggle, must have been shot and killed in short succession. (*Id.*) To explain how Perry, whose body clearly had been severely beaten, had been killed, the State alleged that Zeigler must have struggled with him, holding him in a headlock and violently beating him in the head, before ultimately shooting him as well. (*Id.*) The State claimed that after Zeigler was done attacking his family he, within a very short time, was able to coax three men – Mays, Felton Thomas, and Edward Williams – to the store as part of his plot to stage a robbery and thereby pin the murders on the three men. (*Id.*)

According to the State's narrative, Zeigler first met Mays and Thomas at the store, but then drove off with them and tricked the two men into handling and

shooting guns that were later found at the scene of the crime. (R.00236-37.) To further cover his tracks, according to the State, Zeigler then lured the two men back to the store and shot and killed Mays and attempted to kill Thomas, but he was able to get away. (R.00002; R.00238-40.) The State claimed that Edwards came to the store a bit later but, after Zeigler allegedly tried to kill him as well, he, like Thomas, escaped. (R.00238-40.) The State claimed that when Zeigler was unable to silence two of his three would-be patsies, he turned the gun on himself and shot himself in his belly to make it appear that he was also a victim of the robbery purportedly concocted to frame Mays and his cohorts. (R.00002.)

Central to the State's case at trial was the identity of the person or persons who beat and killed Perry Edwards. (*Id.*) Because there was no physical evidence that could directly link Zeigler to killing either Eunice or her mother, the State relied on circumstantial evidence to support its argument that Zeigler, and Zeigler alone, beat and killed Perry. The State hung its theory of the case on the argument that, if it could be shown that Zeigler had been the person who killed Perry, the jury could also find, by inference, that Zeigler had also killed the others.

The chief contention advanced by the State to persuade the jury that it was Zeigler, and not Mays, Thomas, Williams, or someone else entirely, who killed Perry involved a bloodstain on the underarm of Zeigler's inner and outer shirts. (R.00003.) The prosecution went to great lengths to persuade the jury that the

bloodstain came from Zeigler holding Perry in a headlock and savagely beating him over the head. (R.00003; R.00328-29.) The prosecution even acted out this brutal attack in front of the jurors. (R.00330.)

The centerpiece of the State's proof on this critical point was blood evidence explained by the prosecution's blood spatter expert. (R.00329-30.) The State contended that the jury could find that the underarm bloodstains were from Perry because the stains and Perry's blood were both Type A. (R.00003.) This inference was permissible because Zeigler and his mother-in-law were both Type O, while Eunice and Perry were Type A. (*Id.*) But because Mays also had Type A blood, the stains also could be interpreted to show that Zeigler had, as he had testified, pulled himself across Mays' dead body to reach the phone he used to call for police assistance to save his life. (*Id.*) The prosecution, however, had made the unilateral decision not to test blood samples taken from the victims for subtypes, which could have helped to distinguish Charlie and Perry's blood.[3] (*Id.*) The result was that Zeigler was not able to provide a scientific rebuttal to the State's interpretation of the underarm bloodstain evidence. (*Id.*)

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[3] Even the State Attorney criticized the techniques utilized to collect and test some of the bloodstain evidence. (R.00332.)

3. The Verdict and Sentencing

On July 3, 1976, the jury returned four guilty verdicts. (*Id.*) Two weeks later, a short sentencing hearing was held. (*Id.*) The prosecution did not proffer any evidence, but the defense called two witnesses and stressed residual doubt about guilt. (R.00211.) The jury deliberated for only twenty-five minutes before returning with an advisory sentence of life imprisonment on all counts. (R.00003.)

Despite the jury's unequivocal rejection of the death penalty, the judge overrode its recommendation and imposed two sentences for death (for the first-degree murder convictions) and two for life (for the second-degree murder convictions), which were affirmed. *See Zeigler v. State*, 402 So. 2d 365 (Fla. 1981).

C. Postconviction Relief and Resentencing

Zeigler subsequently pursued postconviction relief, which was denied by the trial court and affirmed by this Court. *See Zeigler v. State,* 452 So. 2d 537 (Fla. 1984); *Zeigler v. State,* 473 So. 2d 203 (Fla. 1985); *State v. Zeigler,* 494 So. 2d 957 (Fla. 1986). (R.00052.) In 1988, however, Zeigler successfully petitioned this Court for habeas corpus relief. (R.00052.) On remand, Zeigler was resentenced and again sentenced to death. (*Id.*) This Court affirmed. *Zeigler v. State,* 580 So. 2d 127 (Fla. 1991), *cert. denied,* 502 U.S. 946 (1991). (R.00052.) Thereafter, this

Court affirmed the denial of another postconviction motion. *Zeigler v. State*, 632 So. 2d 48 (Fla. 1993), *cert. denied*, 513 U.S. 830 (1994).

D. Efforts to Obtain DNA Evidence

In June 1994, Zeigler filed a postconviction motion pursuant to Rule 3.850 to vacate the death sentences imposed on resentencing. (R.00053.) In support of his request, Zeigler sought the release of certain evidence and appointment of an expert so that bloodstain evidence introduced at his trial could be re-examined using modern DNA testing procedures. (R.00053.) The circuit court found that the DNA claim was procedurally barred as untimely under Rule 3.850. (*Id.*) This Court affirmed in *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995), *cert. denied*, 513 U.S. 830 (1994), finding, *inter alia*, that under the version of the statute in effect at the time, the request for DNA testing should have been brought within two years of Zeigler's discovery that such testing was available to him. (R.00053.) Although the Court expressed some skepticism, based on the limited evidence available to Zeigler to present at that time, as to whether the requested DNA testing would have exonerated Zeigler, that statement was dictum because the motion was untimely.

In early 2001, Zeigler filed a motion asking the circuit court to exercise its inherent authority to approve the release of evidence in its possession, so that he could conduct DNA testing for the purpose of using the results in support of a clemency petition (the "2001 Testing Motion"). (R.00073, *et seq.*) On November

19, 2001, the circuit court issued a written order granting Zeigler's request. (R.00086-91.) The State received equal opportunity to test the evidence. (*Id.*)

E. The Testing Results

The testing results were released in 2002. As Zeigler argued they would, the results directly contradicted the State's theory of Zeigler's guilt, exculpated Zeigler from the murder of Perry Edwards, and rendered the prosecution's entire theory of the murders completely untenable. (R.00003.) The results showed that the bloodstain sample taken from spots on Zeigler's shirt underarm – the same bloodstain the State relied on to show that Zeigler had allegedly held Perry Edwards in a headlock and brutally beaten him, and the same bloodstain that the State argued showed by inference that Zeigler had also killed his wife and mother-in-law – *contained no sign of Perry Edwards' blood.* (*Id.*) However, blood consistent with Perry Edwards' DNA profile was found in the deep, saturated blood stains found on the bottom of Mays' pants – which was consistent with Mays, not Zeigler, having stood near Edwards while Edwards was bleeding profusely from his head and discredited the State's ridiculous claim that Mays arrived more than an hour later at Zeigler's command. (R.00003; R.00362-69; R.00100; R.00407-09.) The results also supported Zeigler's testimony that stain on the underarm of his shirt, which the State argued was from savagely beating Perry Edwards, was created when he crawled over Mays' body to call the police.

Thus, the new DNA evidence cast substantial doubt as to the veracity of the State's theory that Zeigler murdered Perry and the rest of his family. Instead, the results were entirely consistent with, and indeed substantiated, the account of the attacks that Zeigler had maintained for nearly thirty years – that he, his wife, and his in-laws were the victims of an attack. (R.00002-03.) Indeed, if a jury who saw this evidence were simply to make the same inference that the State used to convict Zeigler (i.e., finding that whoever had Perry's blood on their clothes was responsible for killing Perry, Eunice, and Zeigler's mother-in-law), it would now find that Mays, and not Zeigler, had beaten Perry and killed the rest of Zeigler's family. (R.00003.)

F. The 2003 Postconviction Relief Motions

Armed with these test results and other newly discovered evidence,[4] in 2003, Zeigler filed a motion to vacate his sentence pursuant to Rules 3.850 and 3.851 based upon the newly available DNA evidence obtained to support his clemency proceedings. (R.00053; R.00080-81; R.00396-403.) At the same time, Zeigler also filed a companion motion to authorize, *nunc pro tunc*, the previously conducted DNA testing pursuant to Rule 3.853. (R.00053; R.00080.) The State opposed the motion, arguing (as it did on the motion that led to the instant appeal) that the motion to vacate should be barred because it was successive. (R.00211.)

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[4] The additional evidence is described in the Petitioner's Reply to State's Opposition to Petition for Post Conviction DNA Testing. (R.00213.)

The circuit court agreed with Zeigler and held an evidentiary hearing. (R.00053; R.00393.) The State successfully moved to limit the evidence at the hearing "to subjects directly related to the DNA test results," which excluded all of the other post-trial evidence listed in Zeigler's motion. (R.00386-91; R.00394.)

G. The 2004 Hearing and the Order

In December 2004, the circuit court conducted an evidentiary hearing (the "2004 Hearing"). (R.00108, *et seq.*; R.00334-78.) Shawn Weiss, an associate technical director of the forensic identity department for the Laboratory Corporation of America, testified concerning the tests performed on items obtained from the crime scene, including certain bloodstains on Zeigler's shirts and Charlie Mays' pants. Stuart James, a forensic scientist specializing in bloodstain pattern analysis, also testified. They collectively provided a reliable and indisputable factual predicate that Perry Edwards' blood made up a saturation stain on Mays' pants in locations that could not have deposited by accidental or incidental contact – thereby strongly suggesting that Mays participated in the killing of Perry Edwards – and that stains on Zeigler's shirt that had been argued at trial as reflecting the deposit of Perry Edwards' blood were, in fact, Mays' blood – corroborating the Defense argument that the stains were caused by a fight between Zeigler and Mays. (*E.g.*, R.00344-45; R.00348-58; R.00362-69.)

Faced with this testimony, the State did not (and could not) deny that the DNA testing demonstrated an absence of Perry Edwards' blood in the areas on Zeigler's shirts that had been identified as significant at trial. (R.00004.) Rather than admit that the evidence no longer supported a critical assertion underlying Zeigler's conviction, the State switched its theory. It argued on the one hand that the sample was too small, mixed, or deteriorated to be reliable, despite presenting no evidence to support that contention. It argued on the other hand that *other* physical evidence – entirely different spots from other portions of Zeigler's shirts *that had not been tested even to determine if they were blood* – explained Zeigler's alleged guilt. This theory, however, was entirely new and *had never been presented to the jury*. (*Id.*)

As the State began questioning about untested spots on Zeigler's shirts, the Defense immediately objected, arguing that the hearing had been limited, at the State's insistence, to DNA testing *results*, and that the State was now improperly eliciting testimony on pure conjecture. (R.00123; R.00127; R.00131.) The Defense maintained that the State should have requested that such spotting be tested. (R.00124.) The expert agreed – testifying that he would "suggest for testing any time" the other stains. (R.00127.) Remarkably, the circuit court allowed the State to continue. Accordingly, the State's argument proceeded without having been subject to discovery or verification.

It bears repeating: this new theory was never presented during Zeigler's original trial. (R.00004.) Nor did the State provide notice to anyone that it would advance this theory at the 2004 Hearing. (*Id.*) Accordingly, Zeigler had no reason to expect this new "interpretation" of untested evidence. Having had no reason to test these other stains, which until that point had never been used by the State to prove or disprove any material fact, Zeigler had no access to scientifically sound evidence that would contradict the State's new claims. (*Id.*)

Even though there was no showing that this other spotting was even blood at all, the circuit court's order accepted the State's speculative assertion that this untested evidence confirmed Zeigler's guilt. (*Id.*; R.00459-74.) The circuit court also expressed concern, despite testimony that the samples that had been tested yielded high quality, unambiguous results, that the exculpatory DNA taken from the underarm stain could have been too small or degraded to constitute reliable evidence. (R.00004; .00459-74.) Accordingly, Zeigler's motion was denied by order dated April 18, 2005. (R.00004, R.00053; .00459-74.)

H. The Motion for Rehearing

Zeigler timely filed a motion for rehearing (the "Rehearing Motion"). In support of the Rehearing Motion, Zeigler also filed a separate motion, "Defendant's Motion for Testing in Support of His Motion for Rehearing" (the "Rehearing Testing Motion"), in which he beseeched the court below to allow him

to test the very evidence relied upon by the State without testing. (R.00476-78.) The circuit court summarily denied the Rehearing Motion, rendering the Rehearing Testing Motion moot, but did not enter any order expressly granting or denying the testing motion. (R.00486.)

I. The Appeal of the Motion to Vacate

Zeigler appealed. Amongst the issues he raised in his appeal, Zeigler explicitly requested a remand to conduct additional DNA testing. (R.00522.) The State argued that the circuit court's failure to enter a separate order denying the motion for further testing left that motion unreviewable. In affirming the circuit court on its conclusions after hearing, this Court accepted the State's assertion. *Zeigler v. State*, 967 So. 2d 125 (Fla. 2007), *cert. denied*, 513 U.S. 830 (1994). (R.00004, R.00053.)

J. The 2009 DNA Testing Motion

1. The Verified Petition

Zeigler decided to petition the trial court anew for additional tests, and did so on or about August 28, 2009 (the "Rule 3.853 Petition"). (R.00001, *et seq.*). Specifically, Zeigler's request pertained to portions of his shirts that had been referenced by the State at the 2004 Hearing, as well as additional points that, according to expert testimony, would serve as a representative sample of all blood that was spattered on his clothing that night. (R.00006.) Although *other* stains on

Zeigler's clothes had been tested, the particular stains he sought to test in the Rule 3.853 Petition *had not*. (*Id.*)

As required by the rule, the Rule 3.853 Petition included a statement by Zeigler that he was innocent of the crimes of which he had been convicted, specifically identified the material he wanted to test, stated that material had not been previously tested, and explained that identification was at issue at his trial and how the testing would exonerate him. (R.00001 at ¶ 1.) Zeigler sought and obtained funds for an expert to review the evidence and report to the court on the testing possibilities. The court implicitly found the petition facially sufficient by ordering an evidentiary hearing but entered no order to that effect.

2. The 2011 Evidentiary Hearing

The circuit court held an evidentiary hearing on December 1, 2011 (the "2011 Hearing"). (R.00740.) During the 2011 Hearing, blood spatter expert Paul E. Kish recommended DNA testing of certain stains that had not been previously tested because this testing *would provide conclusive scientific evidence to rebut the State's hypotheses of guilt and finally exonerate an innocent man.* (R.00784-87.)

Kish testified unequivocally that the requested testing would be dispositive as to whether Zeigler had beaten and killed Perry Edwards:

> Q: And, Mr. Kish, if – Mr. Zeigler, as you know, testified at the trial of this case that he did not commit the murder of Mr. Edwards. If he's lying, would you expect that to be revealed by the testing that you recommend?...

A: Yeah, definitely....

(R.00780 at 41:13-42:6). He further said:

Q: And do you believe, based on your expert opinion, that after this testing is done, that a determination will be able to be made with a reasonable degree of scientific certainty whether Mr. Edwards's blood was spattered on Mr. Zeigler's shirt?

A: Depending upon the DNA testing, yes.

(R.00804 at 65:1-65:6).

Kish noted that Perry had been severely beaten prior to his death and that such a beating would have produced a high volume of blood spatter. (R.00780.) He explained that the volume of spatter that must have been produced made it all but impossible for the person responsible for the beating not to have had the blood spattered onto his or her clothing. Kish also testified that testing the particular stains he identified on Zeigler's clothing would be representative of all blood that had been spattered on Zeigler that night. (R.00778-79.) Consequently, he concluded, if the testing reveals no sign of Perry's blood, then that result would irrefutably demonstrate that Zeigler could not have been not in close proximity to Perry at the time of the attack and thus could not have been responsible for his murder, as the State had contended at trial. (R.00780-81.)

The State responded to this testimony on cross-examination by attempting to have Kish acknowledge that if the test results showed no sign of Perry's blood on Zeigler's shirt, then that would only be evidence that the blood had not been spattered onto Zeigler's shirt in any of the areas that were included in the testing – and thus could not be evidence that would exonerate Zeigler from Perry's murder. Kish unequivocally rejected this conclusion.

In response to the State Attorney's suggestion that such evidence of absence "wouldn't be exculpatory, isn't that correct," Kish said, "Well, yeah, it would be [exculpatory] because I have taken representative samples throughout the overall garment." (R.00802 at 63:5-63:16.) He explained:

> I really believe that just the location of spatter areas that I selected in this particular location with it, that if he was in close proximity to whoever the blood spatter emanated to, that one of these regions or multiples of these regions would pick up some of that spatter....[G]iven the different locations I have selected, I think it would be highly likely that we would pick up a lie relative to him not being near other people.

(R.00780 at 41:13-42:6).

Zeigler's attorneys emphasized the definitiveness and the finality of the requested testing, arguing that the testing would either "confirm[] Mr. Zeigler's guilt" or show that "there was not a crime committed by Mr. Zeigler." (R.00808 at 69:8-13.) They also repeatedly assured the circuit court that this request would not in itself open the door to further testing, stating "if it comes up the other way, Your

Honor, you're never gonna see another one of these proceedings, I can tell you that right now, because you're gonna know for sure one way or another how this case went." (R.00810 at 71:4-8; R.00815 at 76:20-22 ("So when Mr. Nunnelley fears that there's going to be however many more motions down the road, that is just not a real threat.").)

3. The Order

By order dated March 12, 2012, the circuit court denied the Rule 3.853 Petition (the "Order"). (R.00820-22.) The sole basis set forth in the Order for the denial was as follows: (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 [Zeigler] filed his January 2003 motions to authorize testing and/or to vacate his convictions based upon newly available evidence." (R.00822.) The Order cited no legal authority and set forth no findings on whether (a) the physical items containing the DNA still exist, (b) the evidence containing the tested DNA is authentic and it and the results of DNA testing would be admissible at a future hearing, and (c) whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial. (*Id.*) Nor did it attempt to address the fact that the stains at issue have neither been previously tested nor has the Defense ever before had any reason to test them prior

to the State's newly constructed, untried theory of guilt advanced at the 2004 Hearing. This appeal followed.[5]

SUMMARY OF ARGUMENT

The court below erred. It did not follow the dictates of Rule 3.853, which requires the court below to make specific findings when denying a motion for testing. This failing, which impacts other aspects of review, requires an order summarily vacating the Order below and directing the filing of the requisite findings. Alternatively, this Court can direct that Zeigler's Rule 3.853 Petition be granted because Zeigler has shown a reasonable probability that the testing would create reasonable doubt concerning his convictions and in support of his claim of innocence. He set forth specifically how the requested testing would contradict the theory of the case used by the State to convict him and how the testing would render testimony of critical State witnesses totally unreliable, and he supported these showings through expert testimony.

Additionally, the circuit court's conclusion that the Rule 3.853 Petition was barred as successive cannot be sustained. The language in Rule 3.853 that permits DNA testing motions to be filed "at any time" – according to this Court's rulings in

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[5] Additional procedural developments not relevant to the adjudication of this appeal have taken place since the notice of appeal was filed. On April 10, 2012, Zeigler moved the Circuit Court for an order, pursuant to Rule 3.850 and Rule 3.851, vacating and setting aside the judgments of conviction and sentences based on newly discovered evidence. That motion is still pending.

the context of Rule 3.800, which contains identical language – forecloses any successive petition bar. To the extent that, like Rule 3.800, this Court reads a collateral estoppel limitation into Rule 3.853, that doctrine only limits issues that were both actually litigated and fully and finally decided on the merits, and therefore does not apply here because Zeigler's entitlement to the requested testing has never been fully and finally adjudicated. But even if it had been, the manifest injustice exception in collateral estoppel doctrine would mandate hearing his petition on the merits rather than barring it through estoppel. In any case, the Rule 3.853 Petition cannot be deemed successive because it seeks to test DNA material that has not previously been tested.

For these reasons, Zeigler respectfully requests that this Court issue a mandate directing the circuit court to grant Zeigler's Rule 3.853 Petition in full so that he may test the material identified at the 2011 Hearing by his expert as pertinent.

POINT I ON APPEAL

THE CIRCUIT COURT'S ORDER SHOULD BE VACATED SUMMARILY BECAUSE THE CIRCUIT COURT FAILED TO MAKE NECESSARY FINDINGS REQUIRED BY THE RULE

The bare and terse Order of the Court below did not comply with Rule 3.853.[6] Rule 3.853(c)(5) states that a court "*shall* make the following findings

[6] Whether the court below satisfied the requirements of Rule 3.853 is a pure

when ruling on the motion": (a) "[w]hether it has been shown that physical evidence that may contain DNA still exists"; (b) "[w]hether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof that the evidence containing the tested DNA is authentic and would be admissible at a future hearing"; and (c) "[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." (emphasis added.) The rule admits no exception. A court must make these specific findings of fact. The court below did not.

The District Courts of Appeal have routinely reversed circuit courts for failing to address the findings mandated by the rule. *See, e.g., Montez v. State*, 86 So. 3d 1243 (Fla. 2d DCA 2012). This Court should endorse their practice. For example, in *Montez*, the defendant appealed the circuit court's "order summarily denying his motion for postconviction DNA testing" pursuant to Rule 3.853. *Id.* The *Montez* appellate reversed the circuit court's order, finding that Rule 3.853 unequivocally requires the circuit court to make specific findings regarding *each* of the subparts of Rule 3.853(c). *Id.* Notwithstanding that the circuit court had found that Montez's petition failed to demonstrate the third prong of Rule 3.853 (that the

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question of law that is subject to *de novo* review. *See Consalvo v. State*, 3 So. 3d 1014, 1015 (Fla. 2009).

testing could lead to the defendant's acquittal or lesser sentence) the appellate court found that "the postconviction court failed entirely to address the questions set out in subparts (A) and (B) of the rule; whether the [evidence] is still available for DNA testing and whether the results of any testing would be admissible at trial." *Id.* at 1244. The circuit court also impermissibly failed to provide any record citation or attachment to the order that refuted the defendant's explanation for how the DNA evidence would exonerate him. *Id.* at 1245. The appellate court further found that making such findings was especially critical where the defendant was convicted on "largely circumstantial evidence." *Id.*

This Court, notably, has excused lower court compliance with Rule 3.853(c) only when the defendant acts to forfeit judicial consideration of the factors. *See Scott v. State*, 46 So. 3d 529 (Fla. 2009). In *Scott*, this Court concluded that it was not necessary to make findings as to all three subparts only because the lower court specifically found that the defendant "presented no argument" at all to support a reasonable probability that he would be acquitted. *Id.* at 534. Without an argument on that point, consideration of the other Rule 3.853(c) subparts was "irrelevant." *Id.*

Furthermore, as a more general matter, a lower court's failure to cite authority to support a finding as a matter of law can be grounds for reversal. *See Bristol v. State*, 987 So. 2d 184, 186 (Fla. 2d DCA 2008) (noting that, *inter alia*,

because the lower court "did not cite any authority" to support its finding that assistance of counsel was not ineffective, "we must reverse the postconviction court's summary denial of this claim and remand . . . .").

Here, the circuit court completely failed to set forth the findings required by Rule 3.853(c). It also failed to cite *any* legal authority to support its dismissal. The Order contains seven paragraphs: one paragraph identifying the petition under consideration, three paragraphs of procedural history, two paragraphs summarizing the petition and the 2011 Hearing, and one paragraph – *consisting of a single sentence* – wherein the circuit court concludes 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 [Zeigler] filed his January 2003 motions to authorize testing and/or to vacate his convictions based upon newly available evidence."[7] In short, the Order made *none* of the findings required under Rule 3.853(c).[8] It even failed to find that any one of the findings required under

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[7] Although the Order incorporated the transcript of the 2011 Hearing by reference, in the transcript the circuit court made no additional statements or findings to support or otherwise explain the denial of the petition.

[8] One generous way to read the circuit court's decision is to find that it impliedly made findings in Zeigler's favor by denying the Rule 3.853 Petition not on its merits, but solely on grounds that it was successive. If this Court reads the Order in this fashion, no remand in required. Rather, if this Court finds that there is no procedural basis to deny further testing (as, respectfully, it should, for the reasons

Rule 3.853(c) would have been dispositive, thus obviating the need to make findings as to all three subparts. Nor did it cite legal authority. For any of these reasons alone, the Order should be vacated summarily and the case remanded for entry of an order complying with Rule 3.853.

POINT II ON APPEAL

THE CIRCUIT COURT'S ORDER SHOULD BE REVERSED BECAUSE THE CIRCUIT COURT IMPROPERLY FOUND THE MOTION TO BE BARRED AS SUCCESSIVE

The circuit court's Order should be reversed because it wrongly imports a successive motion bar into Rule 3.853. Contrary to the circuit court's conclusion here, Rule 3.853 by its terms imposes no bar for successive motions.[9] In any event, the Rule 3.853 motion was not successive because it sought to test materials that had not been previously tested.

A. Rule 3.853 Imposes No Special Bar To Successive Motions

Rule 3.853 "provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes." Rule 3.853(a). The purpose of the statutory scheme is to allow criminal defendants to obtain evidence that will assist the court in finding truth, even after normal procedures have

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set forth *infra* Point II), it should order that testing should proceed.

[9] Whether the court appropriately concluded that a motion should be barred as successive is a question of law subject to *de novo* review. *See Consalvo*, 3 So.3d 1014.

resulted in a conviction. Rule 3.853 removes discretion from the circuit court to deny request for DNA testing and is to be strictly construed. *See Consalvo*, 3 So. 3d at 1016; *Glenn v. State*, 954 So. 2d 732, 734 (Fla. 1st DCA 2007). Here, the Order expressly rests on the circuit court's judgment that the testing could have and should have been requested in an earlier motion. That is the language of a successive motion prohibition. *See, e.g., Pleasure v. State,* 931 So. 2d 1000, 1001 (Fla. 3d DCA 2006) (construing similarly worded order entered under Rule 3.800 to have impermissibly barred a motion as successive). This finding was in error, as the language of the rule and this Court's interpretation of similar statutes clearly shows that there is no bar on successive motions under Rule 3.853.

Unlike many other rules and statutory schemes providing for postconviction relief, neither Rule 3.853 nor Section 925.11 contain any bar to successive petitions. Although both provisions contain a number of specific pleading requirements, that a motion seeking DNA testing has not been previously filed is simply not one of them. Indeed, the State has acknowledged as much, admitting in its papers below, "the rule does not contain an explicit prohibition of a successive motion." (R.00056.)

The State's concession is correct, but it does not go far enough. In fact, the language of the rule makes clear that successive motions clearly are allowed under Rule 3.853. A particular phrase in Rule 3.853 specifically contemplates that more

than one motion for testing may be entertained from a given defendant. The rule states that motions for postconviction DNA may be heard "at any time." Fla. R. Crim. P. 3.853(d). Identical language in Rule 3.800 has been determined by this Court to expressly *allow* defendants to file successive motions. *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003) (including the phrase "at any time" in a rule providing for postconviction relief "allows defendants to file successive motions").[10]

McBride controls the interpretation of Rule 3.853. Like Rule 3.800, which this Court construed in *McBride,* the use of the phrase "at any time" and the absence of any express successive motion limitation in Rule 3.853 confirms that the Rule does not impose any bar to successive motions. This interpretation of Rule 3.853 is consistent with a clear trend to lower procedural barriers to obtaining relief under the rule. A further reflection of the intent to liberally permit subsequent motions can be seen in the actions of the Florida Legislative and this Court to remove time limitations present in prior versions of the Rule. *See Thomas*

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[10] Another example is Part (b)(2) of the Rule, which requires the petitioner to state that "*the* evidence was not previously tested for DNA." (Emphasis added). By using the specific term "*the* evidence" rather than the generic term "evidence," the clear meaning of the statute is that *other* evidence may have before been tested. The same provision allows the movant to state in the alternative that "the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result. . . ." *Id.* If the rule prohibited successive motions in their entirety, this section contemplating previous testing would be illogical.

v. State, 3 So. 3d 387, 389 (Fla. 2d DCA 2009) (recounting history of rule and statute).[11]

Despite all this, the State below asked the circuit court to rely on the Fifth District Court of Appeals' opinion in *Olvera v. State*, 870 So. 2d 927 (Fla. 5th DCA 2004), to argue that Rule 3.853 should be construed to implicitly prohibit successive motions. In that case, the State had also asked the court to rule that "a convicted person may not file more than one rule 3.853 motion for DNA testing." *Id.* at 930. Although the court opined that the case presented in *Olvera* "offer[ed] no good reason to allow successive motions," it expressly refused to adopt the State's proposed rule prohibiting them, instead "pretermit[ing] for now the argument." *Id.* The court went on to state that even if it were to find that some limits should apply to filing successive motions, under Rule 3.853, not all such motions should be banned in any case. *Id.* It predicted that any rule limiting successive motions would still allow them "pursuant to rule 3.853(d)(1)(B)." *Id.*

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[11] Barring defendants from making more than one Rule 3.853 motion also improperly reads into the rule a burden on defendant that is not contained in its text. In *Glenn*, a circuit court made a similar leap from the text of the statute to find that a postconviction motion for DNA testing should be denied because the defendant had not offered any explanation for why the items he sought to test had not been tested at the time of his conviction. The District Court of Appeals reversed, concluding that there is no such "burden on the defendant to make such explanations and justifications." *Glenn*, 954 So. 2d at 734.

Notably, that subsection concerned time limits for filing *has since been repealed.*[12] The current version of the statute, cited above, expressly states that motions may be filed "at any time." Rule 3.853. Accordingly, *Olvera*'s dicta on this subject is irrelevant: changes in the law undermined the underlying premise on which it was based.[13]

In sum, the text of Rule 3.853 expressly repudiates the implication of a

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[12] The 2004 version of the rule provided that motions for testing must be filed either within certain times dictated by the procedural history of the case, or "[a]t any time, if the facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence." The current version of the statute now says simply that the motion may be filed "at any time." But it is notable that even under the old version, successive Rule 3.853 motions were not entirely barred – rather, they expressly were permitted where "facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence." Rule 3.853(d)(1)(B).

[13] The court's decision in *Olvera* is also entirely distinguishable from the facts of this case. In *Olvera*, the defendant's conviction raised and fell based on DNA evidence, which scientifically and conclusively proved the defendant's guilt. Importantly, the court explicitly differentiated its case from "others seeking DNA testing who were convicted without the corroboration of DNA testing." *Olvera*, 870 So. 2d at 930. Here, Zeigler was just such a case – no pre-trial DNA testing occurred, and the State made a unilateral decision not to test blood sub-types. There was no conclusive scientific proof of Zeigler's guilt. Unlike in *Olvera*, if the Rule 3.853 Petition were granted and testing results corroborate Zeigler's account of his innocence, the prosecution's theory of events will be proved impossible and the verdict will be wholly unsustainable. While a successive motion may have been inappropriate in *Olvera*, here it is not only appropriate, but necessary to have any confidence in Zeigler's convictions or sentences.

successive motion bar.[14] The case on which the State relied in the court below does not construe the current form of the rule. In all, no source supports the circuit court's decision to deny Zeigler's motion on successiveness grounds.

B. Zeigler's Rule 3.853 Petition Is Not Successive

Were this Court, despite the language of Rule 3.853 and the rule in *McBride*, to evaluate whether Zeigler's motion is successive, it should find that Zeigler's Rule 3.853 Petition is not. Two simple facts decide this issue.

First, Zeigler did not previously apply to conduct testing pursuant to Rule 3.853. The Rule did not exist when Zeigler secured an order to test materials in his case, a fact recognized by Justice Amstead when this Court promulgated the rule. *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853,* 807 So. 2d 633, 636 n.1 (Fla. 2001) (Amstead, J., concurring in part and dissenting in part). Instead, Zeigler obtained DNA testing pursuant to his clemency proceedings. Rule 3.853, which was not even in effect at the time, only became referenced in the proceedings when Zeigler filed a Rule 3.851 motion to vacate his sentence based on the DNA testing that had already been permitted. Thus, Zeigler did not file a Rule 3.853 motion, but rather asked the court to find, *nunc pro tunc*, that the

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[14] By so concluding that Rule 3.853 contains no successive motion bar, this Court would keep Florida in step with other states concerned with rectifying past injustices. For example, Texas also has no prohibition on a second, or successive, motion for forensic DNA testing. *See, e.g., Ex parte Baker*, 185 S.W.3d 894, 897-98 (Tex. Crim. App. 2006).

testing he had already conducted had been granted pursuant to the new rule, so that his Rule 3.851 motion could properly rely on the outcome of that testing.

The order allowing consideration of previously obtained results under the rubric of Rule 3.853, *nunc pro tunc*, cannot be treated on equal terms with an application under the rule submitted subsequent to the order approving testing. This Court said as much in *Consalvo*, 3 So. 3d at 1015-16, holding that a motion that met the requirements for testing under the pre-rule regime could not operate as a substitute for a properly filed petition pursuant to Rule 3.853. Indeed, Zeigler could not know the standards of the rule, or whether it might bar subsequent applications, at the time he pursued his application for testing in support of clemency proceedings. Fundamental due process standards forbid retroactive application of any implicit successive motion bar in such circumstances. *Cf. FCC v. Fox Television Stations, Inc.*, --- S. Ct. ----, 2012 WL 12344462, at *10 (Jun. 21, 2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.") (citations omitted).

Second, the prior motion did not seek and could not have sought the representative spatter samples requested in the Rule 3.853 Petition because those spatters had not been identified as potentially relevant to Zeigler's guilt until the

2004 Hearing, which obviously took place after the motion was filed. Motions may only be barred as successive if the movant cannot show that the "grounds for the relief were not known and could not have been known at the time of the earlier proceeding." *Hunter v. State*, 29 So. 3d 256 (Fla. 2008), *cert. denied*, 130 S. Ct. 76 (2009). Zeigler clearly did not and could not have had sufficient knowledge in 2001 to bar, ten years later, testing to contest a theory concocted in the interim.

The State's argument below, and the Order adopting it, implies that if *any* material was tested for DNA pursuant to a Rule 3.853 petition, then any future motion to test *any other* material will be successive. This is contrary not only to logic, but also to how this rule has been interpreted in the lower courts. In *Knighten v. State*, 927 So. 2d 239 (Fla. 2d DCA 2006), for example, the District Court of Appeal for the Second District considered the analogous situation of a defendant who sought first to test DNA using one method, but then filed a successive motion to test the same DNA sample using a different method. There, the defendant sought and, on appeal, was granted the right to conduct DNA testing of two hairs. On remand, the Florida Department of Law Enforcement ("FDLE") submitted a report stating that no DNA testing had been completed because the two hairs were not suitable for one type of DNA analysis, namely STR DNA analysis. When the defendant filed a motion to compel testing the hairs using other types of DNA testing, such as mitochondrial DNA testing, the circuit court denied the

motion as successive, apparently under the reasoning that nothing in Rule 3.853 permitted re-testing of DNA samples after at least one attempt at testing was unsuccessful. The appellate court reversed. It found that the motion was not successive and held that "it is reasonable to conclude that if another, more suitable test could exonerate [defendant], the more suitable test should be performed." *Id.* at 241. The District Court of Appeals reached this result even though the defendant apparently had not specified in his original motion which form of DNA testing he wanted to conduct and even though there was no indication in the record that the defendant did not know or have reason to know that the other forms of DNA testing were available to him when he made that request.

In short, Rule 3.853 does not bar successive motions, but even if it did, it was still wrong for the Court to deny Zeigler's petition here because it was not successive.

POINT III ON APPEAL

COLLATERAL ESTOPPEL DOES NOT BAR ZEIGLER FROM OBTAINING TESTING PURSUANT TO RULE 3.853

Post-conviction motions that are not subject to any successive motion bar may be regulated through the application of collateral estoppel principles.[15]

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[15] Collateral estoppel may apply, but res judicata does not. The successive motion bar is a species of res judicata. When this Court considered the meaning of the phrase "at any time" in Rule 3.800, it concluded that this language "expressly

Because the court below did not analyze the application of collateral estoppel here, this Court may wish to remand for appropriate findings. *See Harris v. State*, 995 So. 2d 1128, 1129 (Fla. 4th DCA 2008) (remanding for factual findings on collateral estoppel where court's initial application of law to facts was erroneous). However, because the application of collateral estoppel is subject to *de novo* review, *see McBride*, 848 So. 2d at 288; *Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2004), this Court may choose to engage in the analysis on its own. In the event that it so elects, this Court should find, for the reasons set forth below, that collateral estoppel does not bar Zeigler's petition here.

Notably, the party claiming collateral estoppel bears the burden of showing its applicability with sufficient certainty through the record or extrinsic evidence. *Campbell*, 906 So. 2d at 295. Here, the State cannot meet its burden because collateral estoppel is generally inapplicable to Zeigler's claims and because none of the previous court rulings on DNA testing in this matter have preclusive effect here.

A. Collateral Estoppel Is Generally Inapplicable to Zeigler's Claims

The application of the doctrine of collateral estoppel to bar relitigation of issues requires: (1) the particular issues in the original and later litigation are

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rejects application of res judicata to [these post-conviction] motions." *McBride*, 848 So. 2d at 290.

"identical," *McBride*, 848 So. 2d at 291; *accord Atlantic Shores Resort, LLC v. 507 S. St. Corp.*, 937 So. 2d 1239, 1243 (Fla. 3d DCA 2006); (2) the particular issue was "fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction," *McBride*, 848 So. 2d at 291; *accord Dadeland Depot, Inc. v. St. Paul & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) (stressing that "collateral estoppel precludes relitigation of issues *actually litigated* in a prior proceeding") (citation omitted); and (3) the court's determination of the issue in question was necessary to support its original judgment, *Goodman v. Aldrich & Ramsey Enters., Inc.*, 804 So. 2d 544, 546 (Fla. 2d DCA 2002). Furthermore, even where all the elements of the doctrine have been shown, under the manifest injustice exception, the doctrine will not be applied if doing so "defeat[s] the ends of justice." *McBride* 848 So. 2d at 291; *accord Cook v. State*, 921 So. 2d 631, 636 (Fla. 2d DCA 2005).

In the court below, the State did not dispute that the collateral estoppel doctrine applies to issues and not causes of action[16] and thus the mere fact that Zeigler previously moved for DNA testing does not bar his current Rule 3.853 Petition under collateral estoppel. Instead, the State likened Zeigler's successive testing motion to the successive resentencing motion in *State v. McBride*, 848 So.

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[16] Thus collateral estoppel is more limited than *res judicata*, which applies to, and may be used to bar later, causes of actions. *See, e.g., Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984).

2d 287 (Fla. 2003), that was denied under the collateral estoppel doctrine. The State argued that because the successive motion was denied in *McBride*, the Rule 3.853 Petition must be denied as well. But, to the contrary, *McBride* illustrates why collateral estoppel does not apply.

In *McBride*, this Court applied the doctrine of collateral estoppel to a successive Rule 3.800 motion for correcting sentencing errors. McBride was convicted on a negotiated plea of *nolo contendere* of attempted first-degree murder and two other related crimes. He was sentenced as a habitual felony offender to concurrent thirty-year terms of imprisonment on each count. Several years later, he filed a Rule 3.800 motion, asserting that the sentence was illegal and that he should therefore be resentenced. The Court denied the motion, and McBride did not appeal. The following year, he filed an identical motion under the same exact rule using the same exact argument. The trial court denied the motion on grounds that the successive claim was indistinguishable from the one already denied.

Upon review, this Court found that the parties (McBride and the State) and issue (the legality of the habitual offender sentence) were exactly the same in both Rule 3.800 motions. *McBride*, 848 So. 2d at 291. The Court also determined that because McBride had not appealed the denial of his original Rule 3.800 motion, the issue had been fully litigated. *Id.* The court therefore decided that, even though Rule 3.800 allowed successive motions, collateral estoppel precluded

McBride's second Rule 3.800 motion not because it was successive, but because it was *repetitive*.[17] *Id.* ("While it may be correct that rule 3.800 does not prohibit successive motions . . . where, as here, a defendant raises an issue under rule 3.800, the lower court denies relief and the defendant fails to appeal, he may not later raise the same issue in another rule 3.800 motion").

Collateral estoppel does not apply to Zeigler's case. Unlike the "identical" motion brought by the defendant in *McBride*, Zeigler brings a motion that seeks to test DNA material that has not been previously tested, to yield information not previously obtained. Because the State does not dispute that the evidence that bears that material still exists and is testable, the only contested issue presented by the Rule 3.853 Petition is whether the previously untested stains the State used at the 2004 Hearing to bolster Zeigler's convictions may be tested for DNA pursuant to Section 925.11 and Rule 3.853. No party had asked to test those stains before the 2004 hearing; they have not been tested since then; this issue has never been litigated;[18] and no court has ruled on Zeigler's request on its merits. As set forth

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[17] The Court also found that a manifest injustice exception did not apply because resentencing McBride would likely *increase* his prison term. *Id.* Zeigler, sentenced to death, is at no such risk here.

[18] The State seems to argue that the "issue" for determining whether collateral estoppel applies is whether *any* DNA evidence can ever exculpate Zeigler. However, no court has ever made such a broad contention, and all previous testing-related decisions in this matter were decided upon motions that were brought under different circumstances, with different evidence, and pursuant to different statutes.

above, the testing only became necessary to evaluate the new theory recently advanced by the State. Having advanced a new legal theory, the State cannot, in good conscience, oppose testing of the precise evidence needed to judge the validity of the theory – and certainly collateral estoppel cannot bar that relief.

B. Precluding the Petition Because of Collateral Estoppel Principles Would Cause Severe Injustice and Prejudice.

As noted previously, the lower courts appear in accord that new methods of testing and analysis should not stand in the way of additional DNA testing. The legislature enacted a policy directed to uncovering the truth about criminal convictions. Every innocent person in prison, or on death row, represents an ongoing travesty of justice and potentially means the guilty party continues to walk the streets and threaten public safety. Collateral estoppel under the circumstances presented here cannot be reconciled with the public interests protected by Rule 3.853. Thus, even if the doctrine of collateral estoppel could apply here, which it cannot, its application would result in a potentially grave injustice to Zeigler, and therefore the manifest injustice exception would bar the doctrine's application.

Under this exception, "collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice." *McBride*, 848 So. 2d at 291. The manifest injustice exception applies even where the requested relief is successive. *See, e.g.*, *Martinez v. State*, 935 So. 2d 28, 29 (Fla. 3d DCA 2006) (finding successive Rule 3.850 motion should be remanded for consideration on

the merits under exception). This is so even where the successive motion asks for precisely the same relief requested in an earlier motion. *See Barnes v. State*, 74 So. 3d 1135 (Fla. 2d DCA 2011).

Manifest injustice will be found where, for instance, a procedural rule prevents a defendant from obtaining relief from a sentence more severe than warranted under the law. *Barnes*, 74 So. 3d at 1136 (finding a manifest injustice where defendant was not credited for 267 days previously served in jail). Manifest injustice also will be found where the defendant states a "cognizable claim" for postconviction relief. *Martinez*, 935 So. 2d at 29 (finding that a claim of ineffective assistance of counsel warranted review on the merits of a successive Rule 3.850 motion because the validity of the claim was apparent from the face of the record).

Refusing to consider the merits of Zeigler's Rule 3.853 Petition would be manifestly unjust. The denial of Zeigler's 2003 motion to vacate his sentence was predicated on evidence that has never been tested – even though the evidence is still available and the testing would reveal one way or the other whether Zeigler was rightfully convicted. Thus, the resolution of the issues in the Rule 3.853 Petition may determine whether Zeigler lives or dies. To preclude the fullest opportunity for him to establish his innocence through this Rule 3.853 Petition on grounds that samples from the same pieces of evidence, but not the same

bloodstains, had already been tested would offend all notions of justice. This is precisely the result that Rule 3.853 is designed to prevent. Furthermore, as set forth below, Zeigler's request for DNA testing undoubtedly should be granted if it were considered on the merits; thus, it is clear that he has a "cognizable claim."

POINT IV ON APPEAL

THE CIRCUIT COURT'S DENIAL OF THE RULE 3.853 PETITION SHOULD BE REVERSED BECAUSE ZEIGLER IS ENTITLED TO THE REQUESTED TESTING

Zeigler's motion for testing should be granted on the merits. Rule 3.853 provides that a motion for testing should be granted where: (1) the physical items containing the DNA material still exists; (2) the testing results are likely to be admissible at trial and the items containing the DNA are authentic and would be admissible; and (3) there is a "reasonable probability" that the movant would have been acquitted or received a lesser sentence if the DNA had been admitted at trial. Expert testimony at the 2011 Hearing established that Zeigler satisfied all of these requirements. Indeed, the first two requirements have not been contested by the State. As for the third showing, for the reasons set forth below, Zeigler's Rule 3.853 Petition clearly demonstrates a reasonable probability of acquittal and therefore should be granted.[19]

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[19] Whether a motion satisfies the three requirements of Rule 3.853 to authorize testing is a pure question of law subject to *de novo* review. *See Consalvo*, 3 So. 3d at 1015.

Rule 3.853 requires that the testing would cause "a reasonable probability of acquittal or a lesser sentence." *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004). DNA testing creates a reasonable probability of acquittal if it causes "reasonable doubt" the defendant committed the crime. *Schofield v. State*, 861 So. 2d 1244, 1245 (Fla. 2d DCA 2003). Thus, testing should be granted when the results, as foresworn by the applicant and indicated by his supporting evidence (such as the expert's testimony here) will weaken the State's case sufficiently to give rise to a reasonable doubt about the defendant's culpability. *Jones v. State*, 709 So. 2d 512, 526 (1998), *cert. denied*, 523 U.S. 1040 (1998). Where testing results call into question the testimony of key State witnesses, the results will render unreliable not only the contradicted testimony, but witness testimony on other matters. *See, e.g., State v. White*, 740 N.W.2d 801, 806 (Neb. 2007).

The State has argued ever since Zeigler's original trial that whoever killed Perry Edwards must have also killed the other three victims. The State has not changed its theory that it was Zeigler, and Zeigler alone, who killed Perry Edwards. The State has, however, altered its account of what evidence can support that theory, first relying at trial on Zeigler's underarm bloodstain (which has since been proven to contradict the State's theory) and now on unidentified spatter on other portions of Zeigler's shirt that has not even yet been shown to be blood.

The State's previous theory based on the underarm bloodstain – which was also based on untested conjecture – was shown, as soon as it was tested, definitively not to be true. Its newest theory is equally untested, equally speculative, and equally likely to be proven false once this Court allows science to weigh in. According to the unequivocal expert testimony taken at the 2011 Hearing on the Rule 3.853 Petition, if Zeigler did kill Perry, then Perry's blood will be among the samples Zeigler now asks this Court to allow him to test. Thus, the evidence needed to test the State's only remaining theory of guilt does exist, and according to uncontradicted expert testimony, the comprehensive testing Zeigler seeks to conduct will show definitively that the theory is simply not true.

Although truth is sometimes an elusive concept in criminal prosecutions, that is not the case here. The Court, the people of the State of Florida, and Zeigler all deserve to know what happened to Eunice, her parents, and Charlie Mays. The DNA testing Zeigler requests will answer those questions. There is simply no reason to permit Zeigler's fate to be sealed based on the State's speculation. This Court should order that the testing be conducted, and lay this matter to rest.

CONCLUSION

For the reasons set forth herein, the circuit court's Order denying Defendant-Appellant William Zeigler's motion for DNA testing should be vacated, and this case should be remanded with directions for the court below to issue an order granting the request for testing, in the manner proposed by Zeigler's expert at the hearing held by the circuit court. In the alternative, this Court should vacate the Order summarily, remand the case with instructions for the circuit court to promptly set forth its findings as required by Rule 3.853, and retain jurisdiction to review those findings, if any party shall thereafter object to them.

Dated: July 2, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellee, and the exhibit annexed thereto, was furnished by U.S. mail to:

Dorothy Sedgwick, Esq.
Office of the State Attorney for the Ninth Judicial Circuit
415 N. Orange Avenue
Orlando, Florida 32801

Kenneth Nunnelley, Esq.
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, Florida 32118.

DATED this 2nd day of July 2012.

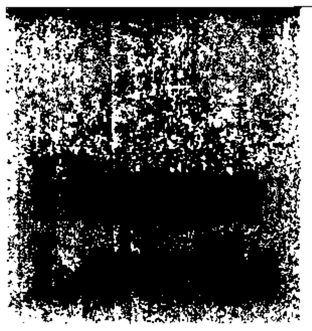
Joanna F. Wasick

CERTIFICATE OF COMPLIANCE

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

DATED this 2nd day of July 2012.

Joanna F. Wasick



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July 2, 2012

Clerk of the Supreme Court
Florida State Supreme Court
500 South Duval Street
Tallahassee, FL 32399

Re: William Thomas Zeigler vs The State of Florida SC12-696

To Whom It May Concern:

Enclosed please the Appellant William Thomas Zeigler's Brief, served July 2, 2012, along with seven additional copies.

An additional copy of Appellant Zeigler's Brief is enclosed. Please return a file stamp received copy in the self-addressed pre-paid envelope that is provided.

Thank you in advance.

Sincerely,

Jessica Tartanella

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