SC12-696

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,
Appellant,

- against -

STATE OF FLORIDA,
Respondent.

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

APPELLANT'S REPLY BRIEF

Dennis H. Tracey, III, Esq.*
Joanna F. Wasick, Esq.*
**Admitted Pro Hac Vice*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Tel: (212) 918–3000

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

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Preliminary Statement[1]

The State's Answer Brief ("Ans. Br.") is essentially nonresponsive to Zeigler's arguments. The State does not contest Zeigler's first argument, that the Order should be reversed because the circuit court did not make any of the findings required by Rule 3.853. In response to Zeigler's second argument, that the Order was premised on the circuit court improperly reading a bar on successive motions into Rule 3.853, the State relies solely on a case that, as shown in the Initial Brief, interpreted a version of the statute that has since been repealed. In responding to Zeigler's third argument, that the Rule 3.853 Petition (the "Petition") is not barred by collateral estoppel, the State misapplies the requirements for collateral estoppel and chooses not to address Zeigler's showing that collateral estoppel cannot apply under the manifest injustice exception. The State's response to Zeigler's fourth argument, that he is entitled to the testing on the merits, ignores the clear language of the Rule and is directly contradicted by the record.

Concluding that the circuit court erred in its reasoning seems indisputable. The Order does not contain any of the findings required by the Rule and it rests solely on principles of res judicata. The State does not defend the circuit court's omissions and concedes that res judicata does not apply. Indeed, precedents of this

[1] Defined terms in this memorandum have the same meanings set forth in Appellant's Initial Brief ("Initial Br.").

Court settle the latter point quite convincingly.

At this point, the State's position shifts to seeking another basis to defend the result below, the denial of testing. None of the State's arguments bear fruit. Assuming that this Court prefers to take the first attempt at resolving the factually based issues that constitute the State's alternate grounds for affirmance, rather than remanding to the circuit court, the facts clearly favor the authorization of testing under the Rule. Expert testimony, uncontradicted and unimpeached, establishes that the proposed testing will yield results at trial that would provide a reasonable probability of acquittal if they are consistent with Zeigler's sworn declaration of innocence.

As the Second District Court of Appeal recently observed, "[R]ule 3.853 is not to be construed in a manner that would bar testing based on the notion that it might substitute a post conviction court's judgment for that of a jury." *Dubose v. State*, No. 2D11-4121, --- So.3d ---, 2012 WL 2053296, at *3 (Fla. 2d DCA June 8, 2012). To the contrary, the Rule specifically authorizes testing in defined circumstances for the express purpose of challenging or confirming the jury's verdict. *Id.* Zeigler presented expert testimony to show that his proposed testing will show whether his guilt can be sustained. This Court should use Rule 3.853 as intended, permit the testing, and ensure that justice is served.

REPLY ARGUMENT

POINT I ON APPEAL
THE STATE DOES NOT DISPUTE THAT THE CIRCUIT COURT FAILED TO MAKE NECESSARY FINDINGS REQUIRED BY THE RULE.

The State utterly fails to acknowledge, much less respond to, Zeigler's Point I on Appeal, that the Order should be summarily vacated because the circuit court failed to make necessary findings required by the Rule. As explained (Initial Br. 23-27), courts have routinely been reversed for failing to follow the procedures set forth in this Rule. Indeed, just a few weeks ago, a court reversed a denial of a Rule 3.853 motion where the lower court failed to "conclusively refute [defendant's] claim[s]" in his petition. *Dubose*, 2012 WL 2053296, at *3 (emphasis added). For this reason alone, the Order should be vacated and remanded.

POINT II ON APPEAL
THE STATE'S ARGUMENTS THAT THE CIRCUIT COURT PROPERLY FOUND THE MOTION TO BE BARRED AS SUCCESSIVE ARE UNSUPPORTED BY LAW OR FACT.

Despite conceding that Rule 3.853 "does not contain an explicit prohibition on successive motions," the State nevertheless persists in arguing that Rule 3.853 does in fact bar "serial" motions. (Ans. Br. 25.) *State v. McBride*, 848 So.2d 287 (Fla. 2003), however, controls the interpretation of Rule 3.853 on this issue, as it decided this precise question based on identical language in Rule 3.800. The State acknowledges the *McBride* holding. But it does not explain how a "serial" motion bar differs from a "successive" motion rule – because there can be no difference,

other than semantics.[2]

In any case, as explained in his Initial Brief (Initial Br. at 32-35), Zeigler's Petition is neither "successive" nor "serial." First, Zeigler has *never before made* a petition for testing under Rule 3.853. (Initial Br. 32-33.) Rather, he obtained DNA testing pursuant to a completely different statute in connection with clemency proceedings, before the Rule, or the underlying statute, even existed. He cannot be faulted for failing to make an allegedly compliant request under a rule that did not then exist. (*Id.* at 32). In 2003, Zeigler requested that he be allowed to proceed *nunc pro tunc* under Rule 3.853 so that, procedurally, his Rule 3.851 motion could properly rely on the DNA test results that had already been obtained.[3] The State completely fails to address this point.

Second, as a very recent appellate decision confirms, a petition that seeks testing of evidence not at issue in prior petitions is not successive. *See Ochala v. State*, No. 1D12-0395, --- So.3d ---, 2012 WL 3115052 (Fla. 1st DCA Aug. 2, 2012). In *Ochala*, the appellate court reversed the circuit court's denial of the

---

[2] The State also misinterprets and misapplies *Olvera v. State*¸ 870 So.2d 927 (Fla. 5th DCA 2004), arguing that dicta contained therein should be construed to prohibit successive motions. However, as thoroughly explained in the Initial Brief (Initial Br. 30-32), that dicta construes a version of the Rule that has been repealed. Moreover, the *Olvera* court explicitly refused to adopt a rule prohibiting successive Rule 3.853 motions.

[3] Fifth District Court of Appeals precedent required that he do so. *Dedge v. State*, 832 So.2d 835 (Fla. 5th DCA 2002).

defendant's petition for additional DNA testing, thereby permitting the defendant to re-test material that had *already been tested* under Rule 3.853. The court found that the defendant's motion was not successive because the motion was not "identical" to the one made prior – the earlier motion sought to test only for blood, but the second motion sought to test for *DNA*, "which may be found in other substances [than blood]." *Id.* at *1; *see also id.* at *2 (explaining that "[a] 'successive motion' for the purposes of postconviction relief has been defined as a 'motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule') (quoting *McCrae v. State*, 437 So.2d 1388, 1390 (Fla. 1983)). In this case, as in *Ochala*, the Petition seeks testing of material (specific blood spatter) that was not at issue in any prior Rule 3.853 request.

Finally, the State attempts to argue that a "serial testing" prohibition should be adopted here because allowing the testing Zeigler requests would permit unending requests for drop-by-drop testing.[4] This is not so. At the 2011 Hearing, Dr. Kish testified that the testing he recommended would contain representative

[4] The State's suggestion that granting the Petition will lead to infinite, piecemeal testing requests is without merit. Zeigler's request is subject to two limiting principles: (1) he seeks to test material that undisputed expert testimony establishes will conclusively prove or disprove Zeigler's innocence; and (2) he seeks to test only material that was never before tested nor presented to the jury, but was identified and used by the State during post conviction proceedings.

samples of potential blood spatter on Zeigler's clothing that would conclusively determine, to a reasonable degree of scientific certainty, whether Edwards' blood was spattered on Zeigler's shirt and thus, whether Zeigler beat and killed Edwards. (R.00766-67; 00788-90.) The State has offered no testimony to rebut Dr. Kish and as such, it as undisputed. Unless the State once again changes its theory of the case,[5] Zeigler will have no need to request additional DNA testing to prove his innocence.

POINT III ON APPEAL
THE STATE FAILS TO ESTABLISH THAT COLLATERAL ESTOPPEL BARS TESTING.

A. The State Fails to Show that Collateral Estoppel is Applicable.

As noted in the Initial Brief, the State bears the burden to show that collateral estoppel should apply here. *See Campbell v. State*, 906 So.2d 293, 295 (Fla. 2d DCA 2004) (the party claiming collateral estoppel bears the burden of showing its applicability). It has failed. The State argues that collateral estoppel should bar Zeigler's claim because the matter of Zeigler's guilt and DNA testing purportedly "has now been fully litigated twice." (Ans. Br. 25.)

[5] The State argues that Zeigler's theories of the case have changed over time (*e.g.*, Ans. Br. at 16 n.9). This is not true. Zeigler has always maintained that he did not kill his family members, that he fought with robbers who attacked him, and that Mays was involved in the robbery. *See, e.g.*, *Zeigler v. State*, 402 So.2d 365, 368, 374 (Fla. 1981).

The State points to this Court's 1995 decision denying DNA testing to Zeigler – a procedural ruling that this Court has acknowledged it overturned with Rule 3.853. The short remark about guilt in that case was dictum,[6] which both the circuit court and this Court acknowledged several years later when the DNA test results became available.

The State's argument that the Petition is precluded because Zeigler allegedly "abandoned" a 2005 previous motion to test the same DNA he seeks to test here is equally specious.[7] First, as explained in the Initial Brief, this testing motion was made in support of, and contingent upon, a separate motion for a rehearing on the denial of his Rule 3.851 motion to vacate. That testing motion became moot when the circuit court denied the motion for rehearing, and the circuit court in fact lost jurisdiction over it when Zeigler appealed the rehearing denial.[8] This procedural disposition does not satisfy the requirement under principles of collateral estoppel

---

[6] *See Gen. Dev. Utils. Inc. v. Fla. Pub. Serv. Comm'n*, 385 So.2d 1050, 1051 (Fla. 1st DCA 1980) (where "[t]he strict holding of the subject order . . . is solely dispositive of the case[] [and] … pronouncements on the other … issues are thus immaterial to the decision and are dicta upon which no claim of res judicata or collateral estoppel could lie."); *accord Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2d DCA 1997).

[7] Although the Answer Brief presents this argument as a stand-alone point, its only relevance relates to whether it precludes Zeigler's request under collateral estoppel.

[8] The State admits this point: "after the previous post-conviction relief proceedings were concluded … the circuit court had no jurisdiction to entertain the [testing in support of rehearing] motion." (Ans. Br. 18-19 (emphasis added).)

for a determination *on the merits*. *See, e.g., Garcia v. State*, 69 So.3d 1003, 1004 (Fla. 3d DCA 2011) (holding that collateral estoppel did not bar the defendant's claim where the prior motion was not considered and decided on the merits). Furthermore, the issue presented in that earlier retesting motion, i.e., whether it was necessary to allow testing in support of a rehearing, was entirely different than the issue presented here. Finally, collateral estoppel does not bar the re-filing of an abandoned motion. *See, e.g., Meintzer v. State*, 943 So.2d 966, 967 (Fla. 5th DCA 2006) & *Meintzer v. State*, 44 So.3d 207, 207-08 (Fla. 5th DCA 2010). Accordingly, the rehearing testing motion could not have any preclusive effect now.

B. The State Does Not Dispute Zeigler's Showing That the Application of Collateral Estoppel Principles Would Cause Severe Injustice.

The State does not respond at all to Zeigler's showing that, even if collateral estoppel could be applied here, which it cannot, a manifest injustice exception would bar such application. (Initial Br. 40-42.) In fact, this exception bars the application of any rule, including collateral estoppel, where, as here, (1) the rule would prevent a defendant from obtaining relief from a sentence more severe than warranted, *see Barnes v. State*, 74 So.3d 1135, 1136 (Fla. 2d DCA 2011); and (2) the defendant has a "cognizable claim" for relief, *see Martinez v. State*, 935 So.2d 28, 29 (Fla. 3d DCA 2006).

POINT IV ON APPEAL
THE STATE FAILS TO COUNTER ZEIGLER'S SHOWING THAT HE IS ENTITLED TO THE REQUESTED TESTING.

The State responds to Point IV of the Initial Brief, that Zeigler is entitled to testing on the merits of his Petition, by misrepresenting Rule 3.853 to require:

> a statement that the evidence was not previously tested for DNA or a statement that the results of a 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.

(Ans. Br. 19 (quoting Rule 3.853(b)(2)) (emphasis in original).) By boldfacing the word "and," the State argues that DNA testing of any part of a piece of evidence in post-conviction proceedings is sufficient to preclude testing of any other part unless science develops better techniques.[9] But read correctly, the Rule in fact requires the movant to state <u>either</u> that (i) the evidence – meaning the portion to be

[9] This reading is directly contradicted by the Florida District Court of Appeal's recent decision in *Ochala*. There, the court reversed the circuit court's denial of the defendant's petition for DNA testing, permitting the defendant to re-test material that, as explained above, had already been tested under Rule 3.853 for blood, but not specifically DNA. The court expressly found that each motion raised a different issue and therefore collateral estoppel could not bar the second motion. *Ochala*, 2012 WL 3115052, at *2. Here, as in *Ochala*, Zeigler is requesting to test evidence (specific blood spatter) that has never been tested before and therefore, as explained in *Ochala*, seeks "different relief" and does "not raise 'substantially the same ground' as previously raised." *Id.* (citation omitted). Collateral estoppel does not apply. The State's reading would also lead to absurd results, that, for example, if a defendant tested a sop of blood located at the tip of the bow of a 50-foot yacht, then he or she would be precluded from testing a different stain deposited at the base of the stern. According to the State, the "evidence" tested (the boat) would be the same.

tested, not merely another part of the same item – was not previously DNA tested, or (ii) that testing was inconclusive and that subsequent scientific developments – meaning developments subsequent to any testing that may have been done on the portion to be tested – would produce a definitive result establishing that the movant did not commit the crime. The Petition clearly states, and the State concedes, that the blood spatter Zeigler wants to test was not previously tested.[10] (Ans. Br. 19 (acknowledging that "[the] other spots were not tested").)

As established in the Initial Brief, the Petition meets the other requirements of Rule 3.853 (Initial Br. at 42-44), and the 2011 Hearing testimony, which the State has been unable to refute, further establishes that the Petition should be granted. At the 2011 Hearing, Dr. Kish explained that, given the amount of blood spatter that had to have been produced during Edwards' attack, it would be all but impossible for Edwards' blood not to have been spattered on the assailant's clothing. (R.00766.) Thus, the testing of the comprehensive, representative sample of the spatter that Dr. Kish recommends would scientifically prove whether Edwards' blood was spattered on Zeigler's shirt and, therefore, whether Zeigler killed Edwards. (R. 00788-90.) *See also Dubose*, 2012 WL 2053296, at

[10] The State's sophistry here illustrates the hazards of first addressing such issues in this Court, rather than having the circuit court hammer out such factual issues.

*3 (recognizing that the absence of an assailant's DNA evidence when DNA would have necessarily been deposited onto particular items is crucial evidence in Rule 3.853 post conviction proceedings). The requested testing will therefore also provide evidence to rebut the State's theory that Zeigler killed the other victims, as this theory was contingent upon Zeigler having killed Edwards. So too will the testing undermine the testimony of key State witnesses, creating further reasonable doubt of Zeigler's guilt. (Initial Br. 42-44.) *See also Dubose*, 2012 WL 2053296, at *3 (DNA evidence may lead to acquittal despite eye witness's identification of defendant).

Thus, Rule 3.853 is satisfied because there is a "reasonable probability that [the] DNA evidence [the defendant seeks to test] would have acquitted him." *Dubose*, 2012 WL 2053296, at *2-3.

CONCLUSION

For the above reasons, the Order should be vacated and the Rule 3.853 Petition granted in full. In the alternative, this Court should vacate and remand with instructions for the circuit court to set forth the findings required by Rule 3.853 and retain jurisdiction to review those findings.

Dated: August 13, 2012

Respectfully submitted,

s/ Joanna F. Wasick

Dennis H. Tracey, III, Esq.*
Joanna F. Wasick, Esq.*
* *Admitted Pro Hac Vice*
HOGAN LOVELLS US LLP
875 Third Avenue
New York, New York 10022
Telephone:(212) 918-3000
dennis.tracey@hoganlovells.com
joanna.wasick@hoganlovells.com

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

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief 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 13th day of August 2012.

s/ Joanna F. Wasick
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 13th day of August 2012.

s/ Joanna F. Wasick
Joanna F. Wasick