IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

Case Nos. CR 76-1076, CR 76-1082,
CR 88-5355, and CR 88-5356

STATE OF FLORIDA,	
Plaintiff,	
- vs. -	
WILLIAM THOMAS ZEIGLER, JR.,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DNA TESTING

July 1, 2015

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William Thomas Zeigler, Jr. ("Zeigler"), defendant in the above-captioned action, respectfully submits this memorandum of law, by and through his undersigned counsel, in support of his Motion For DNA Testing (the "Motion") made pursuant to Section 925.11, Florida Statutes (2006) and Florida Rule of Criminal Procedure 3.853 ("Rule 3.853"). For the reasons set forth in the Motion and herein, Zeigler respectfully prays that this Court enter an order authorizing the release of the physical evidence described in the Motion for DNA testing.

PRELIMINARY STATEMENT

This motion seeks DNA testing using powerful, newly developed techniques that will prove that Tommy Zeigler is innocent. These techniques did not exist 14 years ago when Zeigler obtained limited DNA testing for clemency purposes. Today, they are widely used by Florida prosecutors and law enforcement to determine suspects' guilt and to secure convictions, and for a simple reason: they offer an unparalleled ability to determine through scientific analysis of physical evidence whether a defendant committed a particular crime. The findings Zeigler anticipates this testing will yield are likely to prove unambiguously that Zeigler could not have committed the crimes for which he was convicted. Basic justice demands that he be permitted to use these techniques to test the evidence in his case, as any defendant in similar circumstances would do today, especially since granting Zeigler's request will not cost taxpayers a penny.

As discussed in detail in this brief, Zeigler meets all of the legal requirements for DNA testing. Under Florida law, a post-conviction request for DNA testing must be granted where the requested testing, viewed on top of all of the other exculpatory evidence adduced in the case, would create a "reasonable probability" of reasonable doubt as to the defendant's guilt. In Zeigler's case, the testing he seeks is likely to far exceed that standard. He seeks testing that was not previously performed or even available, including Touch DNA testing; the evidence he seeks

to test remains available; and a jury would be highly likely to find reasonable doubt in light of the anticipated results. Among other things, the testing Zeigler requests will prove that Zeigler could not have held his father-in-law in a headlock as alleged by the State and could not have been the source of smeared and dripped blood the State conceded were deposited on Zeigler's wife's body after she was killed. Proof that Zeigler did not hold his father-in-law in a headlock, and that *someone else* smeared and dripped blood on Zeigler's wife after she was dead, would destroy the State's case against Zeigler.

Furthermore, the probative value of Zeigler's requested testing must be assessed in light of the already substantial doubts raised by the cumulative evidence Zeigler has adduced through trial and post-conviction proceedings. These include Zeigler's lack of a logical motive, the absence of physical evidence of his guilt, and the recent partial recantation of one of the key witnesses against him.

Zeigler's purported motive for killing his family – to collect on his wife's life insurance policies – has always been illogical because Zeigler was a successful businessman with no pressing debts or other need to commit an economic crime and the amount of insurance policies was modest. The notion that a wealthy man with no history of violence or family disharmony would kill his entire family and murder an innocent fourth victim to obtain a modest amount of money simply does not make sense. Further, the State has never offered any explanation at all for why Zeigler would murder his in-laws as part of his plot to collect his wife's life insurance money. The fact that Zeigler was shot *in the stomach* also renders the State's case highly suspect, since that is an extremely unlikely place for Zeigler to shoot himself.

The case against Zeigler lacked much more than a motive; it lacked direct evidence of guilt. There were no eye witnesses to the murders and very limited physical evidence pointing to

Zeigler as the perpetrator. To make its case, the State relied on the testimony of two witnesses to other events that day, which the State claimed showed that Zeigler was executing a plan to frame them for the other murders. The State's star witness, a man named Felton Thomas, told the jury a bizarre tale of Zeigler taking him and the fourth victim, Mays, to an orange grove on the day of the murders to fire two of the murder weapons, which the State contended was evidence that Zeigler plotted to have Mays and Thomas leave their fingerprints on those weapons and therefore must have been the murderer. The Florida Supreme Court has repeatedly pointed to Thomas's testimony as a ground for denying Zeigler's post-conviction petitions for relief.

Thomas, however, has recently recanted critical parts of that story, and now says that he never fired any guns, that no one made any particular effort to get him to fire any guns, and that he *never actually knew who the person who took him to the orange grove that day was* and testified that it was Zeigler due to heavy police coaching. Thomas's revised account drastically weakens the inculpatory value of his testimony, and provides another illustration of the police misconduct that has generally characterized this case. The State's other chief witness lied about the clothes he said he was wearing on the night of the murders and his whereabouts before and after the crimes, *was found in possession of one of the murder weapons, and admitted to buying other weapons found at the crime scene*. These witnesses, neither of whom claims to have seen Zeigler commit the murders, offer weak evidence indeed of Zeigler's guilt.

The State's case against Zeigler was weak enough that the State had a very difficult time obtaining a conviction. The jury was initially split 6-6. After extensive deliberations, there remained a single holdout juror. That juror repeatedly asked to speak to the judge about abuse by other jurors, and only changed her vote after the trial judge, unbeknownst to the defense, supplied her with Valium. The same juror stated in open court just two weeks after the jury

rendered its verdict "*I still feel he's innocent*," explaining that she only changed her vote to guilty because "I just couldn't take any more." While the jury did vote to convict, it expressly rejected the death penalty – which can only be understood as an expression of doubt given the severity of the crimes and charges. Zeigler is on death row because the trial judge deemed it appropriate to override the jury's recommendation and impose the death penalty.

In short, the totality of the evidence creates substantial doubts about Zeigler's guilt. The DNA testing Zeigler seeks is *highly likely* – not just reasonably probable – to produce evidence that would shift the existing doubts in the case over the reasonable doubt standard.

While Zeigler has unsuccessfully sought DNA testing in the past, his current request is different in three important respects: first, Zeigler seeks testing using powerful new technologies that were not previously available; second, he seeks to test all bloodstains on his shirts and the other objects identified in this motion, which addresses the Florida Supreme Court's concern that limited testing might miss important evidence; and third, the main piece of circumstantial evidence used by the Court to discount Zeigler's prior testing request – Felton Thomas's testimony – has now been compromised by Thomas's substantial revision of his trial testimony.

Zeigler's case has always been one of guilt or innocence: either Zeigler murdered his family on Christmas Eve, 1975, or he has been wrongfully imprisoned on death row for almost 40 years. Advanced new DNA technologies now make it possible for Zeigler to prove his innocence with certainty. As one Florida appellate court recently held, Rule 3.853 "offers a chance to ensure the validity of the jury's verdict". *Dubose v. State*, 113 So.3d 863, 866 (Fla. 2d DCA 2012). That Court granted a defendant's request for DNA testing after finding "based on the nature of the crime, inconsistencies between testimony, and the questionable credibility of the witnesses" that "identification is indeed a genuinely disputed fact, and there is a reasonable

probability that DNA evidence would have acquitted him." *Id.* This case falls into the same category. Zeigler meets the criteria for DNA testing and respectfully prays that his Motion be granted.

STATEMENT OF RELEVANT FACTS AND CUMULATIVE EXCULPATORY EVIDENCE WHICH MUST INFORM AN ASSESSMENT OF THE PROBATIVE VALUE OF ZEIGLER'S DNA TESTING REQUEST

As discussed in detail in the Argument section of this brief, Zeigler's request for DNA testing must be determined in light of all of the evidence adduced in his case, including both evidence presented at trial and evidence Zeigler has uncovered following his conviction. This section describes that evidence, including the State's highly implausible theory of how and why Zeigler committed the murders, how the State barely obtained a conviction in the first place, serious misconduct that occurred during Zeigler's trial and rendered Zeigler's convictions unfair and improper, and subsequently discovered *Brady* and *Giglio* violations by the State. Also discussed are powerful newly discovered pieces of evidence, including limited DNA test results from 2001 that exculpate Zeigler and implicate Charlie Mays and the recent and highly troubling partial recantation by one of the key witnesses against Zeigler. The only question presented by Zeigler's Motion is whether, in light of all of these existing reasons to doubt Zeigler's conviction, additional evidence in the form of DNA testing results would be likely to lead a jury to find reasonable doubt as to Zeigler's guilt. As described more fully below, Zeigler amply satisfies that standard.

Overview of the Murders

Zeigler was convicted in 1976 of murdering his wife, Eunice, her parents Perry Sr. and Virginia Edwards, and a fourth man names Charles Mays on Christmas Eve, 1975. The murders occurred at a family-run furniture store Zeigler owned in Winter Garden, Florida (the "Store").

State v. Zeigler, Case No. 48-1988-CF-005355-A/O, 48-1988-CF-005356-A/O, Supreme Court No. SC12-696, 2012 Appeal of the Order Denying Successive Petition for DNA Testing (Ex. A at 8-9.)[1] All of the victims had been shot, and two of the victims, Perry Edwards and Charles Mays, had also been beaten severely with blunt objects. (Ex. A at 8-9, 28-29, 32-37.) Zeigler was himself shot in the abdomen, and underwent immediate surgery after being found by police to save his life. Four days later, while Zeigler was in his hospital bed recovering from surgery, Frye and another officer arrested Zeigler and charged him with committing the murders. (*Id*. at 182.) The following June, Zeigler was tried and convicted of committing two counts of first degree murder and two counts of second degree murder. Zeigler pled not guilty at trial and has maintained his innocence to this day.

I. The State's Case at Trial Was Weak, Reflected Poor Police Practices that Harmed Zeigler's Defense, and Barely Resulted in a Conviction

A. Background Allegations Concerning the Murders

Zeigler's trial began on June 10, 1976. (Ex. A at 1.) 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 what he believed was a botched armed robbery committed by Mays and at least two of his associates that went horribly wrong when Zeigler and his family got in their way. (*Id*. at 22, 207-16.) Zeigler testified that he and his wife had plans on Christmas Eve, 1975 to attend a neighborhood Christmas party along with their parents and several of their friends, including the Winter Garden Chief of Police, Don Ficke. (*Id*. at 199-205.) Before going to the party, Zeigler drove to Store to pick up three large Christmas gifts he planned to deliver before the party that evening. (*Id*.)

[1] Relevant excerpts of the transcript of Zeigler's trial, held before the Honorable Maurice M. Paul, Judge for the Circuit Court for Orange County Florida between June 10, 1976 and July 16, 1976, are annexed hereto as **Exhibit A**.

When Zeigler arrived at the Store that Christmas Eve, he found the lights off and inoperable. (*Id*. at 206-07.) As he walked through the darkened building, he was suddenly and violently hit over the head from behind with such force that his glasses flew off his face. (*Id*.) Reeling from the blow, and unable to see clearly with the lights out and without his glasses, Zeigler picked himself up and fought for his life, striking and attempting to shoot his attackers with a heavy magnum he kept for protection. (*Id*. at 209-13) Zeigler testified that he heard unfamiliar voices and saw two dark figures coming towards him, at least one of which was a large individual. (*Id*. at 210.) In the course of the melee, Zeigler was shot in the stomach and fell to the ground. (*Id*. at 213-14; Ex. B at ¶¶ 3b and 3c.)[2] Before losing consciousness, Zeigler heard one of his attackers say "Mays has been hit. Kill him." (*Id*. at 214.) When he came to, Zeigler crawled over what he believed to be a body and called Police Chief Ficke for help. (*Id*. at 215-219.)

The State argued that it had been Zeigler who, using a number of different weapons, including several firearms, killed his wife and in-laws. (*Id*. at 4, 233-40.) According to the State, Zeigler drove his wife to the Store in someone else's car at approximately 7:15 p.m. that night and then shot her in the head as soon as they entered. (Ex. A at 8.) Zeigler's purported motive for murdering his wife was to collect on her modest life insurance benefits, even though the evidence at trial showed Zeigler to be a wealthy man with no need for additional funds and no history of crime or any type of violence. (*Id*. at 15, 17, 198, and 259.)

According to the State, Zeigler's in-laws arrived at the Store just minutes after Zeigler had murdered Eunice. When they arrived, the State contended, Zeigler promptly murdered them as well. (*Id*. at 8-9.) The State argued that Eunice and her mother, who showed no signs of a

[2] A copy of Zeigler's Petition for DNA Testing Pursuant to Florida Stat. § 925.11(1)(a), dated August 19, 2009, is annexed hereto as **Exhibit B.**

struggle, must have been shot and killed in short succession. (*Id.*) Perry Sr., the State contended, had struggled with his attacker "for some time," *Zeigler v. State*, 402 So. 2d 365, 367 (Fla. 1981), and was beaten severely with an object while being held in a headlock, in addition to being shot. (*Id.* at 8-9.) The State never presented any motive or explanation for why Zeigler would murder his in-laws.

The State also asserted that over the course of the hour that followed after Zeigler killed Eunice and her parents, Zeigler separately coaxed three men to the store – Charlie Mays, Felton Thomas, and Edward Williams – so that Zeigler could kill them, too, and then frame them for the other homicides he had already committed. (*Id.* 7-14.) Thus, according to the State's account, Zeigler planned to murder six people on Christmas Eve – all to collect on modest life insurance money from one victim that the evidence showed Zeigler did not particularly need. The State did not offer any theory as to why Zeigler would attempt to murder and frame three additional three men, rather than just one.

The State presented no direct witnesses to the murders, nor any witness who saw the murder scene prior to the police arriving. Nor did the State furnish any compelling physical evidence linking Zeigler to the murders. Instead, the State built its case upon two things: (1) limited physical evidence relating to Perry Sr.'s murder; and (2) circumstantial evidence in the form of the testimony of two witnesses who claimed they observed Zeigler acting strangely around the Store and elsewhere on the night of the murders. As detailed below, neither of these categories of evidence continues to support Zeigler's conviction. The DNA testing Zeigler seeks in his Motion will conclusively refute the physical evidence used against him at trial and will prove affirmatively that Zeigler cannot be guilty of the crimes for which he was convicted. Further, as noted above, one of the two key witnesses against Zeigler, Mr. Thomas, has recently

recanted substantial portions of his testimony, stating plainly in a recent interview "**I still don't know who it was**" that he saw the night of the murders (Thomas Tr. at 31:25).[3] The second key witness against Zeigler was thoroughly impeached at trial, lacks credibility, and in any event was only a circumstantial witness, not a witness to the murders.

B. Physical Evidence Relied Upon by the State Was Extremely Limited

Aside from Williams' and Thomas's accounts, discussed below, the State relied principally on physical evidence consisting of bloodstains on the underarm of Zeigler's inner and outer shirts. According to the State, these stains proved that Zeigler held Perry Edwards in a headlock under his arm and beat him to death. The State theorized that if Zeigler killed Perry Sr., he must therefore have committed all of the murders.

The State supported its argument with testimony from a blood spatter expert, Professor Herbert MacDonnell, who explained that whoever beat Perry to death at close range with a metal object would have transferred a large quantity of Perry's blood onto his clothing, especially if the murderer was holding Perry in a headlock while he beat him, which is what the State argued occurred. Relying upon simple blood-typing – a procedure that has almost entirely been supplanted by DNA testing – the State asserted that Zeigler must have killed Perry, and thus the other victims, because Zeigler's shirt had type A bloodstains on it and Perry had type A blood. (*Id*. at 173, 241.) The blood could not have belonged to Zeigler or to Virginia, both of whom had type O blood, but could have belonged to Eunice or Mays, both of whom had type A blood, or to any of the hundreds of millions of other people who share that blood type.[4] (*Id*. at 173.)

[3] The Affidavit of Lynn-Marie Carty, sworn to on June 24, 2015, is annexed hereto as **Exhibit C** (the "Carty Aff.") Annexed as Exhibit A to the Carty Aff. is the transcript of a portion of an interview of Felton Thomas conducted by Lynn-Marie Carty on September 23, 2013 (the "Thomas Tr.")

[4] According to the Red Cross, 40% of Caucasians, 31% of Hispanics, 27.5% of Hispanics, and 26% of African Americans in the U.S. have type A+ or A- blood. *See* http://www.redcrossblood.org/learn-about-blood/blood-types, last accessed June 30, 2015.

DNA testing has already largely disproved the State's theory that Zeigler's shirts had Perry Sr.'s blood on it. In 2001, Zeigler obtained limited DNA testing for clemency purposes, using technology that is, by today's standards, antiquated. That testing failed to reveal any of Perry Edwards' DNA in the bloodstains found on the underarm of Zeigler's shirts, demonstrating that those stains did not come from Perry and refuting the principal physical evidentiary argument the State relied on at trial. Testing did confirm the existence of Mays' blood on Zeigler's shirts, which is consistent with Zeigler's testimony that he fought Mays and tried to shoot him. As described herein, modern testing will bolster the existing DNA findings and prove that Zeigler *could not have* committed the murders.

C. The Bizarre Testimony of the State's Star Witness, Felton Thomas

The State's "star" witness was a man named Felton Thomas, who was a migrant fruit picker and an acquaintance of Mays. (Ex. A at 100, 202.) Thomas testified that he had been at a "beer joint" on Christmas Eve when Mays pulled up in a van and asked if he wanted to ride with him. (*Id*.) Thomas had "nothing else better to do" so agreed and got in the van. (*Id.* at 101.) Thomas then recounted how Mays had driven to the Store when a "white man" came to the van and told Thomas and Mays that "the guy [who was] supposed to own the furniture store hadn't got there [yet]." (*Id.* At 102-106.) Thomas had never met this man before and did not know his name. At trial, Thomas nonetheless identified him as Zeigler, (*Id*. at 105), although he has subsequently explained, as described below, that he was never shown a lineup and identified Zeigler in court based on significant coaching from police. *See infra* at Section IV. Neither Thomas nor any other State witness explained why Zeigler, who Mays knew owned the Store, would tell Mays that he was waiting for a *different* man who was the Store's owner.

Thomas testified that he and Mays got into the white man's car, which had two doors and "looked like a Cadillac." (*Id*. at 105-06, 124.) Zeigler's car at the time, which was an Oldsmobile that did not match that description. (*Id*. at 133-134.) Thomas sat in front next to "the white guy [that] was driving," who drove Mays and Thomas to an orange grove and had them remove some guns from a bag in the car and fire them out of the window of the car. (*Id*.at 106-08.) Thomas testified that both he and Mays fired guns out of the car's window into the orange grove. (*Id*. at 107-08.) "The state says that the purpose of the trip was to get the two to handle and fire the weapons in the bag," *Zeigler*, 402 So. 2d at 368, presumably so their fingerprints would be on the guns, even though that theory is inconsistent with the State's claim that Zeigler later wiped those same guns clean of fingerprints. (Ex. A. at 243.)

Thomas continued at trial that after shooting the guns in the orange grove, the white man drove Mays and him back to the store and asked Thomas to pull a switch on a box on the wall of the store, which Thomas did. (*Id.* at 108-09.) Thomas stated that the white man from the car then climbed over a fence to try to gain access to the Store, telling Thomas this was necessary because "the man hadn't come to open the store yet, said he was in Apopka," and that the "white man" also attempted to break into the Store using a long rod before giving up and claiming that he might have an extra key at home. (*Id.* at 112-14.) Following these break-in attempts, Thomas testified, the three men drove in the same car to a house, where the "white man" rummaged around the garage and came back to the car with a box with either ammunition or a gun in it, which he threw to Mays and asked him to load. (*Id.* at 115.) According to Thomas, they then drove back to the Store, whereupon Zeigler unlocked the Store and asked Thomas to come in with Mays. (*Id.* at 115-16.) Thomas declined to go into the Store because it was dark inside, and instead left Mays and went to a nearby store, where he got a ride back to Oakland. (*Id.*) Thomas

did not testify to hearing any gunshots or otherwise observing any signs of disturbance inside of the Store.

Thomas stated that after leaving Mays and the "white man," he continued drinking at a bar in Tildenville[5], and drank beer until around midnight, when someone came into the bar and said that someone had been killed at the Store. (*Id.* at 117.) After hearing this information, Thomas said he got a ride to Oakland to see if the information was true, but, finding few people about, got a ride back to the Zeigler Store. (*Id.* at 118-10.) There, he saw a large crowd of people. (*Id.* at 119.) Despite the large police presence Thomas observed at the Store (*id.* at 125), Thomas testified that he got a ride to Orlando, where he went to a restaurant, ordered coffee, and, upon seeing an officer at the restaurant, reported his information to the officer. (*Id.* at 119-21.)

Zeigler flatly denied that he was the "white man" Thomas described in his account. (*Id.* at 219-20.)

D. The Bizarre Testimony of the State's Other Key Witness, Edward Williams

The State also relied heavily at trial on testimony from a second man, Edward Williams, without which, the lead prosecutor told the jury, "I don't think we could have really made a case." (Ex. A at 252.) Unlike Thomas, who testified that he had never met Zeigler before and did not know him, Williams knew Zeigler and worked for him as a handyman. (*Id.* at 127-28.) Williams testified that Zeigler asked Williams to come to his house at 7:30 p.m. on the night of the murders so that they could go to the Store together to pick up Christmas presents. (*Id.* at 129-30.) Williams said he arrived at Zeigler's house at about 7:30 pm, parked behind Zeigler's

[5] While the trial transcript records Thomas as claiming to drink in "Tylersville," this appears to be a mistyping of the name of Tildenville, an unincorporated area in Orange County, Florida in close proximity to Oakland. No town named "Tylersville" appears to exist in Florida.

truck, and waited. (*Id.* at 131-132.) According to Williams, eventually, at about 8:00 p.m., Zeigler got into Williams' truck and the two drove to the Store. (*Id.* at 135-38.)

According to Williams, upon arriving at the store, Zeigler led him down a hallway, pointed a pistol at Williams' chest, and pulled the trigger three times. (*Id.* at 143-44.) Williams testified that the gun did not fire and that he pleaded for Zeigler not to kill him and ran out of the building, where he encountered a locked gate. (*Id.*at 144-45.) Williams alleged that Zeigler then followed him outside and tried to explain to Williams that it was all a mistake and Zeigler was not really trying to kill him. (*Id.*) Then, according to Williams, Zeigler handed him the pistol, which Williams put into his pants pocket, and tried to coax him back into the Store. (*Id.* at 146, 148.) Williams testified that Zeigler bent down on his knee and begged Williams to come into the store with him. (*Id.*at 147.) Williams said he refused, climbed over the fence and ran away from the store. (*Id.* at 148.) Williams testified that, eventually, after making several stops along the way, he went to the Winter Garden police station and handed over the gun Zeigler gave him. (*Id.* at 149-50.)

Several months after he gave his initial report to the police, Williams came forward with the story that he had actually purchased some of the guns allegedly used by Zeigler on Zeigler's behalf. As part of this late-volunteered story, Williams claimed that Zeigler asked him in June of 1975 to help him buy a "hot" gun. (*Id.* at 151-52.) Williams testified that he contacted a taxi driver named Frank Smith ("Smith") and made arrangements for Smith to obtain two such guns. (*Id.* at 152-53, 167.)[6] Williams also testified that he handled everything from ordering the guns to picking them up himself. (*Id.* at 154-6.)

[6] Smith testimony was limited to the "hot" gun issue—he was not a witness to events of the night of the murders.

Smith testified at trial as well. He admitted that Williams asked him to procure stolen guns, and that he had supplied guns to Williams (which he claimed were not stolen) in response to that request. He also claimed that at one point Williams put Zeigler, who Smith didn't know and was unable to identify at trial, on the phone to discuss the sale. (*Id.* at 168-70.) (Smith had never met Zeigler before, and thus would not have been able to verify Zeigler's voice.) (*Id.* at 167.) Williams testified that Zeigler later asked him to collect from Zeigler a sealed envelope and to drop it off at Smith's house. (*Id.* at 156-57.) Upon dropping off the envelope, Williams said he received an open paper sack from Smith, in which Williams could see the butts of two handguns. (*Id.* at 156.) Williams claimed he folded open the top of the paper sack, (*id*. at 156-57), took the bag to Zeigler's home to deliver it, and left the sack of guns with Zeigler's wife (supposedly, the intended victim) to give to Zeigler. (*Id.*)

Williams' testimony was heavily impeached at trial. For example, Williams testified that he wore the same clothing on the night of the murders from the time he left his apartment at twilight, until, after turning himself in, a deputy sheriff took him to his apartment and collected the clothes. (*Id*. at 161-62.) The clothes he handed over included a black sweater and dark green pants. (*Id*. at 254-55.) But Williams' landlady, Mary Wallace, testified that she saw Williams exiting the front entrance of his apartment complex at twilight wearing khaki plants, a flannel shirt with stripes and checks, and a khaki jacket. (*Id*. at 185-86.) Further, the boots Williams asserted he was wearing that evening and handed over to the police lacked any scuff marks and still had an unsoiled price tag on them, which was inconsistent with Williams' testimony that he wore those boots when he ran through a parking lot and jumped a fence. (*Id*. at. 256-57.) This testimony and evidence strongly indicate that Williams changed his clothes before he handed them over to the police.

Williams' alibi the night of the murders was also directly contradicted by an eye witness. Williams testified that he waited in Zeigler's driveway with his blue truck parked behind Zeigler's truck until about 7:40, at which point Zeigler arrived. According to Williams, Zeigler parked in his garage upon arriving, closed the garage door, and left with Williams in Williams' truck. (*Id*. at 130-39.) Zeigler's neighbor, Ed Reeves, refuted that account. Reeves testified that he had driven past Zeigler's house twice the night of the murders – at 8 o'clock when Reeves left home and at 8:45 when he returned – and had made a point of looking at Zeigler's house on both occasions. According to Reeves, Zeigler's garage was open, empty, and had the lights on at both 8:00 and 8:40 - 8:45 that night – not closed with a car in it as Williams claimed. (*Id*. at 188-92.) Reeves also testified that Ed Williams' blue truck was not in Zeigler's driveway at either of those times. (*Id*.)

Finally, Williams testified that, after Zeigler allegedly tried to shoot him, he ran out of the Store and tried to open a gate, which he found to be locked, preventing his escape. (*Id*. at 145.) But in fact, when police arrived, they found that the locking mechanism of the gate was inoperable, and even in its apparent "locked" position, it could be opened with a simple push – something Zeigler's regular employee and handyman would surely know. (*Id*. at 25-26, 164-66.)

E. The State's Conduct During the Investigation and at Trial was Improper and Prejudiced the Defense

In a number of respects, the State's improper investigation techniques foreclosed Zeigler from pursuing additional lines of defense. From the night of December 24, 1975 until January 8, 1976, the police maintained complete control of the furniture store, and, without any warrant or attempt to obtain one, conducted an exhaustive search that included opening a closed cabinet. (Ex. A at 24, 62-63.) Many items of potential importance to the defense were taken and then lost--evidently through careless handling--and at least one significant avenue of investigation, blood

subtyping, was entirely foreclosed to the defense because the state made the unilateral decision not to perform this testing.[7] (Ex. A at 175-77.)

Despite the failure to subtype, the State asserted at trial that Type A bloodstains on Zeigler's shirt were proof that Zeigler must have beat Perry Edwards. (*Id*. at 219, 241, 246–48, and 252.) The State's basis for this assertion was that Zeigler and his mother-in-law were both Type O, while Eunice and Perry Edwards were Type A. (*Id*. at 241-2; Ex. B ¶ 3(g).) But Mays also had Type A blood (Ex. A at 173), and thus the stains equally supported Zeigler's testimony that he had pulled himself across Mays' dead body to reach the phone he used to call for police assistance to save his life. Blood subtyping could have helped to distinguish Mays' and Perry Edwards' blood. The prosecution, however, had made the unilateral decision not to test blood samples taken from the victims for subtypes. (Ex. B ¶ 3(g).) The result was that Zeigler was not able to provide a scientific rebuttal to the State's interpretation of the underarm bloodstain evidence. (*Id*.) Even the State Attorney criticized the techniques utilized to collect and test the bloodstain evidence, going so far as to send a letter to the Orange County Sheriff's Office stating that he was "very concerned with the methods and procedures employed in the crime scene processing in the Zeigler case, particularly with the handling of the blood evidence." (Ex. D.)[8]

As another example, the police "lifted" a bloody shoeprint which, according to their theory, belonged to the murderer. At trial, the defense adduced testimony from an F.B.I. forensic expert that the shoeprint could not be identified as Zeigler's (Ex. A at 72-76); a prosecution expert testified that he could neither confirm nor deny that the print belonged to Zeigler. (*Id*. at 78-80). The testimony of both experts, however, was made on the basis of a photograph of the

[7] Sub-typing could not be performed at the time on blood stains that were more than two or three weeks old. (Ex. A at 177.)

[8] A letter from State Attorney Robert Eagan addressed to Major Marvin Peele of the Orange County Sheriff's Office, dated March 12, 1976, is annexed hereto as **Exhibit D**.

print (Ex. E, at 35-37)[9], apparently because the actual imprint had been lost by the police. Thus, the best evidence was not available to either expert (or the jury) because of the exclusive but shoddy conduct of the investigation by the police during their warrantless seizure of the store. Had the defense had access to the Store, they could have made an imprint of that shoeprint -- and any other partial prints of the store -and submitted them for meaningful forensic testing.

Additionally, the State had found various partial fingerprints on items from the crime scene, including a gun, a door and a cash register, which were not sufficiently complete to permit their positive identification as belonging to a particular person. They could be used for "negative" identification, however; that is, to eliminate a particular person as the "owner" of the print. But these partial prints were not analyzed for their negative value, and were instead shredded and destroyed. (Ex. A at 96-99.) A fingerprint specialist at Florida's Sanford Crime Laboratory testified that such destruction was not good practice (Ex. A. at 195-96); and loss of the prints was a severe blow to the defense, since they might have been used to establish the presence and involvement of other individuals and thus support the defense case that the murders were committed by intruders.

Additionally, the Sheriff's Office removed bullets from the building where the murders occurred without adequately marking them, so that the defense could not determine the location from which particular bullets had been removed. (Ex. A at 55-60.) Had the bullets been properly labeled, the defense could have determined which shots were fired by each gun. When compared with the location of the victims and the estimated times of their deaths, such evidence might well have permitted the defense to show that one man could not have fired all of the bullets found in the store.

[9] Relevant excerpts of the deposition of Donald F. Frye, taken May 14, 1976, are annexed hereto as **Exhibit E**.

Also, a loose tooth shown in crime scene photographs was lost by the police. In the crime scene photographs, a tooth was shown lying on the parka of Charles Mays, and a forensic dental expert testified that the tooth in the photographs was not the same tooth that was turned over to the defense and which came from Mr. Mays. (*Id*. at 179-80.) Due to inadvertence or otherwise, the prosecution did not recover the photographed tooth from the crime scene, and it was never found. This tooth, which the unrebutted evidence established was not the tooth of any person known to be at the Store that night (*id*. at 38-39, 52-54, 94, 179-80), might have enabled the defense to show that an additional, unidentified person was present at the store that night, thus supporting its theory that one or more others committed the murders.

II. The State Barely Obtained a Conviction Through Extreme Juror Misconduct, Including the Drugging of a Holdout Juror

In its first vote on the case, Zeigler's jury was split evenly, with six jurors voting to acquit and six jurors voting to convict. Post-trial investigation revealed that the jury deliberation process was fraught with pre-judgment, intimidation and harassment, and other violations. Immediately after being elected foreman of the jury, the foreman stated that he had made up this mind two weeks earlier and didn't need to discuss the case or deliberate. (Ex. F ¶¶ 5(b), 6(a).)[10] Juror Irma Brickel, who expressed strong doubts about Zeigler's guilt, was subjected to strong intimidation and harassment. When she attempted to discuss the evidence in the case, she was subjected to verbal abuse, while one of the jury members clicked one of the guns in evidence behind her head. (*Id.* ¶ 5(e), 6(e).) When Juror Brickel suggested getting a mannequin to examine the bloodstains on murder victim Eunice's clothing, another juror told her that she was approximately the same size and could put them on to get a feel for the situation. (*Id.* ¶ 6(f).)

[10] The Affidavit of Stephen J. Robertson, sworn to August 9, 1976, is annexed hereto as **Exhibi**t F**.**

As a response to this prejudgment and harassment, Juror Brickel asked to speak to the judge outside the presence of the other jurors, to discuss "other jurors and decisions made before they [were] permitted to make them." (Ex. A at 260.) Judge Paul denied that request and a subsequent similar request, in spite of the fact that at one point Mrs. Brickel fainted because of the pressure in the jury room (Ex. A at 261-63). Instead, without consulting or even advising defense counsel, Judge Paul called Juror Brickel's doctor and arranged a prescription for Valium for her. *See Zeigler v. State*, 632 So. 2d 48, 52 (Fla. 1993). Shortly after taking the valium, Mrs. Brickel abandoned her holdout position and voted with the other eleven jurors to convict Zeigler at 5:00 p.m. on July 2, 1976 - Friday afternoon of the Bicentennial July 4th weekend. (Ex. A 264-66.)

At a sentencing hearing held just two weeks later on July 16, 1976, Mrs. Brickel stated in open court that she did not believe Zeigler was guilty and that she had only voted to convict because the pressure on her was too great.

> JUROR BRICKLE: If I could call back the Friday, I would have changed my mind. In fact, I almost did. **I still feel he's innocent**. My reasons don't seem to be important or they weren't.
>
> THE COURT: But you stated in open court that was your verdict.
>
> JUROR BRICKLE [sic]: I know I did, but I just couldn't take any more.
>
> (Ex. A at 268 (emphasis added).)[11]

The prosecution did not present any witnesses at the sentencing hearing. The jury deliberated for only twenty-five minutes[12] and returned an advisory sentence of life

[11] On information and belief, the trial transcript improperly spells Juror Irma Brickel's name as "Brickle."
[12] It is difficult to interpret the jury's recommendation of life imprisonment as anything other than evidence of residual doubt amongst the jurors. Juror Prickle openly testified to her residual doubt. And if the jury was entirely

imprisonment on all counts. (*Id*. at 267.) Despite that recommendation, and despite just hearing Juror Brickel's residual doubt, Judge Paul disregarded the jury's recommendation and sentenced Zeigler to death. (*Id*. at 270.)

III. After Trial, Zeigler's Counsel Discovered That the State Suppressed Numerous Pieces of Critical Evidence and Deliberated Used Perjured Testimony at Trial to Procure his Convictions

In the decades following Zeigler's conviction, Zeigler has discovered that the State suppressed many pieces of critical evidence and provided perjured testimony to obtain his conviction. An exhaustive listing and description of this suppressed evidence and perjured testimony is not possible in this factual summary. The more egregious examples of suppressed evidence and perjury are detailed below.

A. The State Suppressed Crucial Witness Statements and Police Reports Made Early in the Police Investigation

Despite explicit requests by the defense,[13] the State failed to disclose key witness statements and police reports from the period early in the investigation when the defense lacked access to either the witnesses or the crime scene. These early pieces of evidence could well have led to effective impeachment of important State witnesses that was not otherwise possible. The State prevented Zeigler from using this evidence at trial by suppressing it until April 1987, when the State was compelled to grant access to Mr. Zeigler's file in response to counsel's Florida Public Records Act request.

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confident in its verdict, it would be odd for it to not recommend the death penalty for a brutal mass killing of family members and a man allegedly killed in order to frame him for the murders—all for an alleged motive of monetary gain. At the very least, a jury that was entirely confident in its verdict would have debated imposing the death penalty for more than 25 minutes.

[13] *See* Ex. E at 92-95.

1. The State Suppressed the Full Report of the First Night's Investigation Prepared By The First Officer to Arrive at the Crime Scene

Immediately after the crime, Chief Thompson, the first police officer to arrive on the scene, drew up two reports: a brief, one-page summary of his observations (Ex. G)[14] and an elaborate, 14-page statement containing detailed descriptions of the crime scene and a chronicle of Thompson's activities on the night of the crime and the days which followed (Ex. H).[15] In response to Zeigler's discovery request, the State produced the one-page summary, but withheld the 14-page statement. Among other things, the longer, suppressed statement included Thompson's observation that Zeigler had only dry blood on his wounds and clothing. (*See* Ex. H at 4.)

The State's suppression of this report seriously weakened Zeigler's case at trial. A crucial element of the State's case was its contention that Zeigler shot himself immediately prior to the arrival of the police around 9:20 p.m. on the night of the crime, and not before. This was important because for the State's theory to be true, Zeigler needed time before shooting himself to first kill his wife and in-laws at approximately 7:10-7:25, then take Thomas and Mays to the orange grove, the Store, his home, and back to the orange grove, then kill Mays, then return home to meet Edward Williams, and finally return with Williams to the Store. (Ex. A. at 8-14, 228, 240-41.) Had Zeigler shot himself after taking all of those actions, the blood surrounding his wound would have been wet, not dry, when the police arrived at 9:20. The presence of dry blood surrounding Zeigler's wound, by contrast, would strongly corroborate Zeigler's account that he had been shot shortly after arriving at the Store at approximately 7:40 – more than an hour and a half before the police arrived. Zeigler did not have time to carry out the elaborate

[14] A copy of Robert J. Thompson's one page police report concerning the crime at issue, sworn to on December 24, 1975, is annexed hereto as **Exhibit G**.

[15] A copy of Robert J. Thompson's 14-page police report concerning the crime at issue, sworn to on December 24, 1975, is annexed hereto as **Exhibit H**.

actions the State asserted and shoot himself enough in advance that the blood on his wounds would be dry at 9:20.

At trial, when questioned about the condition of the blood on Mr. Zeigler, Chief Thompson testified that he observed "what appeared to be dried blood and damp blood," which the State offered as proof that Zeigler shot himself shortly before calling the police (and after committing all four murders). (Ex. A at 50; emphasis added.) The defense was unable to cross-examine Thompson with his contradictory statement that the blood on Zeigler was dry, not damp, because that report had been suppressed. Had defense counsel been in possession of this prior inconsistent statement at trial, they might well have been able to launch a successful attack on Chief Thompson's testimony, and thus on the State's entire theory of the case.

The State also suppressed summaries of statements the State's key witnesses, Thomas and Williams, made to the State's principal investigator, Detective Donald Frye. (Ex. E at 93-95.) Those summaries, which Frye included in his investigative report, would have afforded the defense unique impeachment material, as they were the only evidence of Frye and Williams' statements to police during the two-weeks following the murders that Frye and Williams were secluded and inaccessible to the defense. Any material which tended to show inconsistencies between their earlier and later statements to the police and between the police interviews and trial testimony would have been of material assistance to the defense.

2. The State Suppressed a Recorded Conversation With an Eyewitness Across the Street From the Murders Whose Account Contradicted The State's Theory of the Case

The State also suppressed a tape-recorded telephone interview of Jon Jellison ("Jellison"), an eyewitness not disclosed to the Defense prior to trial. Jellison was located in a motel immediately next to the Store, and witnessed some of the events at the Store on the night

of the crime. The interview was recorded on April 20, 1976 at 4:30 p.m. by Jack Bachman, an investigator for the State (the "Jellison Interview"). (Ex I.)[16] Jellison, his parents and his sister were staying at a motel immediately behind the Zeigler furniture store on Christmas Eve of 1975. Mr. Jellison told the State's investigator that shortly after 9:00 p.m. he (and the rest of his family) saw a police car at the back of the store, that a police officer aimed his gun toward the store over the top of the car and fired shots, and that other police cars had arrived on the scene soon thereafter. (Ex. I at 2-4.)

The State's investigator made plain his disappointment with Jellison's recollection of events, apparently because it conflicted with the State's theory of the case, stating: "As long as you heard the gunshots after you saw the police car, that wouldn't help us a bit." (*Id* at 5.) This is an express acknowledgement that this evidence, never disclosed to Zeigler's trial attorneys, was exculpatory. The state investigator then made a naked attempt to get the witness to tailor his memory to the State's pattern. When Jellison asked if Mr. Bachman wanted to interview Jellison's mother, who had also witnessed the events, Bachman stated: "Not unless you all get together and decide you heard those gunshots before you saw the police car. In that case, we'd give you a free trip back to Florida." (*Id.* at 5-6.)

Testimony by Jellison and other family members consistent with his taped statement would have tended to refute the State's theory of the case at several points.

> **(i)** Under the State's theory, Zeigler fired the shots that killed Mays before 8:30 p.m., when, it was claimed, Zeigler tried to kill Edward Williams as part of a scheme to make the murders appear to be the result of a failed robbery attempt, and probably before 8:05 p.m., when the State asserted Zeigler had gone to his home to meet Williams and drive him to the Store. (Ex. A at 131-44.) Testimony by four disinterested Jellisons that shots were fired after 9:00 p.m. would have significantly undermined the State's theory.

[16] A transcript of the Jellison Interview is annexed hereto as **Exhibit I**.

(ii) Second, the State contended at trial that Chief Thompson was the first officer to arrive on the scene and that he did so as a result of Zeigler's telephone call for help. (Ex. A at 44-46, 48-49.) The Jellisons' testimony would have contradicted that contention.

(iii) Finally, the Jellison evidence is totally irreconcilable with the State's position that no shots were fired after the police arrived on the scene. Thus, their testimony would have seriously undercut the State's theory of the case, and would certainly have raised questions in the minds of the jurors about who the police were shooting at.

B. The State Suppressed the Existence of, and Presented Perjured Testimony Regarding, a Key Witness to the Murders Who Was Also a Suspect in an Attempted Robbery Across the Street From the Murders, The Existence of Which Was Also Suppressed

The State suppressed the existence of a key witness named "Robert Foster" who came to the police two days after the murders seeking protection based upon what he knew about them. The State also suppressed the existence of an attempted robbery across the street from the murders on the same night, for which the same witness was a suspect.

On December 30, 1975, Detective Frye signed an Arrest Report summarizing his investigation of the Zeigler Store murders and highlighting his interview of a key witness named "Robert Foster," mentioning the name five times (the "Frye Arrest Report"). (*See* Ex. J.)[17] But in February 1976, Detective Frye drafted a new summary of his investigation in a homicide report dated February 6, 1976 (the "Homicide Report"). (*See* Ex. K..)[18] The Homicide Report omitted any mention of Robert Foster and instead named a "Felton Thomas" as the key witness who was interviewed by the police on December 24, 1975. (*Id.* at 3.) Attached to the Homicide Report was a summary of a police interview of Thomas allegedly conducted on the night of the

[17] A copy of the Frye Arrest Report is annexed hereto as **Exhibit J.**
[18] A copy of the Homicide Report is annexed hereto as **Exhibit K**.

homicides by Detective C. Jenkins, in which Thomas recounts a story which is similar to the one Detective Frye described in the Arrest Report as coming from Robert Foster (the "Jenkins Interview"). (*See* Ex. L.)[19] The summary of Thomas' police interview was signed by Thomas and notarized by Detective Frye. (*Id.*at 9.) When asked, under oath, about the name substitution, Detective Frye said that the original mention of "Robert Foster" was a "typographical error" and a "mistake," and that he was attempting to refer to "Felton Thomas" all along. (Ex. A at 182-83; Ex. M at 2-4.)[20] Detective Frye denied knowledge of anyone named "Robert Foster." (*Id.*) At trial, Thomas initially testified that he didn't remember signing his statement, (Ex. A at 122) but proceeded to give testimony that was largely consistent with his prior statement—the details of which had initially been attributed to "Robert Foster."

Unbeknownst to Zeigler and his counsel, on or about December 26, 1975, a black male named Robert Foster came to the police seeking protection because he believed that someone was trying to kill him for what he knew about the Zeigler Store murders. (Ex. N ¶ 4.)[21] (This information was provided by Leigh McEachern ("McEachern"), who in 1975 was Chief Deputy Sheriff at the Orange County Sheriff's Office.) McEachern was also advised that "Robert Foster had been admitted into the county jail in a special section that we set aside for the protection of material witnesses." (*Id.*)

In 2011, an investigator for Zeigler, Lynn-Marie Carty ("Carty"), using the internet, was able to track down a man named Robert Foster and confirm that Foster was present in Orange County after his release from prison in 1975. (*See* Ex. O.)[22] A woman who was at a Gulf gas station across the street from the Zeigler Store on the night of the murders positively identified

[19] A copy of the Jenkins Interview is annexed hereto as **Exhibit L**.
[20] An excerpt of the deposition of Donald R. Frye, taken April 23, 1976, is annexed hereto as **Exhibit M**.
[21] A copy of the affidavit of Leigh McEachern, sworn to April 1, 2012, is annexed hereto as **Exhibit N**.
[22] A copy of an affidavit of Carty, sworn to April 2, 2012, is annexed hereto as **Exhibit O**.

Robert Foster as the man who attempted to rob the gas station after dusk on the night of the murders upon Carty showing her his mug shot. (Ex. P ¶¶ 6-7, 20.)[23] The same woman details how Chief Thompson—who later investigated the Zeigler Store murders—responded to the attempted Gulf station robbery and took notes. (*Id*. ¶¶ 9-11.) Yet, in his sworn testimony in the Zeigler case, Chief Thompson failed to mention responding to a robbery across the street from the murder scene earlier in the evening, despite being asked to describe the events of the evening. (*See* Ex. Q.)[24]

Zeigler filed a timely Rule 3.851 motion to set aside his convictions based on these discoveries, which motion was denied on the ground that the suppression of Robert Foster's existence was not sufficient to "undermine [the Court's] confidence in the outcome" in light of other evidence of guilt such as "the testimony of Smith, Thomas, and Williams." *See Zeigler v. State*, 130 So. 3d 694 (Fla. 2013) *cert. denied*, 134 S. Ct. 2292 (2014).

IV. Key State Witness Felton Thomas Has Now Recanted Substantial Portions of His Testimony

Felton Thomas, whose testimony has been cited repeatedly by the Florida Supreme Court as key to Zeigler's conviction,[25] has now recanted critical portions of that testimony. As discussed in greater detail above, at trial, Thomas testified that Zeigler picked him and Mays up

[23] A copy of the Affidavit of Susan Ambler Graden, sworn to April 3, 2012, is annexed hereto as **Exhibit P**.
[24] Sworn testimony of Robert Thompson, given in January of 1976, is annexed hereto as **Exhibit Q**.
[25] *See, e.g.*, *Zeigler*,, 130 So. 3d at *1 (("there is no reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different . . . to have believed [Zeigler's] story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams . . . .") (citations and internal quotation marks omitted); *Zeigler v. State*, 116 So. 3d 255, 256-57 (Fla. 2013) *cert. denied*, 134 S. Ct. 825 (2013) ("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 [Smith, Thomas, and Williams]. . . *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*") (citations omitted); *Zeigler v. State*, 967 So. 2d 125, 131 (Fla. 2007) (same); *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995) (same); *Zeigler*, 402 So. 2d at 368 ("To have believed [Zeigler's] story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams . . . .").

the night of the murders, took them to a nearby orange grove, and had them fire guns out the window of the car. (Ex. A at 107-08.) According to the State, Thomas' account proved that Zeigler intended to kill Mays and frame him for the other murders by having Mays and Thomas handle the murder weapons so that their finger prints would be found on them. (*Id*. at 230-33.) The degree to which the State emphasized Thomas's testimony cannot be overstated. (*See e.g.*, *id*. at 230-73.)

Two critical aspects of Thomas's testimony were that (1) Thomas could positively identify the driver he rode with the night of the murders to be Zeigler, and (2) the driver had Thomas and Mays handle and fire the guns as part of his plot to frame them – which the State contended was the whole purpose for the trip. Thomas now states that neither of those two critical aspects of his trial testimony is true. Attached as Exhibit A to the Carty Affidavit is a transcript of a conversation Felton Thomas recently had about this case with two law enforcement officers (one retired) and a private investigator working for Zeigler (hereinafter the "Thomas Trans."). Thomas, who reports still being afraid to speak about this case for fear of his safety and wellbeing despite knowing that Zeigler is in jail and on death row, insisted that the conversation take place in the front lobby of the Ft. Pierce, Florida police station, which is under video surveillance. (See Ex C ¶ 3.)

In that conversation, Carty asked Thomas whether the "white man" he saw in the car the night of the murders was Zeigler. (Thomas Trans. at 31:20-31:21.) Thomas responded "I still don't know who it was." (*Id.* at 31:25) Thomas explained that the police never showed him a photo lineup *or even asked Thomas who he had seen that night*, (*Id.* at 3:8-12; 53:4-8) even though Thomas did not know Zeigler and "only saw the person twice in my whole life . . . That night and at the courtroom". (*Id.* at 3:10-12; 42:17-22.) Instead, the police *told Thomas* that the

man he reported seeing was Zeigler, and improperly provided Thomas with additional information about their case against Zeigler to solidify that thought in Thomas's mind. (Carty Aff. ¶ 6.) Thomas recounted how instead of asking him for the identity of the "white man" he had seen, "detectives" on the night of the murders "said Zeigler -- that this man Zeigler said he called and say Charlie tried to rob him -- Charlie tried to rob him. Said he had -- he had done shot himself in the side right here. They could tell he had shot himself in the side because he had gun powder right here." (Thomas Trans. at 50:1 – 50:12.) Thomas explained that he stated that the "white man" from the car was Zeigler because "Zeigler" was "the way they call him," referring to the police, and that the police told him Zeigler had committed the murders. (*Id.* at 30:22.) Thomas added that in a situation such as this case, where he did not personally know someone, he would not only accept a suggestion as to that person's name, but would also identify that person by their suggested name if asked. Thomas illustrated that point by stating that if someone told him that a person's name was JoAnn, "that's what I'm going to say, too, because I don't know anybody by their name. Call you JoAnn and tell him that that's JoAnn right there. ***To point JoAnn out, I say, That's her right there***." (*Id.* at 58:25-59:3.) (emphasis added).

Not only was Thomas never shown any sort of lineup, but he readily concedes that if he had, he might have identified someone else. In response to the question "Do you think you could point out the wrong white guy?", Thomas responded "If I don't [know] a person . . . and you line a whole lot of people up I ain't seen but one -- one time, . . . I don't know who I might pick out . . ." (*Id.* at 42:15-20.) When pressed about whether Zeigler was the man from the car, Thomas referred to media reports that linked Zeigler to the murders, suggesting he had formed his view about whether Zeigler was the same person he had seen in the car from police and other accounts that Zeigler was guilty. (*Id.* at 38:10-14.) Thomas also explained in portions of his

interview not captured on the recording that he was and remains illiterate and that substantial coaching by police bolstered his view that Zeigler was the man he saw in the car the night of the murders. (Ex. C ¶ 6-7.)

Thomas also told Carty and officers Gene Jones and Jeff Thompson repeatedly that he never fired or even touched any guns the night of the murders. Thomas answered the question "So you didn't fire a gun?" with an emphatic "No, no, no. . . I ain't fire". (Thomas Tr. at 23:15-23.) Carty confronted Thomas with his trial testimony, in which he states clearly that he did fire a gun the night of the murders, and Thomas responded "That's wrong . . . I don't give a shit what they say [referring to the transcript of his trial testimony]. I know I didn't do that, I didn't do that. . . I never had my hand on one of those guns. Never." (*Id.* at 61-24-25; 62:1-8.)[26]

Thomas further altered his trial testimony in at least two other important respects. *First*, Thomas stated that the car the "white man" was driving had four doors, rather than two as he testified at trial. When asked in his recent interview "How many doors? Do you remember how

[26] When shown a picture of Zeigler's brother-in-law, Perry Edwards, Jr. ("Perry Jr.", and asked if he recognized him, Thomas said "I don't know that man by no mustache, no," (Thomas Trans. 32:2-17) indicating that he did recognize him without a mustache—which Perry Jr. only grew after the murders. Perry Jr. (now deceased) inherited substantial assets under the Edwards' will following their murders. (*See* the Will of Perry Edwards Sr. and Virginia Edwards, executed August 2, 1967, a copy of which is annexed hereto as **Exhibit R**; Affidavit of Perry Edwards, Jr., sworn to June 2, 1988, ¶ 6, a copy of which is annexed hereto as **Exhibit S.)** *(Will; Edwards Jr. Assets).* Perry Jr. probated the will on January 7, 1976, the date of Eunice's funeral. (*See* an excerpt from the "Petition and Proceeding for Probate In Solemn Form" for the will of Perry Edwards, Sr., filed January 7, 1976, and annexed hereto as **Exhibit T**. Court records confirm that the Edwards' will was checked out in August of 1975, indicating that they were planning to make some sort of change to the will (*see* the excerpt of the "Will Docket, Living Persons" containing entries for the Edwards' Will annexed hereto as **Exhibit U**); while the Edwards' had approached Zeigler in November of 1975 to make him, and not Perry Jr., the executor of the estate. (*See* the Affidavit of Connie Crawford, sworn to December 19, 2012, ¶ 2, annexed hereto as **Exhibit V**.) There are indications that Perry Jr. and his parents did not get along well. (*See* the Affidavit of Lizzie Parker, sworn to October 23, 2012, ¶ 5, annexed hereto as **Exhibit W**.) There is also evidence that Perry Jr. was in town on the night of the murders, and had a strange reaction upon receiving news of the murders. (*Id.* ¶¶ 6-7; Affidavit of April Nicole Lanier, sworn to October 16, 2012, ¶ 4, annexed hereto as **Exhibit X.)** Perry. Jr. had a history of violence. (*See* the Complaint for Divorce of Sandra May Edwards ¶ 9, annexed hereto as **Exhibit Y**; Lanier Aff. ¶¶ 5-7.) And it appears that a ring missing from Eunice's body after the murders (Ex. A at 223-226) later came into the possession of Perry Jr.'s wife, Sandra Faye (*see* Lanier Aff. ¶ 3). Despite all of this, it does not appear from the records of this matter that the State has ever considered Perry Jr., or anyone other than Zeigler, to be a potential suspect in this case—and rather rushed to judgment that Zeigler was the *only* possible suspect. This appears to have created a motivation for the State to ignore, and in many cases suppress, evidence contrary to this assumption.

many doors [the white man's car] had?," Thomas responded "[y]eah. It got four doors on it." (Thomas Tr. at 73:4-6.) At trial, by contrast, Thomas insisted that the car the white man was driving the night of the murders "didn't have no back door on it". (Ex. A at 124.) This is an important change in his story because Zeigler's car had only two doors, not four. (*See* the Motion for DNA Testing Pursuant to Fla. Stat. § 925.11(1)(a) ("Motion"), submitted herewith, ¶ (3)(k).)

Second, Thomas stated contrary to his trial testimony, there were no cars other than Mays' van and the car driven by the "white man" at the Store on the night of the murders. In his interview, Thomas stated that when he, Mays and the "white man" went to the Store, there were "[n]o cars. No nothing there. When we got back, there was nothing there but just [Mays'] van." (Thomas Tr. at 20:9-13.) That account is flatly inconsistent with the State's claim that Perry and Virginia Edwards drove to the Store separately from Eunice and were subsequently murdered by Zeigler. It is also inconsistent with Thomas's trial testimony that "I saw a vehicle parked in front of the store when we first got there", which he "took [] to be a Buick," and that this extra vehicle "was still there" after Thomas returned with the "white man" from the orange grove. (Ex. A at 110.)

V. The Results of Zeigler's Prior DNA Testing Were Exculpatory and Implicate Mays

In 2001, Zeigler obtained authorization to use DNA testing technologies on portions of his clothing the State presented to the jury at trial. (*See* **Ex. Z.**)[27] The testing 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

[27] The Order of Hon Donald E. Grincewicz, Circuit Judge, dated November 19, 2001, is annexed hereto as **Exhibit Z**.

beaten him, and the same bloodstain that the State argued showed by inference that Zeigler had also killed his wife and mother-in-law – were not Perry Edwards' blood. (Ex. B at 3; Ex. **Exhibit AA**.)[28] Further, the testing showed that Perry Edwards' blood was found in the deep, saturated blood stains found on the upper calf and lower thigh of Mays' pants – which was consistent with Mays, not Zeigler, having knelt on Edwards' chest while Edwards was bleeding profusely. The testing results also discredited the State's claim that Mays arrived more than an hour after Perry was killed at Zeigler's command. (Ex. B at 3; Ex. BB at pages 33-41; Ex. AA at 3 and at Ex. 1 thereof.)[29] Rather, the results supported Zeigler's testimony that the stain on the underarm of his shirt, which the State argued arose from a savage beating of Perry Edwards while Edwards was held in a headlock, was created when he crawled over Mays' body to call the police. (Ex. BB at 82-94.)

After obtaining these test results, Zeigler moved in 2003 to set aside his convictions. (*See* Ex. AA) The Circuit Court held an evidentiary hearing on his motion the following year at which two expert witnesses testified. (*See* Ex. BB.) They explained that Zeigler could not have killed Perry Edwards in the manner described to the jury (beating him to death with a blunt instrument while holding him in a headlock) without transferring a large quantity of Perry's blood onto his clothing, and that the DNA testing conducted showed no trace of Edwards' blood in the areas identified to the jury as relevant by the State. (*E.g.*, BB at 39-40, 95-103.) The State contended in response that the sample was too small, mixed, or deteriorated to be reliable, despite presenting no evidence to support that contention. (Ex. B at 4.) The State also argued that other physical evidence – entirely different spots from the portions of Zeigler's shirt that the

[28] Zeigler's Motion to Vacate Convictions Based Upon Newly Available Evidence, dated January 15, 2003, is annexed hereto as **Exhibit AA**.

[29] Relevant excerpts of a transcript of an evidentiary hearing held in this matter before the Hon. Reginald Whitehead on December 20, 2004, are annexed hereto as **Exhibit BB**.

State had pointed to at trial – might contain Perry Sr.'s blood and thus could prove Zeigler's alleged guilt. (Ex. BB at 49-50, 53, 239-240, 243, 248-249.) This theory, however, was entirely new and had never been presented to the jury.[30] (*Id.*) In fact, the only thing the State's expert told the jury about the stains the State used to deny the significance of the DNA testing results in 2004 was that they might not be blood at all. (*Id.* at 125-26, 165.) The circuit court allowed the State to continue to hypothesize about how untested evidence could support a new theory of Zeigler's guilt over objections from the defense and ultimately denied Zeigler relief at least partly on that basis. (*See* Ex. CC.)[31] The Florida Supreme Court affirmed. *Zeigler v. State*, 967 So. 2d 125 (Fla. 2007).

In 2009, Zeigler filed a motion seeking to test the additional stains the State in 2004 contended were evidence of Zeigler's guilt and other stains that could shed light on Zeigler's guilt or innocence. (*See* Ex. B.) The Circuit Court approved Zeigler's retention of an expert to review the physical evidence and design a plan for testing. The expert, Paul Kish, prepared a thorough report and presented himself for testimony and cross-examination. After an evidentiary hearing, the circuit court denied Zeigler's testing motion on the ground that it was barred as successive. (*See* Ex. DD.)[32] The circuit court did not comment on the merits of testing or set forth findings on the testimony or the likely outcome of DNA testing.

The Florida Supreme Court rejected the circuit court's basis for its holding (that Zeigler's motion for testing was successive), finding that Florida's Rule 3.853 in fact permitted successive DNA testing motions. The Florida Supreme Court nonetheless affirmed the circuit court's

[30] And the theory lacked any sound factual basis. Subsequent examination of the spots by another expert, Paul Kish, confirmed that the spots did not have the right shape to have been deposited on the shirt in the manner hypothesized by the State.

[31] The Order of Hon. Reginald Whitehead, Circuit Court Judge, dated April 18, 2005, denying Zeigler's "Motion to Vacate Convictions Based Upon Newly Available Evidence," is annexed hereto as **Exhibit CC**.

[32] A copy of the Order of Reginald Whitehead, Circuit Court Judge, dated March 12, 2012, denying Zeigler's "Successive" Petition for DNA Testing Pursuant to FLA. Stat. § 925.11(1)(a) is annexed hereto as **Exhibit DD**.

decision, ruling that Zeigler's motion should be denied on the different ground that Zeigler failed to show that "the absence of Perry's blood" on Zeigler's clothing would "give rise to a reasonable probability of acquittal or a lesser sentence" – the Florida Supreme Court's standard for obtaining DNA testing – because (1) "it was possible to miss blood on the shirt, due to deterioration and improper storage," (2) "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area," and (3) "there was no way to know for sure that all of the contributors to the blood on Zeigler's clothing would be identified unless every single bloodstain was tested." *Zeigler v. State*, 116 So.3d 255, 259 (Fla. 2013) (citation omitted).

VI. Substantial Recent Advances in DNA Testing Technology Make a Conclusive Determination of Zeigler's Guilt or Innocence Possible

As explained in greater detail in the attached affidavit by Richard Eikelenboom, an expert in cutting edge DNA testing techniques regularly engaged to support prosecutions, DNA testing techniques have advanced dramatically in the past 3-4 years, and especially dramatically since Zeigler last obtained DNA testing thirteen years ago in 2001. (*See* Ex. EE ¶¶ 4-9.)[33] Newly developed techniques, include mini-STR, Y-STR, and touch DNA testing, now provide technological solutions to the very concerns cited by the Florida Supreme Court as its basis for denying Zeigler's last request for DNA testing. Among other things, these techniques make it possible to accurately identify bloodstains that are old, degraded, or from mixed samples. (*Id.*)[34]

New technologies and techniques also make it possible to test for an entirely new category of DNA known as touch DNA. Touch DNA refers to DNA recovered from epithelial

[33] The Affidavit of Richard Eikelenboom, sworn to January 6, 2015, is annexed hereto as **Exhibit EE**.

[34] It is widely acknowledged that new testing technology significantly enhances technicians' ability to test degraded DNA evidence. For instance, The U.S. Department of Commerce, National Institute of Standards and Technology, states in a page on mini-filer technology that "[r]ecovery of information from [] degraded samples is often enhanced by use of smaller PCR products" and that mini-filer equipment "help[s] recover information from degraded DNA samples that typically produce partial profiles and a total loss of information from larger STR amplicons." *See* http://www.cstl.nist.gov/strbase/miniSTR.htm, last accessed on June 30, 2015.

(skin) cells deposited when a person makes contact with an object. Once collected, this DNA is analyzed using the same methods as "traditional" DNA samples, such as blood or bodily fluid DNA. Touch DNA can be retrieved and identified on virtually any object, including clothing and the exterior or interior of a gun (the interior typically contains the touch DNA of the person who opened and cleaned the gun). Touch DNA is also likely present in blood that has dripped from one person's hands onto another object because skin cells from that person's hands mix into the blood sample, creating two separate DNA profiles. Modern DNA testing can both detect and separate those two profiles, revealing (1) who the dripped blood belonged to, as well as (2) whose hands the blood dripped from. (Ex. EE ¶¶ 10-12.) As described more fully in Section B(1) of the Argument, *infra*, these techniques, which are now regularly employed by Florida prosecutors, often reveal crucial, case cracking information on crimes.

ARGUMENT

Under well-settled Florida law, Zeigler is entitled to conduct DNA testing of the evidence identified in his Motion. Zeigler meets all of the requirements specified in Rule 3.853 and its jurisprudence. Moreover, while it is not a requirement under Rule 3.853, the interests of justice demand that Zeigler be permitted to conduct the DNA testing he seeks. As described above, the combination of factual inconsistencies in the State's original case, subsequently revealed police misconduct intended to improperly bolster the State's case at Zeigler's expense, and new evidence, including Felton Thomas's recantation, already render the accuracy and fairness of Zeigler's conviction highly dubious. The State has both a statutory and a moral obligation under such circumstances to allow Zeigler to use modern scientific testing techniques to prove his innocence. There is certainly no harm to the State from allowing Zeigler to conduct this testing – at no expense to the State – while the harm of depriving Zeigler of the testing he seeks is mortal.

In short, no good reason exists to deprive Zeigler and the people of Florida of DNA testing in this case, and every good reason exists to allow it. The Motion should be granted.

A. Zeigler's Motion is Facially Sufficient

Rule 3.853 specifies a two-stage process for deciding a motion for DNA testing. First, the Rule states that the Court must determine whether a motion is facially sufficient. Fla. R. Crim. P. 3.853(c)(2). If the motion is facially sufficient, the Court must order the State to respond and then either enter an order on the merits or hold an evidentiary hearing. Fla. R. Crim. P. 3.853(c)(2-3). In this case, Zeigler's Motion is both facially sufficient and meritorious. The Motion should therefore be granted.

Pursuant to Rule 3.853, a motion for post-conviction DNA testing is facially sufficient if it includes "(1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained; (2) a statement that the evidence was not tested previously 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; (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime; (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received; (5) a statement of any

other facts relevant to the motion; and (6) a certificate that a copy of the motion has been served on the prosecuting authority."

Zeigler's Motion contains all of the information a defendant is required to assert under Rule 3.853. (*See* Motion at ¶¶ 1-15.) Accordingly, the Motion is facially sufficient and this Court must order the State to submit a response. Fla. R. Crim. P. 3.853(c)(2).

B. Zeigler's Motion Should Be Granted on the Merits

In addition to meeting the statutory requirements for facial sufficiency, Zeigler's Motion also satisfies Rule 3.853's substantive requirements and should therefore be granted on the merits. Rule 3.853 directs that "[i]f the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court," and "[u]pon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing." Fla. R. Crim. P. 3.853(c)(2-3). Here, Zeigler has demonstrated that his Motion for DNA testing is meritorious and should be granted.

Under Rule 3.853, a defendant is entitled to conduct post-conviction DNA testing where he can demonstrate that the rule's three requirements are met. Those requirements are:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
>
> (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.

Fla. R. Crim. P. 3.853(c)(5).

The first two of these requirements are undisputedly met. The Clerk of the Court in Orange County has advised Zeigler's counsel that the evidence he seeks to test exists. Motion at ¶ 5. That evidence – which was already used in Zeigler's trial – is plainly admissible.

Zeigler has also amply satisfied Rule 3.853's third and primary requirement, which is that he allege facts that would "create a 'reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial.'" *Dubose*, 113 So.3d at 864 (citing *Knighten v. State*, 829 So. 2d 249, 252 (Fla. 2d DCA 2002)). This standard for obtaining DNA testing is deliberately meant to be a low one. A defendant meets it merely by showing a reasonable probability that DNA testing results would create reasonable doubt as to the defendant's guilt if they were presented to a jury. *See e.g. Schofield v. State*, 861 So. 2d 1244, 1245 (Fla. 2d DCA 2003) (reversing denial of DNA testing because "[i]f DNA testing confirms Schofield's allegations, the results would create a reasonable probability that Schofield would be acquitted *because reasonable doubt would exist that Schofield committed the murder*.") (emphasis added). Where a defendant has met that standard, "DNA testing procedures should be allowed." *Dubose*, 113 So.3d at 864. Importantly, "Rule 3.853 does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing." *Id*. at 1246 (concluding "that the trial court should not have denied the motion on such a basis.")

In assessing the probative value of the DNA testing, the court is required to accept all of the movant's allegations as true. *See e.g., Montez v. State*, 86 So. 3d 1243, 1245 (Fla. 2d DCA 2012) ("[t]hese allegations in Mr. Montez's sworn motion must be taken as true.") The Court is also required to "consider the cumulative effect of all of the evidence that has been presented

during [the defendant's] postconviction proceedings . . . ." *Hildwin v. State* 141 So. 3d 1178, 1183 (Fla. 2014).

In Zeigler's case, the standard he must meet to obtain DNA testing is even lower because the State's case against him was almost entirely circumstantial. *See State v. Zeigler*, 494 So. 2d 957, 960 (Fla. 1986) (Barkett, J., dissenting) (noting that Zeigler's was a "circumstantial evidence case" and urging "[i]n light of an initial vote by the jury in this circumstantial evidence case of six jurors to acquit and six to convict, the allegation of newly discovered evidence warrants a careful review of the record."). *C.f. Zeigler*, 654 So. 2d at 1164 (finding "[t]he State's case was not *entirely* circumstantial") (emphasis added). The Florida Supreme Court has expressly held that Rule 3.853 requests for DNA testing in such cases must be assessed under a "special standard," as follows:

> The special standard requires that the circumstances lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence.
>
> . . . .
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, [] is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a

probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Dausch v. Florida, 141 So. 3d 513, 517-18 (Fla. 2014) (citations omitted).

1. The Testing Zeigler Seeks Would Create Reasonable Doubt

Zeigler has maintained since his arrest that someone else murdered his family and Mays in 1975, and that he was indeed a victim shot by those same persons. His story has never wavered. In his Motion, Zeigler seeks testing that will prove his innocence. Among other things, Zeigler seeks to test (1) blood stains that cannot belong to Zeigler found on the body of Zeigler's wife, Eunice; (2) DNA on Perry Edwards Sr.'s clothing and fingernails *belonging to Perry's attacker*; and (3) DNA left inside the Saturday Night Special guns that Zeigler has always maintained he did not buy, own, or use. Each of these categories of testing will independently create reasonable doubt as to Zeigler's guilt; together, they will create overwhelming doubt as to Zeigler's guilt, particularly when viewed, as they must be, together with all of the other evidence of innocence Zeigler has amassed through his post-conviction proceedings.

i. Testing of Blood Stains on Eunice's Clothing Will Create Reasonable Doubt As to Zeigler's Guilt

The first category of testing Zeigler seeks in his Motion is DNA testing of blood stains found on Eunice Zeigler's clothing. One set of stains is located on the inside of Eunice Zeigler's coat. A second set of bloodstains is located on the bottom of Eunice's socks and the inside of her shoes, even though Eunice was wearing shoes at the time she was found. A third set of bloodstains is located on the inside of Eunice's pants. All three sets of bloodstains include blood that was *smeared* onto Eunice's clothing by someone; those stains did not "drip" there. They also included dripped blood. Zeigler, who has type-O blood, could not have been the source of

any of these stains, as all are type-A blood. According to the State's expert, Eunice could not have been the source of this blood, either.

New testing procedures allow these bloodstains to be tested in two crucial ways. First, they can be tested to determine the source of the blood deposited on Eunice's clothing. (Ex. EE ¶¶ 10-12.) This testing would utilize the recently developed Y-STR and mini-STR techniques, which as explained above carry a significantly greater ability to identify DNA from mixed, degraded or small samples than previously available techniques. *See* infra at Section B(1) of the Argument and Ex. EE ¶¶ 4-9. Second, they can also be tested to determine the identity of the person who smeared or dripped that blood onto Eunice's clothing. This is possible, as explained further below and in the. Eikelenboom's affidavit, because a person who smears blood onto an object transfers their own touch DNA to that blood. The touch DNA can be isolated from the blood DNA to reveal the source of each separate DNA profile. (Ex. DD ¶ 12.)

The significance of this testing cannot be overstated. As described below, the bloodstains on Eunice's clothing, and particularly the smeared stains, had to have come from Eunice's killer. The State acknowledged as much at trial. With respect to the blood on Eunice's coat, the State's blood spatter expert, Dr. MacDonnell, testified that: (i) Eunice's coat, which was found closed and buttoned up, "would have to have been open" at the time blood was dropped and smeared onto it, meaning that the coat was buttoned up *after* Eunice was killed but *before* she was found by police, indicating that her killer was the individual who buttoned her coat; (ii) the blood would not have come from Eunice, who sustained a single gunshot to the head; (iii) the blood dropped and smeared on her coat "was in a manner that is possible that someone may have had their thumb on the outside and their hand on the inside holding the lapel"; and (iv) the blood found on Eunice's clothing was consistent with "someone with blood on their hands [leaving]

those spots from the fingertips." (Ex. A at 83-85.) The State also argued at trial that Eunice's murderer repositioned her body after killing her.[35]

Dr. MacDonnell testified at trial that he also found blood spots on the *inside* of Eunice's shoes and that the blood stains *did not come* from Eunice's gunshot to the head but rather "*had to have come from some other source*." (Ex. A at 89) (emphasis added). He also found a "very heavy deposit" of blood on the *inside* of Eunice's pants, even though she was found fully clothed, which he testified "*definitely*" came from a source other than Eunice. Dr. MacDonnell explained that the blood on Eunice's pants "could not have come from a woman being shot in the head, either standing or lying down in that position." (Ex. A at 92.)

These bloodstains must be tested. Modern DNA testing techniques make it possible to identify exactly whose blood is on Eunice's clothing, as well as who deposited that blood on her. That information will very likely reveal who killed her and will confirm that Zeigler did not. For instance, if testing reveals that the blood found on Eunice's clothing belongs to Mays, that would form powerful evidence that Mays, not Zeigler, killed Eunice. There is simply no way to reconcile the discovery of Mays' blood on Eunice with the State's theory that Zeigler killed Eunice more than an hour before luring Mays into the store and then killing him. The same is true if testing reveals that the blood on Eunice's clothing belongs to one of the two key witnesses against Zeigler – Ed Williams or Felton Thomas. Again, there is simply no way to reconcile such a discovery with the State's theory of the case – or with the testimony of either of those witnesses. Both Thomas and Williams testified that they did not set foot in the Zeigler store the night of the murders. Indeed, Thomas testified that he had *never* been in the Zeigler store. There

[35] The State also argued that this repositioning indicated Zeigler was the murderer, under a perverse theory that spousal tenderness would have motivated Zeigler, as Eunice's husband, to stage Eunice's murdered body in a more peaceful pose.

is therefore no reason for the blood of these men to be found on Eunice's body, and any discovery to the contrary would immediately implicate them as Eunice's murders. At an absolute minimum, any such discovery would support substantial doubts about Zeigler's guilt, particularly because the only thing known with certainty about the Type-A bloodstains on Eunice Zeigler's clothing is that they could not have come from Zeigler.

The ability to test for the touch DNA of the individual who smeared blood on Eunice's clothing carries an equally powerful ability to prove Zeigler's innocence. As Mr. Eikelenboom explains, if Eunice's murderer already had blood on his hands at the time he handled her body, as Dr. MacDonnell suggested at trial, then the murderer could easily have transferred that blood onto Eunice's clothing. Touch DNA testing makes it possible to determine both DNA contributors in such a scenario: the person whose blood is on Eunice's clothing *and* the person who smeared that blood on her clothing.

Importantly, the State routinely relies on the techniques Zeigler seeks permission to use in his Motion to prosecute crimes. For instance, in November 2013, the St. Petersburg police department reported that since they began testing for touch DNA in August 2010, the technique had helped them solve 38 percent of their burglary cases. An ABC program covering that story noted that touch DNA testing requires a mere 30 skin cells – a trivial number considering human beings shed 30,000-40,000 skin cells hourly – and quoted Janel Borries, DNA supervisor at the Pinellas County Forensic Laboratory, as stating the accuracy of touch DNA testing is one in 330 billion.[36] (*See also* Ex. EE at ¶ 5.) The testing techniques Zeigler seeks to use in his case may be new, but they are entirely sound and have been upheld as such in numerous cases. *See*

[36] *See* "St. Petersburg Police report that touch DNA has helped solve 38 percent of burglary cases," last accessed on June 29, 2015 and available at http://www.abcactionnews.com/news/region-pinellas/st-petersburg-police-report-that-touch-dna-has-helped-solve-38-percent-of-burglary-cases.

Montez, 86 So. 3d at 1244 (ordering evidentiary hearing on motion for newly-available touch DNA testing.); *State v. Reynolds*, 186 Ohio App. 3d 1, 5, 2009-Ohio-5532, 926 N.E.2d 315, 318 (2d Dist. 2009) (holding that "Y–STR testing allows DNA technicians to differentiate between male and female DNA from a mixed source" and "mini-STR and touch DNA permit technicians to obtain a DNA profile from very small, degraded, and compromised samples" and holding that the defendant was entitled to conduct DNA testing using these new techniques as they did not previously exist and could yield probative results); *State v. Johnson*, 14 N.E.3d 482, 2014-Ohio-2646 (8th Dist. 2014) (same).

ii. DNA on Perry Edwards Sr.'s Clothing Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The second category of testing Zeigler seeks in his Motion is touch DNA testing of Perry Sr.'s clothing. This type of testing has never been requested or performed in this case because, until a few years ago, it did not exist. Since its development, it has been rapidly embraced around the country, including by Florida prosecutors, because of its tremendous power to shed light on instances where, for instance, a physical altercation occurred. *See* infra at Section B(1) of the Argument.

As explained by Mr. Eikelenboon, touch DNA can be transferred to objects such as clothing in a variety of ways, one of which is through physical contact associated with fighting. In a fighting scenario, the victim comes into aggravated contact with his attacker's touch DNA in the course of trying to defend himself. Due to modern testing techniques, that DNA evidence can now be tested to determine the identity of the victim's attacker, in the same way as fingernail evidence can be used to identify an assailant.

As Mr. Eikelenboom's affidavit makes clear, touch DNA testing of Perry Sr.'s clothing could reveal crucial evidence in the case – namely, physical evidence identifying Perry Sr.'s killer. If, for instance, testing reveals Mr. Mays' DNA on Perry Sr.'s clothing, that evidence would corroborate Zeigler's claim that Mays fought with and killed Perry Sr., and destroy the state's case, which casts Mays as a victim rather than a perpetrator. Even if testing merely shows significant touch DNA on Perry Sr.'s clothing that does not belong to Zeigler, that finding would be powerful evidence of Zeigler's innocence. It would certainly exceed the statutory requirement that the test result bear a "reasonable probability" of creating reasonable doubt when viewed in conjunction with all of the other evidence adduced in through post-conviction proceedings in the case, such as juror tampering, suppression of Foster's existence, and suppression of the Jellison tape. Accordingly, Zeigler has carried his burden under Rule 3.853 of establishing entitlement to conduct touch DNA testing of Perry Sr.'s clothing.

iii. DNA on Perry Edwards Sr.'s Fingernails Are Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The third category of evidence Zeigler seeks to test in his Motion is the genetic material recovered from beneath Perry Sr.'s fingernails. As with the other evidence Zeigler seeks to test, this material would be tested using recently developed mini-STR and Y-STR techniques, which are capable of identifying the source of genetic material even if that material is degraded or found in limited quantities.

This testing, which was not previously possible, is likely to yield powerful evidence of reasonable doubt as to Zeigler's guilt that far exceeds the standard for testing under Rule 3.853, which is that the testing sought carry a "reasonable probability" of establishing reasonable doubt. *Schofield v. State*, 861 So. 2d at 1245. As in many other cases involving a physical struggle, fingernail evidence from Perry Sr. is critical because it carries the potential to reveal who Perry

Sr. struggled with as he was being killed. Indeed, Florida courts have routinely deemed such evidence sufficiently probative so as to require testing under Rule 3.853. For instance, in *Dubose*, 113 So.3d at 864-5, the Court found a defendant's Rule 3.853 motion to DNA testing facially sufficient based on evidence of a struggle between the murder victim and the murderer. In that case, as here, the victim was physically restrained by the murderer (in this case, the State contends that the murderer held Perry Edwards in a headlock while beating him). The Court found that DNA testing was warranted based on the defendant's allegations that "such a struggle would more likely than not have caused the assailant's DNA to transfer to the victim's clothing and would have involved the victim's clawing at the assailant's arms, thus transferring the assailant's DNA to the victim's fingernails." *Id*. The Court further rejected the State's argument that DNA testing could not establish reasonable doubt as to the defendant's guilt because of the existence of eye witness testimony to the effect that he was guilty. *Id*.

Other Florida courts considering the issue have come to the same conclusions. *See e.g. Schofield*, 861 So. 2d at 1245 (reversing trial court ruling and finding defendant's Rule 3.853 motion seeking DNA testing of hair and fingernail scrapings facially sufficient despite limited evidence that a murder victim physically struggled with her killer because "the results would create a reasonable probability that Schofield would be acquitted because reasonable doubt would exist that Schofield committed the murder."); *Reddick v. State*, 929 So. 2d 34, 36 (Fla. 4th DCA 2006) (reversing and finding defendant's Rule 3.853 motion facially sufficient in a case where the victim was beaten and sexually assaulted because "[i]f DNA testing confirms the presence of DNA of someone other than Reddick from the vagina, rectum, mouth or fingernail swabs, ***those results surely would create a reasonable probability that [the defendant] would be acquitted of the charges***." (Emphasis added) (citation omitted).

iv. DNA on the Interiors of the Saturday Night Special Guns Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

The fourth category of evidence Zeigler seeks to test in his Motion is touch DNA from the interiors of the Saturday Night Special guns used to commit at least two of the murders. As Mr. Eikelenboom explains, touch DNA from the guns' interiors is likely to reveal the identity of the individual who cleaned those guns. (Ex. EE at ¶ 17.) That evidence may reveal if Williams was one of the murderers.

At trial, Williams testified that he collected the Saturday Night Special guns that were later used in the murders from Frank Smith in a bag, and delivered that bag to Zeigler's wife, Eunice, without ever even opening the bag, let alone touching its contents. Williams was very clear on this point. When asked "But you didn't look inside [the bag containing the guns]," Williams answered "No, I didn't open the package". (Ex. A at 156-57, 160.) If Williams was telling the truth at trial, none of his DNA will be on the inside of the guns. Similarly, if Zeigler was telling the truth at trial, his DNA will not be found there, either. If, on the other hand, Williams' DNA is found on the guns' interiors, then Williams must have opened them, meaning that he was necessarily lying when he testified against Zeigler, was the person who owned and maintained the guns, and was, quite likely, the person who used those guns to commit the murders.

Indeed, there is already a long list of reasons to disbelieve Williams' testimony, including the incredible nature of his story and that he was found with one of those guns in his possession, failed to share his alleged story about buying the guns for Zeigler until months after giving his initial statement, and presented clothing to the police that he was almost certainly not wearing on the night of the murders. The testing Zeigler seeks will establish whether Williams' handling and use of the murder weapons was as he claimed.

As the Florida Supreme Court held as recently as 2013, Zeigler's prior request for DNA testing – which sought different testing using different techniques than those at issue here – failed to demonstrate that testing would create a reasonable probability of acquittal in part because of the existence of Ed Williams' testimony. The touch DNA testing Zeigler seeks of the guns would conclusively demonstrate that Williams' testimony was false, undermining what the Florida Supreme Court has said has been a key reason for their denial of Zeigler' prior DNA testing request and other requests for post-conviction relief. Testing is therefore warranted.

v. Modern DNA Testing on Zeigler's Shirts Is Highly Likely to Create Reasonable Doubt As to Zeigler's Guilt.

Lastly, Zeigler seeks to conduct additional testing of the inner and outer shirts he was wearing the night of the crimes to demonstrate that those shirts do not contain any of Perry Sr.'s DNA. Such a finding would constitute significant evidence of Zeigler's innocence. As the State contended at trial, Perry Sr. was beaten to death with a blunt instrument by someone who held him in a headlock. It would not be possible for Zeigler or anyone else to murder Perry Sr. in such a fashion without transferring a significant quantity of Perry Sr.'s DNA onto his clothing. Among other things, if Zeigler held Perry in a headlock and beat him, Zeigler would have a significant quantity of Perry's touch DNA on the areas of his shirts that were in contact with Perry's head. Testing for such evidence has only recently become possible. (Ex. EE ¶¶ 4-9.) In addition, Zeigler would likely have a significant quantity of Perry's blood on his shirt as a result of beating Perry at close range with a blunt instrument.

DNA testing conducted on Zeigler's shirts back in 2001 failed to reveal even a single drop of Perry Sr.'s blood, however the Florida Supreme Court deemed that result insufficient to set aside Zeigler's convictions, and then denied additional testing, for four reasons. *First*, the Court found that "there was no way to know for sure that all of the contributors to the blood on

Zeigler's clothing would be identified unless every single bloodstain was tested." *Zeigler v. State*, 116 So. 3d at 259. *Second*, "it was possible to miss blood on the shirt, due to deterioration and improper storage". *Id*. (Citation omitted). *Third*, "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area." *Id.* (Citation omitted). *Fourth*, the Court found that DNA test results would have been unlikely to create reasonable doubt for a jury because of the existence of witness testimony from Felton Thomas, Edward Williams and Frank Smith.

None of those four grounds apply to Zeigler's instant Motion. As an initial matter, Zeigler seeks to test touch DNA evidence on his shirt in addition to blood evidence, which was not possible when Zeigler last obtained DNA testing in 2001. The absence of Perry's DNA using such testing technology will form powerful evidence that Zeigler could not have held Perry in a headlock and thus did not kill him.

Further, as to the Court's first ground for previously denying additional testing, Zeigler proposes in his Motion to do exactly what the Florida Supreme Court suggested in 2013 would be necessary here, which is to test "every single bloodstain" on his clothing. If that testing fails to reveal any of Perry Sr.'s DNA, that will form powerful evidence of Zeigler's innocence. Substantial advances in DNA testing technology eliminate the Court's second and third grounds for denying Zeigler's earlier request for additional testing – that the absence of Perry's blood would be inconclusive because of the possibility of degradation or of a mixed sample – by allowing for testing of degraded or mixed samples. If Zeigler's shirts fail to reveal a single drop of Perry Sr.'s blood despite testing using modern techniques, that finding would form even more powerful evidence of Zeigler's innocence. Finally, Felton Thomas's testimony on what he observed the night of the murders, viewed in light of his substantial revisions to that

account, no longer weighs against the materiality of proposed DNA testing. Indeed, Thomas's recent statements make clear that the police engaged in "unduly suggestive" behavior in procuring Thomas's purported identification of Zeigler without showing him a photo lineup that would, if known, have rendered testimony about his supposed identification of Zeigler inadmissible. *See Fitzpatrick v. State*, 900 So.2d 495, 518-510 (Fla. 2005) (quoting Washington v. State, 653 So.2d 362, 365 (Fla. 1994)) (noting that "the showing of a single photo [i]s unduly suggestive" when seeking a pre-trial witness identification); *State v. Gomez*, 937 So.2d 828 (Fla. 4th DCA 2006), (affirming trial court's finding that "there was a substantial likelihood of irreparable misidentification" requiring exclusion of "both the pre-trial and in-court identifications" where police officers told witnesses the name of the arrested suspect prior to any lineup or photo identification).

C. Zeigler's Is Entitled to DNA Testing by a Qualified, Private Laboratory

Zeigler is also entitled to an order from the Court allowing him to conduct the testing he seeks in his Motion at a private laboratory. Under Rule 3.853(c)(7), the Court "may order testing by [a] laboratory or agency" other than the Florida Department of Law Enforcement so long as the defendant shows good cause and the laboratory the defendant seeks to use is certified by either the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB") or Forensic Quality Services, Inc. Zeigler's Motion, which seeks testing by Cellmark Forensics[37] ("Cellmark"), a private laboratory located in Dallas, Texas, meets both of these requirements.

Zeigler has demonstrated good cause to have Cellmark perform the testing specified in his Motion because, as Florida courts have already held, that testing is specialized and exceeds

[37] Cellmark Forensics is a division of Lab Corp Specialty Testing Group formerly known as Orchid Cellmark,

the capabilities and expertise of the Florida Department of Law Enforcement. *See Cardona v. State,* 109 So. 3d 241, 243 (Fla. 4th DCA 2013) (describing miniSTR and Y-STR testing, which are among the testing types Zeigler seeks in his Motion, as "more sophisticated DNA testing" methods and finding that "neither the Palm Beach County Sheriff's Office nor the Florida Department of Law Enforcement is able to perform these types of sophisticated DNA testing"). *Johnston v. State,* 27 So. 3d 11, 16 (Fla. 2010) (Noting LabCorp—now the parent of Cellmark—was approved to conduct post-conviction DNA testing where Florida Division of Law Enforcement lacked the capability to conduct certain Y-STR DNA testing); *Hildwin v. State*, 951 So. 2d 784, 787 (Fla. 2006). Furthermore, Zeigler's use of Cellmark will not only spare the State the expense of this testing, it will allay possible doubts regarding the thoroughness of the testing or accuracy of the results given the State's previous suppression of evidence and use of perjured testimony in Zeigler's trial.

Further, Cellmark is both ASCLAD certified, as required under Rule 3.853, and is employed regularly by the State of Florida to handle specialized DNA analysis work.[38] Indeed, Cellmark specializes in precisely the types of testing Zeigler seeks and has been approved by Florida courts to conduct testing pursuant to Rule 3.853 in the past. *See Cardona*, 109 So.3d at 243 (Fla. Dist. Ct. App. 2013); *Hildwin,* 951 So. 2d at 787. Given the sophisticated and state of the art nature of the testing needed to establish Zeigler's innocence, the Court has good cause to order the use of Cellmark for post-conviction testing.

[38] *See e.g.* http://spacecoastdaily.com/2014/02/palm-bay-partners-with-cellmark-forensics/, last accessed June 29, 2015, describing the Palm Bay Police Department's announcement on February 14, 2014 to enter into a 2-year contract with Cellmark "in support of its continuing use of DNA to solve property crimes."

CONCLUSION

For the reasons set forth above, Zeigler respectfully requests that this Motion be granted. In the alternative, he requests an evidentiary hearing.

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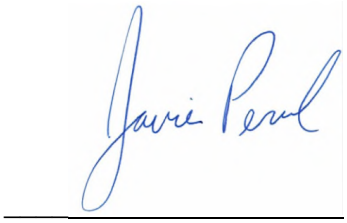
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2015, a copy of the foregoing Memorandum of Law was served upon State Attorney Jeffrey Ashton, State Attorney's Office, by Federal Express, addressed to 415 North Orange Avenue, Orlando, FL 32801, and by e-mail addressed to jashton@sac9.org, and upon Attorney General Pamela Bondi, Office of Attorney General, The Capitol PL-01, Tallahassee, FL 32399, and by e-mail at pam.bondi@myfloridalegal.com and



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