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.	

MOTION FOR DISCOVERY IN SUPPORT OF MOTION FOR DNA TESTING

February 1, 2016

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William Thomas Zeigler, Jr. ("Zeigler"), defendant in the above-captioned action, respectfully submits this motion, by and through his undersigned counsel, for discovery prior to the hearing to be held in connection with Zeigler's Motion For DNA Testing filed July 2, 2015 (the "DNA Motion"), and for the issuance of a subpoena compelling key witness Felton Thomas to give testimony at a deposition and at the hearing.

PRELIMINARY STATEMENT

On July 2, 2015, Zeigler filed a motion seeking DNA testing using powerful, previously unavailable techniques that will demonstrate Zeigler's innocence. Among other things, Zeigler's motion established that (1) he is requesting testing using newly developed testing technology, such as "touch DNA," "Y-STR" and "mini-STR" testing; (2) the probative value of the testing Zeigler seeks must be assessed in light of the cumulative exculpatory evidence Zeigler has uncovered since his trial; and (3) a particularly important piece of exculpatory evidence the Court must consider is the recent recantation of key witness Felton Thomas, who now contends that crucial aspects of his trial testimony were false. Felton Thomas's recantation is directly relevant to Zeigler's DNA Motion because Thomas's testimony was central to the State's case at trial and because the Florida Supreme Court has repeatedly cited it in the past as a basis for denying Zeigler additional DNA testing.

The State did not even discuss, let alone challenge, the significance of Thomas' recantation in its opposition to the DNA Motion. During the October 21, 2015 conference to address the motion, however, the State asserted that Thomas's recantation is irrelevant to the issue of DNA testing. That is simply wrong. It is well-settled that the probative value of requested DNA testing cannot be determined in a vacuum, as the State would prefer, but must be assessed in light of the cumulative exculpatory evidence adduced since trial. Thomas's

recantation is an important piece of exculpatory evidence. The requested DNA testing's ability to give rise to a reasonable probability of Zeigler's acquittal is clearly bolstered by the fact that a key witness relied upon by the State has recanted relevant testimony. In order to put the clearest and best possible evidence of Thomas' changed testimony before the Court, Zeigler should be permitted to depose Thomas concerning his changed testimony and to subpoena him to appear to testify at the evidentiary hearing on Zeigler's DNA Motion.

Put simply, when this Court makes its decision on whether to grant the requested DNA testing, it must determine whether the "totality of the evidence" – including newly discovered evidence – would reasonably likely result in an acquittal. The recanting of critical testimony by one of the most important witnesses at trial must be considered on this motion.

The State has also indicated that even though it did not include any expert affidavit in its opposition to the DNA Motion, it intends to call an expert witness to testify at the DNA Motion hearing, which is scheduled for March 31, 2016. Zeigler therefore requests that the Court enter an order (1) requiring the State to disclose the name and curriculum vitae of any expert it intends to call at the hearing no later than March 1, 2016; (2) requiring the State to provide an affidavit from its expert summarizing the subjects the expert will testify to by March 8, 2016; and (3) permitting Zeigler's counsel to depose the State's expert prior to the hearing, so as to learn what positions and opinions the State's expert might offer and prepare an appropriate cross-examination.

Both of Zeigler's requests are eminently fair and will entail minimal burdens on the State. As such, Zeigler prays that his requests be granted and the limited discovery he seeks be ordered.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

The factual and procedural history of this case is set out in detail in the DNA Motion Memorandum. (DNA Motion Memorandum at 5-33.) For the Court's convenience, the most relevant factual and procedural history to this motion is set forth below.

On July 2, 2015, Zeigler filed the DNA Motion. There, Zeigler demonstrated that DNA testing has advanced dramatically since Zeigler last obtained DNA testing fifteen years ago in 2001, and that these advances could reveal compelling evidence of his innocence. (DNA Motion Memorandum at 33; Affidavit of Richard Eikelenboom at ¶¶ 4-9[1].) The DNA testing that Zeigler seeks includes testing for touch and other DNA using recently developed Y-STR and mini-STR techniques not available in 2001, which carry a significantly greater ability to identify DNA from mixed, degraded, or small samples than previously available techniques. (DNA Motion Memorandum at 40, Eikelenboom Aff. ¶¶ 4-9). As discussed at length in the DNA Motion Memorandum, applying these tests to evidence in the State's possession---Zeigler's clothing, the clothing of victims Eunice Zeigler and Perry Edwards Sr., material recovered from beneath Perry Edwards Sr.'s fingernails, and the interior of guns used to commit at least two of the murders in question---is expected to provide results highly likely to create reasonable doubt as to Zeigler's guilt, particularly when viewed, as the anticipated results must be, in connection with the other exculpatory evidence Zeigler has adduced during and since his trial. (DNA Motion Memorandum at 39-49.)

Among the exculpatory evidence presented in the DNA Motion is the fact that key State witness Felton Thomas has recently recanted critical parts of his trial testimony. The prosecution heavily relied on Thomas' testimony at trial that Zeigler picked Thomas and Charlie Mays up on

[1] The Affidavit of Richard Eikelenboom ("Eikelenboom Affidavit" or "Eikelenboom Aff.") is annexed as **Exhibit EE** to the DNA Motion Memorandum.

the night of the murders, took them to a nearby orange grove, and had them fire guns out the window of the car. (Trial Tran. At 107-08.) [2] The State argued at trial that Thomas' account proved Zeigler intended to kill Mays and frame him and/or Thomas for the murders by having Mays and Thomas handle the weapons, leaving their finger prints on the guns. (Trial Trans. 230-33.) The degree to which the State emphasized Thomas' testimony cannot be overstated. (*Id*. at 230-73.) Indeed, the Florida Supreme Court has repeatedly emphasized Thomas' testimony as key to Zeigler's conviction and cited it in the past as a basis for denying DNA testing. *See Zeigler v. State*, 402 So. 2d 365, 368 (Fla. 1981) (affirming Zeigler's convictions and finding that "[t]o have believed [Zeigler's] story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams . . . ."); *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995) (citing as a reason for denying Zeigler's request for DNA testing made prior to enactment of Fla. Stat. § 925.11 and Fl. R. Crim. P. 3.853 that "[i]n 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" one of whom was Felton Thomas); *Zeigler v. State*, 967 So. 2d 125, 128-29 (Fla. 2007) (denying request for DNA testing and again identifying Thomas' testimony as key evidence of Zeigler's guilt); *Zeigler v. State*, 116 So. 3d 255, 256 (Fla. 2013) (same). [3]

In September 2013, prior to the filing of the DNA Motion, private investigator Lynn Marie Carty ("Carty") and two law enforcement officers interviewed Thomas. DNA Motion

[2] A copy of relevant excerpts of the transcript of Zeigler's trial ("Trial Tran."), held between June 10, 1976 and July 16, 1976 before the Honorable Maurice M. Paul, Judge for the Circuit Court for Orange County, Florida, is annexed to the DNA Motion Memorandum as **Exhibit A**.

[3] While the Florida Supreme Court referenced the importance of three trial witnesses – Thomas, Edward Williams, and Frank Smith – Thomas was by far the most important to the State's case. The second witness, Williams, was heavily impeached at trial for, among other things, having possession of a murder weapon, turning over to police a different set of clothes than a witness recalled him wearing the night of the murders, and lying about his alibi. DNA Motion pp. 14-15. The third witness, Smith, testified only that he agreed to acquire stolen guns for Williams and that he spoke by phone to someone about the transaction whom he believed was Zeigler. He admitted, however, that he did not know Zeigler personally, had never met him before, and could not identify the voice he heard on the phone as being Zeigler's. *Id*. Smith's and Williams' testimony was exceedingly weak without Thomas.

Memorandum at 9, 26-27; Affidavit of Lynn Marie Carty, ¶ 3)[4]. During that interview, which was recorded, Thomas recanted the two critical aspects of his testimony: (1) that he was able to identify the driver he rode with the night of the murders as Zeigler, and (2) that this driver had Thomas and Mays handle and fire guns as part of a plot to frame them. Contrary to his trial testimony, Thomas insisted that he never knew the identity of the man who drove him the night of the murders. (Thomas Trans. at 31:20-21.) Thomas confirmed that he was never asked to identify Zeigler in a photo lineup, and indeed only identified Zeigler at trial because *police told him* it had been Zeigler. (Carty Aff. ¶ 6; Thomas Tran at 30:22, 58:25-59:3.) Indeed, Thomas agreed he could have improperly identified Zeigler at trial as the man he drove with the night of the murder, and suggested that his identification of Zeigler at trial was influenced by viewing media accounts portraying Zeigler as guilty. (Thomas Tran. 42:15-20, 38:10-14). Thomas also repeatedly told Carty that, contrary to his trial testimony, he did not fire the murder weapons, or any other weapons, the night of the murder, and that no one made any effort to coerce him to do so. (Thomas Tran. At 61:24-25, 62:1-8.)

The State filed a memorandum in opposition to the DNA Motion on September 23, 2015 ("State Opp.") The State argued that Zeigler's DNA Motion should be denied as Zeigler was granted an opportunity in 2001 to have evidence in the State's custody tested for DNA. The State did not, however, submit any expert affidavit or address Zeigler's showing that DNA testing technology has substantially changed since 2001, with new methods allowing for findings not available in 2001. Nor did the State in any way address the significance of Thomas' recantation to this motion.

[4] The Affidavit of Carty is annexed to the DNA Motion Memorandum at **Exhibit C.** Annexed to the Carty Aff. as **Exhibit A** are relevant excerpts of the transcript of Lynn-Marie Carty's September 23, 2013 interview of Thomas ("Thomas Trans.").

At a conference held by the Court on October 21, 2015, the Court determined that a hearing is necessary to evaluate Zeigler's DNA Motion. The Court indicated that it would require further briefing before deciding whether Thomas could be subpoenaed to testify in connection with the hearing. The State indicated that it would call an expert at the hearing, but opposed Zeigler calling Felton Thomas to testify.

ARGUMENT

I. STANDARD OF LAW

On a hearing for post-conviction relief, "limited pre-hearing discovery" may be allowed "into matters that are relevant and material." *Davis v. State,* 624 So. 2d 282, 284 (Fla. 3d DCA 1993) (reversing lower court and permitting discovery before hearing on motion for post-conviction relief). "The trial judge, in deciding whether to allow this limited form of discovery, shall consider" the following factors: "the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994) (allowing discovery before hearing on motion for post-conviction relief). This discovery may include depositions of attorneys, *see Davis*, 624 So. 2d at 284, and Florida state judicial officers. *See Lewis,* 656 So. 2d at 1250.

Zeigler's request to subpoena testimony from Felton Thomas and to depose any expert the State intends to call easily satisfies the standards set forth in *Davis* and *Lewis*. Indeed, both sets of factors weigh in favor of allowing pre-hearing discovery. For that reason, the Court should grant Zeigler's request.

II. DEPOSING THOMAS WOULD BE RELEVANT AND MATERIAL TO THE UPCOMING HEARING

Thomas' anticipated testimony is both relevant and material to Zeigler's DNA Motion. On a motion for post-conviction relief—such as a motion for DNA testing—courts consider "the totality of the evidence," including evidence "newly discovered" after defendant's trial. *Hildwin v. State*, 141 So. 3d 1178, 1181 (Fla. 2014) (granting new trial based on DNA evidence discovered after conviction). The State, in claiming that no potential results of new DNA testing could give rise to a reasonable likelihood of acquittal, ignores that a motion for DNA testing, and the materiality of anticipated findings the testing would reveal, are not viewed in a vacuum, but in the light of all other previous and new evidence. Thomas' testimony is directly relevant to the DNA Motion in that it bears on whether Zeigler can meet the standard under Rule 3.853 of showing that the DNA testing results he anticipates, viewed together with all of the other evidence, would create "a 'reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial.'" *Dubose v. State*, 113 So.3d 863, 864 (Fla. 2d DCA 2012) (citing *Knighten v. State*, 829 So. 2d 249, 252 (Fla. 2d DCA 2002)). The case at trial against Zeigler was based on circumstantial evidence, and Thomas's testimony represented a key foundation of that case. Zeigler has shown in the DNA Motion Memorandum that the expected results will create a reasonable doubt as to Zeigler's guilt (DNA Motion Memorandum at 39-49), but it is undeniable that the strength of this evidence is further bolstered by Thomas' recantation of his trial testimony. Put differently, the Supreme Court has already indicated that Thomas's testimony must be considered in determining Zeigler's right to post-conviction relief; therefore, it is essential for the court to consider the recantation of the testimony in evaluating this motion.

The *Lewis* factors favor permitting Zeigler to subpoena Thomas. Giving deposition testimony on the limited and straightforward questions at issue here would minimally burden

Thomas or the State. And while the recording and transcript of the interview of Thomas is relevant and highly probative, Zeigler should be offered the chance to have his counsel directly depose Thomas to provide the Court sworn testimony as to Thomas's recantation. Because Thomas has refused to provide an affidavit, absent an opportunity to subpoena him, Zeigler may not be able to obtain admissible evidence of Thomas's recantation. Accordingly, this Court should permit Zeigler to subpoena Thomas to testify at a deposition and at the hearing being held in connection to his DNA Motion.[5]

III. ZEIGLER SHOULD BE PERMITTED TO DEPOSE THE STATE'S EXPERT

If the State intends to call an expert to testify at the DNA Motion hearing, Zeigler's attorneys should be afforded an opportunity to depose that expert in advance so as to learn the opinions the expert intends to offer, the expert's qualification to offer those opinions, and the expert's bases for forming those opinions. *See generally Hodges v. State*, 885 So. 2d 338, 354-55 (Fla. 2004) (motion by the State to depose defendant's experts prior to a postconviction evidentiary hearing granted, where State did not have experts' expert reports or curricula vitae); *Staveley v. State*, 744 So. 2d 1051, 1053 (5th DCA 1999) (finding that "[t]he state must furnish discovery within sufficient time to allow the defendant to prepare for trial" and finding that the State had satisfied that obligation because "the defendant could properly prepare for trial by taking the expert's deposition") (internal quotations and citations omitted); *Chandler v. Dugger*, 634 So. 2d 1066, 1068 (Fla. 1994) ("the trial court correctly held that, if Chandler listed the

[5] Zeigler does not contend that Thomas's recantation alone meets the high bar necessary to bring a Rule 3.851 motion, which relates to new evidence that is sufficiently powerful that it entitles the defendant to have his convictions set aside. Thomas's recantation is, however, clearly exculpatory and relevant to the balancing test the Court must conduct in assessing whether the anticipated results of Zeigler's requested DNA testing would – in light of Thomas' recantation and the other evidence – be likely to lead a jury to find reasonable doubt. As such, Rule 3.851's statute of limitations for seeking to vacate a sentence with new evidence does not apply to Zeigler's request to subpoena Thomas's testimony in connection with his DNA Motion. If Rule 3.851's time limitation were to apply, the result would be to force defendants to file Rule 3.851 motions every time they identify potentially exculpatory evidence, even where that evidence is not independently sufficient to support vacatur of their sentence – a result which does not make sense.

expert as a witness to use at trial, the state could cross-examine that "witness as to any relevant matter including, but not limited to, the basis for any opinion that he has reached" and, to that end, that the state could depose the expert."). Basic fairness requires that Zeigler be afforded the ability to depose an expert called to testify against him, particularly where, as here, the State has not submitted an expert affidavit setting forth the opinions its expert intends to present at the hearing, and did not challenge Zeigler's expert in its opposition. Absent such an opportunity, Zeigler's counsel will learn the opinions offered by the State's expert for the first time at the hearing, and will not have any meaningful opportunity to research those opinions or conduct an effective cross-examination.

CONCLUSION

For the reasons set forth above, Zeigler's motion for post-conviction discovery should be granted, and an order entered (1) permitting Zeigler to subpoena Thomas to give testimony at a deposition and at the DNA Motion hearing; (2) requiring the State to disclose the name and curriculum vitae of any expert it intends to call at the hearing no later than March 1, 2016; (3) requiring the State to provide an affidavit from its expert summarizing the subjects the expert will testify to by March 8, 2016; and (4) permitting Zeigler's counsel to depose the State's expert prior to the hearing, so as to learn what positions and opinions the State's expert might offer and prepare an appropriate cross-examination.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February, 2016, a true and correct copy of the foregoing was electronically filed via the Florida Courts eFiling Portal, which will serve a Notice of Filing on all counsel of record via the Court's e-service system.

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