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

STATE OF FLORIDA,
Plaintiff,

CASE NO: 48-1988-CR-005355

DIVISION: 10

vs.

WILLIAM T. ZEIGLER,
Defendant.
_____/

STATE'S RESPONSE AND OBJECTION TO MOTION FOR DISCOVERY

COMES NOW the State of Florida, by and through the undersigned counsel, and states as follows:

On or about February 1, 2016, Zeigler filed a pleading entitled "motion for discovery in support of motion for DNA testing." That motion contains two distinct components, which are addressed separately below.

PRELIMINARY MATTERS

Post-conviction DNA testing is governed by *Florida Rule of Criminal Procedure* 3.853, which reads as follows:

> **(a) Purpose.** This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.
>
> **(b) Contents of Motion.** The motion for postconviction DNA testing must be under oath and must include the following:
>
> > (1) a statement of the facts relied upon 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 previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result

establishing that the movant is not the person who committed the crime;

(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.

(c) Procedure.

(1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If 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.

(3) Upon 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.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, *Florida Statutes*.

(5) The court shall make the following findings when ruling on the motion:

(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.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

Fla. R. Crim. P. 3.853. The only "relief" available to a defendant in a Rule 3.853 proceeding is an order for DNA testing -- relief from a conviction and sentence is not an available option.

The Florida Supreme Court has left no doubt that Rule 3.853 is a discovery rule that is not to be used as a fishing expedition:

> In *Robinson v. State,* 865 So.2d 1259, 1264-65 (Fla.), *cert.* denied, 540 U.S. 1171, 124 S.Ct. 1196, 157 L.Ed.2d 1224, *and cert. denied,* 540 U.S. 1171, 124 S.Ct. 1197, 157 L.Ed.2d 1225 (2004), we held:
>
> > Pursuant to *Florida Rule of Criminal Procedure* 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. *See Fla. R. Crim. P.* 3.853(b)(1)-(6); *Hitchcock v. State,* 866 So.2d 23 (Fla. 2004). It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence. *Id.*

> In *Hitchcock v. State,* 866 So.2d 23, 27 (Fla.2004), we likewise set forth a specific holding applicable to 3.853 motions:
>
> > The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. Here, Hitchcock failed to demonstrate such a nexus.
>
> We said specifically that "[r]ule 3.853 is not intended to be a fishing expedition." *Id.*

Cole v. State, 895 So. 2d 398, 402-03 (Fla. 2004). And, in the context of a federal habeas corpus proceeding, the United States District Court for the Middle District of Florida described a Rule 3.853 motion as follows:

> Stated another way, motions that seek to develop or acquire the *means* to mount a challenge to the conviction do not interrupt the running of AEDPA's period of limitations. An application for DNA testing falls squarely within that category of preliminary proceedings and cannot be distinguished on any principled or reasoned basis. *See, e.g., Zollman v. State,* 820 So.2d 1059, 1062 (Fla. 2nd DCA 2002) **(the purpose of Florida's post-conviction DNA testing procedures "is to provide defendants with a *means* by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue."')** (emphasis added) (citing *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing),* 807 So.2d 633, 636 (Fla.2001) (Anstead, J., concurring)).

Cole v. Crosby, 2006 WL 1169536, at *4 (M.D. Fla. 2006) (italics in original; emphasis added). A motion under Rule 3.853 is not a motion for post-conviction relief, and cannot be used to evade the time limitations contained in Rule 3.851.

DEPOSITION OF A FACT WITNESS IS INAPPROPRIATE

The State is opposed to Zeigler's request to subpoena Felton Thomas to take his deposition or to call him as a witness at the hearing. Zeigler filed a Motion for DNA Testing pursuant to *Florida Statute* § 925.11 and *Florida Rule of Criminal Procedure* 3.853 -- **both the**

statute and the Rule pertain to DNA testing only. Neither the statute nor the procedural rule gives the Defendant the right to depose or call any witness who would not be testifying specifically regarding DNA evidence. Felton Thomas was a lay witness at trial who would not be called as an expert witness to testify on the DNA evidence in the case. Zeigler's attempt to pull Thomas into this case is a thinly-veiled and wholly improper attempt to use the DNA Motion as a means to circumvent the procedural rules and put Thomas back on the witness stand in an effort to get him to change his testimony from the trial. Zeigler tips his hand in footnote 5, where he admits that his desire is for this Court to apply a standard applicable in Rule 3.851 to this Rule 3.853 litigation. That is contrary to the *Florida Rules of Criminal Procedure,* has no legal basis, and should be denied.

Rule 3.853 is not a vehicle through which post-conviction relief may be granted. Instead, it is a procedural rule of discovery which may develop evidence which would qualify as "newly discovered" for purposes of litigating that evidence in a properly filed motion under *Florida Rule of Criminal Procedure* 3.851. *See Hitchcock v. State*, 991 So. 2d 337, 338-9 (Fla. 2008); *Hildwin v. State*, 951 So. 2d 784, 787 (Fla. 2007). One need look no farther than the history of this case to find the distinction between a motion for DNA testing, and a motion for post-conviction relief **based on the test results.** *Zeigler v. State*, 654 So. 2d 1162, 1164 (Fla. 1995) ("Acknowledging that the issue before us is whether Zeigler should be allowed to subject the evidence to DNA testing rather than whether he should be granted a new trial based on newly discovered DNA evidence, we find that even if the DNA results comported with the scenario most favorable to Zeigler, he still would not have been able to show that the evidence would have probably produced an acquittal.") Because that is the law, Zeigler's arguments for "cumulative" consideration of testimony by Felton Thomas, about the "circumstantial nature" of the case against Zeigler, and other evidentiary matters are inappropriate in the context of this proceeding.

Some of those arguments **might** be proper in a Rule 3.851 proceeding, but they are improper here because the sole issue is whether DNA testing will be allowed in accordance with the standard established by the Rule and the controlling case law.

In a remarkably misleading bit of advocacy, Zeigler cites *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) as a basis for allowing discovery from Thomas. What Zeigler has omitted is that *Hildwin* was **an appeal from the denial of a motion for post-conviction relief which did not involve Rule 3.853.** *Hildwin v. State*, 141 So. 3d 1178, 1180 (Fla. 2014) **(**"Paul Christopher Hildwin appeals from the denial of postconviction relief in this death penalty case."). Zeigler's claim, on page nine (9) of the discovery motion, that a motion for DNA testing is "a motion for post-conviction relief" is simply wrong, and a misstatement of Florida law.

Alternatively, without waiving the argument set out above, and without conceding that it is in any way proper to address any substantive matters concerning Felton Thomas, contrary to the Defendant's arguments in his Motion, there is no proof that Thomas has actually recanted his trial testimony. In support of the argument, the Defendant points to an affidavit by Private Investigator Lynn-Marie Carty that was annexed to the DNA Motion Memorandum as Exhibit C. Attached to the affidavit, as Exhibit A, was a transcript that Zeigler alleges contains portions of a taped interview with Thomas. In the affidavit, Carty states that she and two other individuals – Deputy Jeff Thompson who was with the Sheriff's Department in Worth County, Georgia and retired Deputy Gene Jones, formerly of the Worth County Sheriff's Department – interviewed Thomas for about one hour and 41 minutes. **No explanation is given for the presence of out-of-state law enforcement personnel who have no jurisdiction within the State of Florida and have no official basis for involvement in this case.** And, the transcript attached to the affidavit is not a complete recollection/recording of the conversation. The time listed on the transcript's cover sheet indicates that the audio recording lasted one hour and three minutes. Thus, it is

unknown what was said to Thomas by Carty and the (out-of-state) law enforcement officers before the transcript began or after the transcript ended. In fact, the last page of the transcript indicates that the conversation continued after the audio recording stopped.

In addition, a review of the transcript leaves no doubt that Thomas was being pressured to recant his trial testimony. On the first page of the transcript, Carty told Thomas "We were talking on the phone about this, you and I before, and you said you didn't want to see anybody that was in prison that shouldn't be in there and that I got you thinking **when I told - - explained to you what was - - what was done and what - - what happened here. It happens a lot**." (Thomas Transcript at 2: 2–10). It is obvious from the beginning of the transcript that Carty was trying to influence Thomas' statements prior to meeting with him by telling him her version of the facts of the case. The transcript indicates that Carty attempted to tell Thomas what he knew and did not know about the murders, with Thomas subsequently telling Carty, "And I don't want to see nobody be in - - in trouble, but I - - **you telling me I - - I don't know who - - who - - who to pick out**. Only thing I can tell you is what happened when I was there." (Thomas Transcript at 2: 18-21).

Despite efforts by Carty and the Georgia law enforcement officers, Thomas stated that he picked Zeigler out in court and he [Zeigler] was the same man that he saw pulling up in a car as he and victim Charlie Mays sat in a van. (Thomas Transcript at 2:22-25, 3:1-7). Mays and Thomas were outside of Zeigler's furniture store where Zeigler had killed his wife and in-laws before leaving the store and returning to meet Mays. *Zeigler v. State*, 402 So. 2d 365, 367-8 (Fla. 1981). Zeigler took Thomas and Mays to an orange grove to try out guns before returning to the store. *Id*. at 368.

Zeigler's argument that Thomas insisted that he never knew the identity of the man who drove him the night of the murders is misleading. Mot. For Discovery in Support of Mot. For

DNA Testing at 7. During the interview, Thomas stated that he had only seen Zeigler twice before in his life. "It was that night and at the courthouse." (Thomas Transcript at 3: 10-12). But Thomas stated that he learned the name of the man he and Charlie Mays were with that night when Mays called the man, Zeigler. (Thomas Transcript at 31: 20-25.) "[T]hat's the only way I know that's who it was by that name." (Thomas Transcript at 31: 24-25). Thomas never stated in the interview that he could not identify the man he and Charlie were with that night. He only stated that he did not know the name of the man until Charlie Mays told him.

Carty tried numerous times to influence Thomas' statements. For example, she asked him "Have you ever heard people say that it was the wrong guy?" (Thomas Transcript at 33:8-9). Later in the interview (in a statement that seems intended to intimidate), Carty told Thomas that the FBI was getting involved and that she wanted to make sure that he was protected. (Thomas Transcript at 57:7-14). At one point, Carty asked Thomas "Why can't - - why aren't you wrong?" to which Thomas replied, "**No. What I seen is what I seen**." (Thomas Transcript at 37: 15-17). Thomas repeatedly told Carty and the officers that he did not have any second guesses about what he first said. (Thomas Transcript at 41:11-12). Finally, to the extent that additional discussion of Felton Thomas is necessary, the State accepts Zeigler's concession in footnote 5 on page 10 of the motion that the claimed "recantation" does not satisfy the newly discovered evidence standard, and is insufficient to support such a claim in a Rule 3.851 motion where that claim would properly be brought.

EXPERT DISCOVERY

On pages 10-11 of the motion, Zeigler asks this Court to require various things from the State's expert witness. The State will identify the witness and supply a curriculum *vitae* in advance of the evidentiary hearing currently set for March 31, 2016. Those materials have been supplied for Zeigler's expert, and the State will reciprocate. Zeigler's expert has supplied an

affidavit which attached to the motion for DNA testing, but Zeigler has not offered to engage in reciprocal deposition discovery, and the State will not agree to a one-sided process. The State will agree to provide an affidavit, or, alternatively, to a deposition of the state's expert if Zeigler's expert is also made available for a deposition. The State will not agree to both a deposition **and** to providing an affidavit.

I CERTIFY that a copy hereof has been furnished to Dennis H. Tracey, III, dhtracey@hhlaw.com, 875 Third Ave, New York, NY, 10022 by e-mail on this _____ day of February, 2016.

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