

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

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STATE OF FLORIDA, :  
 : Case Nos. 1988-CF-5355  
 : 1988-CF-5356  
 - vs. - :  
 : **DEFENDANT’S MOTION**  
 WILLIAM THOMAS ZEIGLER, JR., : **FOR REHEARING**  
 :  
 Defendant-Petitioner. :  
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Pursuant to Fla. R. Crim. P. 3.851(f)(7) and 3.853(e), defendant-petitioner William Thomas Zeigler, Jr. (“Zeigler”), by and through his undersigned attorneys, hereby moves for rehearing of this Court’s Order dated April 18, 2005 (“Order”), denying Zeigler’s motion to vacate convictions, and states as his reasons for this motion as follows:

1. The motion seeks rehearing of the Court’s order because the Court committed errors in analyzing the facts that led it to an incorrect conclusion and errors of law that compounded the factual errors, as more fully detailed below.

**Background**

2. Zeigler filed his Motion to Vacate Convictions on or about January 15, 2003, setting forth the results of DNA testing on evidence from his case and eight other pieces of evidence, discovered since trial of the case, that impeached the jury’s verdicts. Zeigler also moved to authorize the DNA test *nunc pro tunc* under Fla. R. Crim. P. 3.853 and to obtain funding for an expert. The State answered and opposed all of Zeigler’s motions. The Court granted an evidentiary hearing in order dated August 11, 2003, and the State immediately moved thereafter to limit the presentation of evidence to the results of the DNA tests.

3. On December 30, 2003, the Court entered three orders, granting Zeigler's motions to authorize the testing and for funding for an expert and granting the State's motion to limit the presentation of evidence. The Court's ruling on the State's motion stated: "Evidence presented at the evidentiary hearing on Defendant's Motion to Vacate Convictions Based Upon Newly Available Evidence shall be limited to those matters directly related to the DNA test results supporting the motion."

4. On December 20 and 21, 2004, the Court heard evidence and argument. Zeigler adhered to the Court's order limiting the presentation of evidence. The State did not. The State elicited testimony from a defense expert, Stuart James, concerning certain untested spots on Zeigler's red outer shirt. Those spots had not been the subject of any substantive argument or testimony at the original trial of this case.<sup>1</sup> They were raised an issue for the first time in these proceedings. Defense counsel objected to this testimony and the Court overruled that objection.

5. Zeigler's presentation had focused on two important findings from the DNA testing: (a) the type A bloodstains on Zeigler's red outer shirt ("the red shirt") and Zeigler's undershirt ("the t-shirt") showed no signs of the genetic materials for Perry Edwards, a conclusion directly contrary to the theory and argument of the State's case at trial; and (b) two significant type A bloodstains on the pants worn by Charlie Mays ("Mays' pants") were not Mays' blood, as previously assumed, but instead the blood of Perry Edwards, a fact wholly inconsistent with the State's theory of Mays' death and highly corroborative of the defense theory that Mays was a perpetrator of the murders of Perry Edwards, Virginia Edwards, and Eunice Zeigler.

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<sup>1</sup> At trial the State's expert, Herbert MacDonell, identified the existence of the spots and testified that they had not been tested to determine whether or not they were blood spatters. In the Order however, this Court repeatedly refers to that spotting as "spatter."

6. On April 18, 2005, this Court rendered its decision denying Zeigler's motion. It rejected Zeigler's arguments about the absence of Edwards' blood on the red shirt or the t-shirt, accepting that "it was possible to miss blood on the shirt, due to deterioration and improper storage" and that "[i]t was also possible to have a mixed stain, from multiple contributors, in the same area." Order, p. 15. It rejected the results on Mays' pants as significant for the following reason:

While the blood found on Mays' shoes and the stains on his pants leg and cuff areas revealed a genetic profile consistent with Perry, these findings are consistent with Mays standing next to Perry, or being in close proximity to his body, after Perry was killed. These findings do not show, as Defendant asserts, that Mays was the perpetrator, rather than a victim of the crimes. Instead, if Mays were involved in a struggle with Defendant while in close proximity with Perry's bloodied body, it would not be surprising that Perry's blood ended up on Mays' shoes and pants during the altercation.

*Id.*, p 14. The Court also accepted as significant the State's new hypothesis about the untested spots on the red shirt, *id.*, although the Court found that Mr. James had described three possible scenarios which would explain all of the spotting. *Id.* at 12. The Court could not accept Zeigler's explanation concerning how his red shirt became saturated with Mays' blood, *id.* at 14, but neither the State nor the Court has explained how that saturation occurred either.<sup>2</sup> As further developed below, this analysis commits several critical errors.

7. The Court concluded that "even if the newly discovered evidence resulting from the DNA testing had been admitted at trial, there is no reasonable probability that Defendant would have been acquitted" because the DNA testing identified whose blood was on the clothing of Zeigler and Mays but "it did not conclusively eliminate Defendant as the

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<sup>2</sup> It is vital to keep in mind, as the Court considers these issues, that the "spatter" theory used to explain the spotting on the red shirt and to cast culpability on Zeigler is inconsistent with any reasonable hypothesis under which Zeigler's underarm is saturated with Mays' blood. *See infra* ¶ 16.

perpetrator of the crimes.” Order, p. 13. As further developed below, this analysis misapplies the controlling legal standard.

### **Arguments For Rehearing**

#### **I. THE COURT COMMITTED CRUCIAL ANALYTICAL ERRORS IN ITS CONSIDERATION OF THE RESULTS FROM THE DNA TESTS**

8. Zeigler’s first set for grounds for rehearing turn on crucial analytical errors committed by the evidence in reaching conclusions about the significance of the DNA test results on the three main pieces of evidence, Mays’ pants, Zeigler’s red shirt, and Zeigler’s t-shirt.

9. **Perry Edwards’ Blood on Mays’ Pants.** At trial the defense argued that the physical evidence, limited as it was to the definition of blood types at the four major group level, reflected Mays involvement in the killing of Perry Edwards. (R. 2612-13.) Mays had Type A blood on the soles, sides and tops of his shoes (R. 2301-02) – the blood on bottom thick with cat hairs and other flotsam struck within the blood (R. 2281, 2994, 2229, 2300) – and type A blood on his pants (R. 2302). The Court, however, dismissed the significance of the finding of Perry Edwards’ blood on Mays’ pants by hypothesizing an explanation that it believed to be consistent with the State theory’s of Zeigler as Mays’ killer. That explanation, with all due respect, is untenable.

10. The Court’s hypothesis, as quoted above, places Mays stepping into and out of the bloody area around Perry Edwards while struggling with Zeigler in a fight that ultimately ends in Mays’ demise in a location fifteen feet to the north of Edwards’ body, on the other side of several obstructions. The physical evidence, however, forecloses this activity. Mays’ shoes, having dipped into the blood pool,<sup>3</sup> would have to leave a bloody footprint trail

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<sup>3</sup> The physical appearance of Mays’ shoes, with blood covering the sole, up the sides of the sole rubber piece and spilling on to the top, would suggest that he indeed stepped into the pooled blood.

from Edwards' body to (at least) the area fifteen feet away where Mays died, but at trial Professor MacDonell testified that, based on his personal examination of the store and the crime scene photographs, the pattern on the bottom of Mays' shoes did not appear in blood anywhere in the W.T. Zeigler furniture store. (R. at 1046, 1056-57.) Indeed, how would Mays step into a pool of Perry Edwards' blood, collect materials in the sticky blood on the bottom of his shoes, and end up fifteen feet away without leaving a set of identifiable shoeprints? The Court's hypothesized explanation for the blood on Mays' pants cannot be squared with these facts.

11. Moreover, the floor between Edwards' body and Mays' body is littered with the spatter produced when Edwards was killed, distinctly overlaid with the subsequent spatter from the murder of Mays. (R. 985-87.) If Mays had struggled with Zeigler near Edwards' body – especially with bloody soled shoes – would not distinct, pervasive disturbances in the pattern of spatter on the floor document that activity? Such smears appear in the area where Mays died (smearing Mays' own blood, from the initial bullet wounds he suffered, we submit) but not near Edwards, where they would be expected if the Court's hypothesis were correct.

12. Further, how did this hypothesized struggle create the Edwards' bloodstain both so high and so low, front and back, on Mays' pants in a saturation stain pattern? Professor MacDonell could not explain the higher stain; offered the opportunity to attribute it to a smear pattern on the floor he demurred.<sup>4</sup> (R. at 1075.)

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<sup>4</sup> In his pretrial deposition, MacDonell was asked about the likely source of the heavy bloodstains on the lower portion of Mays' pants. He said: "If he had been partially incapacitated by some kind of blow or gunshot and had, in fact, gone in the direction which it appears he likely did go, it's difficult to determine." (Depo of 5/12/76, p.141.) He added: "If he went that way and this blood underneath his leg as he went, it's not the left side – you'd wonder why he isn't face down rather than face up. I don't know." (*Id.* at 142.) (Copies of these pages are attached as Exhibit A hereto.)

13. In contrast to the Court's hypothesis, there is a set of events that fit with the physical evidence. If Mays were standing next to Perry Edwards, in the pooling blood, before the final shots or blows killing Edwards occurred (perhaps administering those blows, kneeling on Edwards' body to create the stain on Mays' pants), and turned from Perry Edwards to the carpeted portion of the store to pursue and kill Virginia Edwards (who was cowering amidst the furniture), then Mays would acquire all of the known blood on his shoes and pants, would pick up the cat hairs and other matter on his shoes as he crossed the carpet (*see* R. 2298, for testimony on the presence of these materials in the carpet), and the excess blood that might otherwise leave shoeprints on the tile would be removed by his walking on the carpet. Additionally, the spatter emanating from Perry Edwards' head would be undisturbed, as Mays does not walk through it, having turned to go after Virginia Edwards.

14. It is, of course, for a jury to resolve the conflicts among such hypotheses. The Court's task on this motion is to determine whether a jury could reasonably accept and adopt the defense hypothesis and thereby acquit. If so, then there is a reasonable probability of the new evidence leading to an acquittal and a new trial must be ordered.

15. **Absence of Perry Edwards' blood on Zeigler's red shirt.** The Court appears to have accepted the importance of a finding that Perry Edwards' blood is not on Zeigler's clothing – that finding eviscerates an indispensable building block in the State's circumstantial evidence case. The Court errs, we respectfully submit, by dismissing the absence of Edwards' blood on Zeigler's shirts as a fluke, a mixed stain, or an issue arising from the degradation of DNA or the mishandling of evidence.

16. First, the red shirt yielded a finding that runs to twelve alleles – a solid test result that does not suggest degradation. Was it a fluke? No reason to suppose so.<sup>5</sup> The sample came from a contact stain (T. 77-79) – not a spatter – and the State has hypothesized only one source for a contact stain, Perry Edwards. In fact, the new theory floated by the State to account for “spatters” on the red shirt positively excludes the notion that Mays contributed a contact stain to the shirt. Recall that Mr. Ashton worked out his hypothesis as placing Zeigler kneeling on the floor, swinging a crank with two hands to inflict the fatal blows on Mays. (T. 11-12.) It is not physically possible to perform that act while also holding Mays in a headlock to acquire the contact stains on the red shirt. The State cannot have it both ways.

17. Second, the notion of a mixed stain on the red stain is not a tenable hypothesis. Indeed, Weiss did not testify that it was; he simply opined about the possibility for the t-shirt, where the results were limited to one allele. (We will address that in the next paragraph.) Since the hypothesized source of degradation is the handling of the evidence (either at the time of the crime or in the last thirty years), an exogenous source that applies equally to all of the material on the shirt, there is no reason, in evidence or logic, to suppose that biological evidence from Edwards would degrade at a substantially greater rate than biological evidence from Mays, yet that is the only way that the DNA results on the red shirt could be so strong for Mays without any sign of Edwards.<sup>6</sup> For this reason, the Court must rule out the red herring of the mixed sample.

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<sup>5</sup> If the question boils to this “fluke” assertion, then the just and proper resolution of Zeigler’s case requires additional testing to put the assertion to rest.

<sup>6</sup> Mixed stains ordinarily do not conceal one source or the other. Rather, all of the alleles show up and the technician must sort out the results: “Studies in which DNA from different individuals is combined in differing portions show that intensity of the bands reflects the proportions of the mixture. Thus, if bands in a crime-scene sample have different intensities, it may be possible to assign alleles to major and minor contributors.” David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, *MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY*, at 25-2.4.3, n.93 (2001).

18. **Absence of Perry Edwards' blood on Zeigler's t-shirt.** As for the possibility of differential degradation on the t-shirt, the problem with this contention is that source of the blood in the arm pit on the t-shirt, according to Professor MacDonell, is bleed-through – the blood creating the contact stain on the red shirt soaked through. (R. at 1028-31, 1053.) (The Court acknowledged this fact in this order.) The State's various theories of events, however, do not provide a credible basis for a bleed-through of Mays' blood from the red shirt to the t-shirt, particularly in the underarm. If the new "spatter"-based theory of Mays' death is accepted, then Mays' blood lands on Zeigler's shirt by spatter, which James described as inherently different from contact stains. (T. 78-79.) Zeigler's underarms also would appear to be well defended from spatter in this theory, a fact reflected in the assertion that spotting on the outer portion of the arms of the red shirt is part of the alleged spatter.

19. And, as noted in the footnote above, the viability of a DNA reading in a biological sample is going to reflect the relative proportions of the sources. This means that Mays would have to be a greater contributor to the t-shirt stain than Edwards in order for his DNA to have survived more robustly in a mixed sample. There is nothing here to suggest a plausible hypothesis that yields that result.<sup>7</sup>

20. A jury confronted with the test results for Zeigler's two shirts would not reasonably find that Perry Edwards' blood "must have been on there somewhere." Rather, a reasonable jury would conclude that the State has no evidence to connect the bloodstains on Zeigler's clothing to Perry Edwards. The tectonic shift in the landscape of the evidence caused

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<sup>7</sup> Under the State's trial theory, the saturation/contact stain in Zeigler's underarm comes from Edwards, so theoretically it would be conceivable to obtain a DNA test result that identified Edwards without identifying Mays that is consistent with the assertion of a mixed sample. That the results came out just the opposite refutes the State's trial theory.

by that conclusion cannot be overstated. A reasonable jury would probably acquit and therefore Zeigler is entitled to a new trial.

21. Moreover, the combined impact of the test results obtained from the various pieces of evidence is greater than the sum of the individual parts. It alters the context of the circumstantial evidence and dubious testimony from compromised witnesses who are, in all likelihood, confederates in the killings. The Court should rehear and grant the motion.

## **II. THE COURT MISAPPLIED CERTAIN CONTROLLING LEGAL PRINCIPLES, WHICH LED IT TO THE WRONG RESULT**

22. Zeigler's other grounds for rehearing concern certain legal errors in the Order and the proceedings.

23. **First**, the Court set too high a threshold for defendant to meet in order to obtain relief. Although the Court acknowledged the "reasonable probability of acquittal" standard, it then held defendant to establish that the new evidence "conclusively eliminat[ed]" him as the perpetrator of the crimes. (Order, p.13.) That is a misapplication of the standard. While the controlling standard is high, it is not that high. *See Kutzner v. State*, 75 S.W.3d 427, 437 (Tex. Ct. Crim. App. 2002) (contrasting "reasonability probability" standard with the higher "actual innocence" standard); *see also Hood v. State*, 158 S.W.3d 480 (Tex Crim. App. 2005) (change in Texas DNA testing statute from the "reasonable probability" standard to one that places the burden on a defendant to show that he "would not have been convicted if exculpatory results had been obtained through DNA testing" raised the threshold of proof for defendants).

24. This Court's use of a "conclusively eliminate" threshold exceeds the "reasonable probability" standard applicable here. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Young v. State*, 739 So. 2d 553, 557 (Fla. 1999). Nor does a reasonable probability. *See State v. Ways*, 850 A.2d 440, 455

(N.J. 2004) (granting new trial because “there is a probability – not a certainty – that a new jury would find [the defendant] not guilty” based on newly discovered evidence). We urge the Court to rehear the motion and to apply correctly the controlling standard.

25. **Second**, the Court did not factor into its analysis the many manifestations of significant weaknesses in State’s case. Among them are:

a. The fact that the jury’s initial vote in deliberations was a tie, six to six, on the disposition of the case. Such a balanced opening vote demonstrates that the addition of significant evidence in support of the defense would be expected to readily tilt the scales toward acquittal.

b. The fact that the final jury verdicts at the guilt and sentencing phases demonstrate compromises among the jurors that reflect their openness to additional evidence in support of Zeigler’s defense. The case as laid out by the State, if accepted openly and fully by the jury, would have been expected to produce four verdicts of first degree murder and a death sentence recommendation. Instead, the jurors agreed on two convictions for first degree murder, two convictions for second murder, and a recommendation of life imprisonment. Why? The jury sent a message that it was convinced but not convinced – that it was convicting with the sneaking suspicion that it might well be wrong. Well, it was. And the message that the verdicts sent must be factored into calculating what it takes to say that the evidence would probably produce a different result.

c. The many conflicts and factual inconsistencies in the State’s case create the weaknesses that the jury pondered. For example, Mays’ van was parked on the wrong side of the fence and in the wrong position to have been pulled in, as Felton Thomas claimed, to pick up a television. Thomas described driving a route that would have required the car to go

over a three foot concrete wall. We attach, as Exhibit B hereto, a table of the conflicts and discrepancies that has been submitted in other proceedings, and we urge the Court to re-read defense counsel's closing in the original trial transcript, which eloquently describes the weaknesses presently to the jury.

26. The many manifestations of weaknesses in the State's case create a lower practical threshold for ordering relief. Consistent with the treatment of a case involving overwhelming evidence of guilt, which is more difficult to challenge, *cf. Herrera v. Collins*, 506 U.S. 390, 443 (1993) (Blackmun, J., dissenting), a case with more problematic evidence of guilt is ripe to be pushed into an acquittal by new evidence. *See, e.g., Ways*, 850 A.2d at 453 (the court "cannot ignore . . . that the State's proofs were far from overwhelming"); *Santiago v. State*; 779 A.2d 868, 870 (Conn. Supp. 1999) (granting new trial on newly discovered evidence, observing that "this was not a strong case for the state and the evidence was replete with inconsistencies), *aff'd*, 779 A.2d 775 (Conn. App. 2001); *cf. Baker v. State*, 336 So. 2d 364, 370 (Fla. 1976) (affirming trial court's grant of new trial on newly discovered evidence because trial judge "obviously had reservations about the strength of the State's identification testimony"). The reasonable probability of that acquittal is reached more easily. The Court should rehear the motion, factor these other case weaknesses into its analysis, and conclude that a new trial should be granted.

27. **Third**, the Court refused to hear and consider other evidence in the original motion that supports Zeigler's innocence. It entered, at the State's urging, the order limiting the scope of the evidentiary hearing to the results of the DNA testing. The other evidence which Zeigler would have offered, and its impact on the case, is as follows:

a. Test results on Edward Williams pants. Williams possessed one of the murder weapons, recovered from the car of one of his friends by the police. Asked to turn in his clothes as well, Williams handed in what looked to be recently purchased items – the shoes had so little wear that they still had the price tag on the sole. Zeigler proposed to show that the pants turned in by Williams had no traces of the residues that would be expected if Williams were truthful in his testimony that he placed the recently discharged murder weapon in his pants’ pocket (and that he had turned over the clothes he wore that night to the police). Evidence impeaching this portion of Williams’ story forces the jury to consider not only his credibility, but his culpability. After all, the simplest explanation for the absence of the residue in Williams’ pants’ pocket is that he did not turn over the clothes he wore, and the simplest explanation for his withholding of the clothes, given that he possessed one of the murder weapons, is that his clothes would have tied him to the murders.

b. Williams’ deed and mortgage documents. Deed and mortgage documents that Zeigler proposed to present demonstrate that Williams and another prosecution witness, Mary Stewart, were once married and cohabitated in the residence in which Stewart lived at the time of the crimes and of trial. In fact, Williams had, only two months prior to the murders, quit-claimed his interest in the property to Stewart. Yet throughout pre-trial discovery and trial Williams and Stewart went to lengths to place distance between each other. This certainly suited the State Attorney’s case, since Frank Smith, another prosecution witness, was Stewart’s son-in-law. The suggestion that Williams was more than a mere friend to either Stewart or Smith, and that Stewart and Williams sought to conceal this connection, could and would suggest unseemly collaboration among witnesses to the jury.

c. Testimony of the Jellisons & the Roaches. Three other witnesses identified in the original motion – Jon Jellison, Kenneth Roach, and Linda Roach – provide a description of events on the night of December 24, 1975 that directly contradicts Felton Thomas and Edward Williams. All three saw vehicles and persons in the Zeigler Furniture Store parking lot that suggest the presence of persons other than the ones the State contended entered the Store that night. This supports Zeigler’s testimony and undermines the evidentiary basis of the convictions.

d. Testimony of Johnnie Beverly. In 2002 Johnnie Beverly, a former inmate trustee in the Orange County Jails who was involved in the State’s search for evidence in a citrus grove in 1976, testified at an evidentiary hearing. He disputes the State’s claim that it found a bullet in a citrus grove, which was presented at trial in an effort to corroborate a part of Thomas’ story. Beverly would testify that the evidence was planted by an individual cooperating with Sheriff’s deputies.

e. Previously suppressed report of Chief Thompson. This report adds a significant piece of additional corroboration to Zeigler’s trial testimony and the new DNA results. The notation in Chief Thompson’s original report that the blood around Zeigler’s wound was dry, not damp, supports Zeigler’s testimony that he was shot and unconscious; it disputes the State’s contention that Zeigler shot himself and then called for assistance. (If Zeigler shot himself as the State contended, the blood around his wound would have been wet when Chief Thompson arrived; if Zeigler had been unconsciousness and recovered, the blood around his wound would have dried.) The original report also posits a troublesome question for the State: why did Chief Thompson change his “observation” and submit a second report that allowed him to testify at trial, unimpeached, that the blood around Zeigler’s wound was still partially damp?

f. Previously suppressed tape recording. In a conversation between Jon Jellison and Jack Bachman, an investigator for the State Attorney's Office, Bachman is revealed as manipulative in his approach to witnesses. He coaches Jellison on what the "facts" are and urges Jellison to change his testimony to conform accordingly. Since Bachman had a significant role in handling key witnesses such as Williams and Thomas, his conduct in that conversation provides a clear explanation for a jury as to why the witnesses were able to testify as they did.

28. The Court should hear that evidence for two reasons. First, this is a capital case. The idea that the State should take the life of an innocent person is so grave a decision that it should be taken only based on a hearing of **all** evidence that bears on guilt or innocence. Zeigler respectfully submits that the Court has a legal and moral obligation to give Zeigler a full hearing of all facts before condemning him to death. Second, the high threshold of the new trial standard "presupposes that all essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984); *see also Trepal v. State*, 846 So. 2d 405, 437 (Fla. 2003) (Pariente, J., specially concurring); *Robinson v. State*, 770 So. 2d 1167, 1171 (Fla. 2000) (Anstead, J., specially concurring). Where there exists, as here, substantial evidence collected after trial that the underlying supposition is wrong, the Court should look to that evidence, as a whole, to evaluate the true strength of the State's case. (The Court appeared to apply this philosophy asymmetrically here, allowing the State to offer new evidence outside of the trial record and the DNA test results.) After all, at a new trial, this additional evidence would be considered by the jury.

29. **Fourth**, and last, the Court erred in hearing and relying on the State's hypothetical evidence of guilt derived from untested spots on the red shirt. In doing so, the Court departed from its own limitation on the hearing, as the spots were not subjected to and did not involve the DNA test results. Those spots had not been the subject of any substantive testimony or argument at trial. Zeigler was unaware prior to the testing of the evidence that they were considered to be an issue, so he did not test them. The entire theory spun around those spots is based on speculation that the spots are blood, that they are Mays' blood, and that they were deposited by one event rather than two, or several, events.

30. Zeigler was left unable to effectively rebut this highly speculative theory, which deprived him of a full and fair opportunity to litigate his motion. As the Court noted, Zeigler had no evidence to introduce to contradict the hypothesis that, if all of the spots were in fact Mays' blood, then the pattern of the spots would be suggestive of Zeigler being the one who beat Mays on the floor. (Order, p. 14.) But the reason for the lack of evidence was the Court's decision to depart from the previously determined limitations on the hearing and the absence of the theory from the trial of the case. Moreover, as the Court itself observed, Mr. James provided at least three scenarios that would explain the spots on Zeigler's clothes, if they were in fact spatter from Mays, two of which do not involve any culpable criminal conduct on Zeigler's part. (Order, p. 12, citing T. 183.)

31. Moreover, it violates Zeigler's rights to due process of law under the Federal and Florida Constitutions, as well as his right to trial by an impartial jury under the Federal and Florida Constitutions, to continue his confinement and sentence of death, despite otherwise showing an entitlement to vacate his convictions, based on the speculative conclusions derived from the spots where those conclusions were never presented to a jury. If there is any

value to the State's theory, it can be gleaned only by vacating the convictions and permitting the State to argue its new theory before a new jury, which is entitled to accept or reject it.

32. An appropriate cure for this last legal error is to order testing of the spots on the red shirt to determine whether the State's hypothesis bears fruit. The fact that the Court believed that they may hold significance is a sufficiently strong reason to authorize such tests as part of this rehearing process. We address this issue in more detail in a companion motion. Procedurally, the Court should grant the motion for rehearing, authorize the testing, and rehear the merits of the underlying motion promptly following receipt of the test results.

**Conclusion**

WHEREFORE, defendant respectfully requests that the Court enter an order granting this motion for rehearing, rehear the Motion to Vacate Convictions, and grant him the relief he seeks, and grant such other relief as is just and proper in the circumstances.

Dated: May 2, 2005

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 2nd day of May, 2005, to Chris Lerner, Esq., Office of the State Attorney for the Ninth Judicial Circuit, 415 N. Orange Ave., Orlando, Florida 32801 (CLerner@sao9.org), and Kenneth Nunnelley, Esq., Office of the Attorney General, 444 Seabreeze Blvd., 5th Fl., Daytona Beach, Florida 32118 (Nunnelley\_Ken@oag.state.fl.us).

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John Houston Pope