SC16-1498

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

- against -

STATE OF FLORIDA,

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Zeigler demonstrated in his Opening Brief that the DNA testing he seeks exceeds all of the requirements set forth in Fla. R. Crim. P. 3.853 and should have been authorized by the Court below. Zeigler presented uncontested testimony from leading DNA expert Richard Eikelenboom, who explained in detail that the requested testing would prove that Zeigler did not shoot and kill Perry and Virginia Edwards, and that someone else bled all over Eunice Zeigler's shoes and clothing after she was killed. Evidence of this nature is among the most powerful imaginable, as it would constitute scientific proof that Zeigler *could not have been* the murderer. It certainly meets Rule 3.853's requirement that testing be likely to lead to an acquittal, especially when viewed, as it must be, together with all of the existing evidence of innocence in this case.

The State attempts to justify the Circuit Court's denial of testing on appeal with four arguments, none of which withstands scrutiny. *First*, the State argues that the DNA Motion is barred by collateral estoppel, even though the State concedes that the DNA Motion seeks testing that Zeigler has never previously requested and asserts a legal ground for testing based on new technology that Zeigler has never previously raised. *Second*, the State claims that Zeigler's testing request should be denied based on the novel theory – which was never presented to the jury, is unsupported by any evidence, and is flatly at odds with the State's case

at trial – that "Zeigler would have had time to change clothes." *Third*, the State raises an unpreserved and meritless objection to Eikelenboom's qualification as an expert – even though the State *stipulated* to Eikelenboom's admission and his opinions were not disputed by the State's expert. *Fourth*, the State claims that the background facts surrounding the murders are irrelevant, suggesting the probative value of the requested testing could be examined in a vacuum. None of these arguments has any merit or supports the denial of testing in this case.

ARGUMENT

I. Collateral Estoppel Does Not Bar The DNA Motion

The State's first argument on appeal is that Zeigler's DNA Motion should be barred by collateral estoppel because "Zeigler was given the opportunity in 2001 to test for 'every single bloodstain'" and "fail[ed] to avail himself of that opportunity," and because Zeigler "did not request using these 'cutting edge' . . . testing methods" – namely, mini-STR, Y-STR, and touch DNA testing – "when he requested DNA testing in 2009." State Br. 20, 25-26. That argument is both legally and factually incorrect. Whether Zeigler could have previously sought to use the testing technology he seeks permission to use in his instant motion has no legal significance, and in any event, Zeigler could not have reasonably requested the testing he now seeks in 2009.

As Zeigler demonstrated in his Opening Brief, the State has improperly conflated collateral estoppel, which applies to issues actually litigated in the past, with res judicata, which relates to issues that were not raised in the past but arguably could have been. *See* Opening Brief 66-67. This Court has already held that res judicata *does not apply* to Rule 3.853 motions. *See Zeigler v. State*, 116 So. 3d 255, 258 n.3 (Fla. 2013) ("We agree with Zeigler that his motion for postconviction DNA testing was not barred because it was successive" and noting that Rule 3.853 states that motions ""may be filed or considered at any time following the date that the judgment and sentence in the case becomes final" and allows for re-testing of DNA). *See also Ochala v. State*, 93 So. 3d 1167, 1169 (Fla. 1st DCA 2012) ("The doctrine of res judicata does not bar a second motion under rule 3.853 because the rule allows for the filing of a motion 'at any time.'"). It is therefore immaterial whether Zeigler *could have* requested the testing he now seeks in prior motions. The State's concession that Zeigler *did not* seek that testing in any prior motion is fatal to its assertion that collateral estoppel applies.

Further, it is well-settled that "[t]he party claiming collateral estoppel bears the burden of showing its applicability with sufficient certainty through the record or extrinsic evidence." *Campbell v. State*, 906 So. 2d 293, 295 (Fla. 2d DCA 2004); *see also Meyers v. Shore Indus., Inc.*, 597 So.2d 345, 346 (Fla. 2d DCA 1992). The State's burden is a heavy one. "For the doctrine of collateral estoppel to apply

to bar relitigation of an issue, five elements must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated." *Criner v. State*, 138 So. 3d 557, 558 (Fla. 5th DCA 2014) (internal quotations and citation omitted). "Whether collateral estoppel precludes litigation of an issue is reviewed de novo." *Id*.

Aside from showing that the parties are identical, the State has not met its burden as to any of these required elements, nor can it. It is undisputed that Zeigler never previously sought to conduct touch, mini-STR or Y-STR testing on any evidence. Similarly, Zeigler never previously sought to test every bloodstain on his clothing – which as this Court noted might have been necessary for testing to produce probative results using old technologies due to issues such as degradation. *Zeigler*, 116 So. 3d at 259; *Zeigler v. State*, 967 So. 2d 125, 131 (Fla. 2007). Thus, there is no question that the first required element – "an identical issue must have been presented in the prior proceedings" – is not satisfied. The second and fourth required elements – that the issues presented were "a critical and necessary part of the prior determination" that was "actually litigated" – are also necessarily lacking because Zeigler's current request to use new technologies was

not a part of any prior determination, let alone a critical and necessary part, and was never previously litigated.

Not only did the State fail to meet its burden in asserting collateral estoppel, but the uncontested facts make clear that the State could not have done so. It is undisputed that none of the testing technologies Zeigler seeks to use in his current motion existed in 2001. Eikelenboom testified that mini-STR technology was not even invented until 2007; that his laboratory was the first to use a mini-STR kit in the United States in 2008; that the mini-STR kit was necessary for modern touch DNA testing, and that the type of Y-STR testing he recommends "was certainly not possible in 2001." R. 1067-1070, 1078, 1112-13. *See also State v. Johnson*, 14 N.E.3d 482, 486 (Ohio Ct. App. 2014) (authorizing DNA testing under Ohio law and noting that "DNA testing has drastically evolved since [the defendant's trial in 2001]" and that newly developed technologies included Y–STR testing, which "allows DNA technicians to differentiate between male and female DNA from a mixed source, mini-STR and touch DNA[, which] permit technicians to obtain a DNA profile from very small degraded, and compromised samples."). The State did not present any evidence to the contrary. Thus, the State's argument that Zeigler should have requested the testing he now seeks when he sought DNA testing for clemency purposes in 2001 is nonsense. Zeigler could not have requested the testing he now seeks in 2001 because it did not exist. And in any

event, the State concedes that Zeigler *did not* request the testing he now seeks in any prior motion. Thus, it is impossible for the propriety of that testing to have been previously litigated or decided, as would be necessary for collateral estoppel to apply.

The State also concedes that Zeigler did not request the testing he now seeks when he last moved for DNA testing in 2009, claiming that collateral estoppel should nonetheless apply because "nothing prevented him from asking that such testing methods be done during his last motion requesting DNA testing in 2009." State Br. 34. But as discussed above and in the Opening Brief, collateral estoppel only applies when an identical issue is "actually litigated." Thus, whether Zeigler could have requested the testing he now seeks in a prior motion is not material.

In any event, the State presented no evidence demonstrating that Zeigler could have reasonably sought any of the testing he now seeks in 2009, when he last moved for DNA testing. The State has not pointed to a single case or other instance in Florida from 2009 in which any of the three types of DNA testing Zeigler now seeks was obtained or used. Moreover, the uncontested evidence in the case establishes that each of the new technologies Zeigler seeks to use is cutting edge, such that even today, they are not widely available. For instance, the State's expert testified that mini-STR and Y-STR testing are not currently available in the State's Orlando laboratory, and that despite his vast experience in DNA

testing generally, including testifying about DNA approximately one hundred times, he has *never* personally conducted any testing using either technology. R. 1132, 1134-35, 1140. Eikelenboom testified that his laboratory was, to his knowledge, the very first laboratory in the United States to use touch DNA, in or about 2008. R. 1120-21. That case was in Colorado, not Florida. R. 1120. Eikelenboom similarly testified that the mini-Filer kit used to conduct mini-STR testing was not even released until 2007, and that "a lot of laboratories in the United States still don't use it." R. 1118. Thus, the fact that it might have been theoretically possible for Zeigler to request testing using these new technologies has little relevance. A defendant cannot be expected to immediately seek to use a new technology the minute it is released when, years later, it is still not widely used in Florida, and certainly cannot be barred from seeking to use that testing technology if he does not make such an instantaneous request.

The State also ignores that Rule 3.853 expressly authorizes successive testing motions based on "subsequent scientific developments in DNA testing techniques". Fla. R. Crim. P. 3.853(b)(2). It is undisputed that Zeigler has never before sought DNA testing pursuant to that rule – nor has he sought to use any of the new technologies at issue in his motion. As such, Zeigler could not have raised the issues presented in his motion, and cannot be collaterally estopped from doing so now.

Finally, the State ignores Zeigler's arguments that, even if collateral estoppel were applicable, significant developments in DNA testing technology and Felton Thomas' recantation constitute changed circumstances requiring consideration of the motion, and that, even if collateral estoppel were otherwise applicable, this Court should exercise its discretion and decline to apply it under the manifest injustice doctrine. As Zeigler demonstrated in his Opening Brief, this Court's prior decisions on the probative value of DNA testing were rooted in the reliability of Felton Thomas' trial testimony and limitations imposed by now-antiquated DNA technology. In ruling on Zeigler's prior testing motions, this Court expressly relied on testimony from 2004 that "it was possible to miss blood on the shirt, due to deterioration and improper storage." *Zeigler*, 116 So. 3d at 259 (quoting *Zeigler*, 967 So. 2d at 130). The Court also relied on testimony from 2011 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." *Id.* Based on that information, the Court found in 2013 that "even if additional testing on the six areas again revealed the absence of Perry's blood, it still would not give rise to a reasonable probability of acquittal or a lesser sentence." *Id*.

None of those statements remains true today. As Mr. Eikelenboom testified, mini-STR testing "was especially made . . . for deteriorated DNA." R. 1067. The State's expert Mr. Baer agreed, testifying that mini-STR testing technology "is

designed to work on degraded DNA". R. 1138. Both experts also agreed that it was no longer necessary to test "every single bloodstain" in order to determine if Zeigler killed Perry Edwards. Eikelenboom testified that modern testing technology made it possible to determine "whether [Zeigler] was the shooter and beater of Perry Edwards" without testing every individual stain, and also made it possible using a new method called "taping" to actually test every stain if the Court required it. R. 1079-81. Baer testified that if there was a close range shooting or a beating (as the State's expert determined was the case with Perry and Virginia Edwards), "I would assume there would be quite a bit of transferred blood" and using modern technology, there was "no" reason to think it would be hard to find that blood today. R. 1147. He added that "the suggestion that every stain be tested" was "absurd" from a modern perspective – not, as the State seeks to imply, because the testing Zeigler seeks would be fruitless, but because Baer was able to identify specific locations on Zeigler's clothing that were "reasonable to test" to establish whether Zeigler's clothing contains the backspatter that would necessarily be present if Zeigler was the individual who shot Perry and Virginia Edwards at close range. R. 1131, 1146. Given that technology has radically altered the probative value of the testing Zeigler requests, this Court's rulings on Zeigler's prior testing motions could not have presented "identical" issues. The change in circumstances

renders the issues presented different, requiring that they be considered on the merits.

It also bears stressing that the DNA testing Zeigler seeks in his motion carries the ability to present scientific proof of Zeigler's innocence. As Eikelenboom testified, the requested testing would literally show "whether [Zeigler] was the shooter and beater of Perry Edwards". R. 1079-80. Baer similarly conceded that "you would expect there to be transferred blood back to [Zeigler]" if he was the individual who shot Perry and Virginia Edwards at close range, and there would be "no" reason it would be hard to find that blood today. R. 1147-48. Under such circumstances, denying Zeigler the right to test the evidence sitting in the State's custody – at no cost to the State – on the basis of collateral estoppel would be manifestly unjust. For all the foregoing reasons, collateral estoppel does not bar the DNA Motion.

II. Zeigler Amply Demonstrated that the Testing Results Would Create a Probability of Acquittal

In his Opening Brief, Zeigler described in detail how each type of DNA testing he requests would create a probability of acquittal. As described above, the requested testing would prove whether Zeigler, or someone else, shot Perry and Virginia Edwards. Evidence that Zeigler could not have shot and killed those victims would destroy the State's case against Zeigler and would constitute proof of innocence that far exceeds Rule 3.853's requirement to show "a reasonable

probability" that testing would establish reasonable doubt. Evidence that someone other than Zeigler smeared and dripped blood on Eunice Zeigler, that Perry Edwards had significant quantities of someone else's touch DNA under his fingernails and on his clothing, would similarly present powerful evidence of innocence, as would evidence that Edward Williams – who testified that he never touched the RG guns used in the murders – left his DNA on those guns. That is all the more true when the probative value of the requested testing is considered, as it must be, together with all of the other evidence of innocence Zeigler has already adduced.

None of the State's responses has any merit. Accordingly, the DNA Motion should be granted, and testing authorized.

A. Zeigler Demonstrated That Testing Would Show He Did Not Kill Perry or Virginia Edwards

Aside from reiterating its flawed res judicata argument, the State's sole contention for why Zeigler's requested testing would not create reasonable doubt as to whether he killed Perry and Virginia Edwards is rank speculation that Zeigler could have changed clothes or worn a raincoat to shield his clothes from bloodstains at the time he murdered them. Not only is there no evidence that Zeigler or anyone else wore a raincoat on the night of the murders, but the State argued the exact opposite at trial, insisting to the jury that bloodstains on Zeigler's clothing proved he killed the victims – and therefore that Zeigler must have been

wearing that clothing when he committed the murders. The State may not, consistent with constitutional due process and Zeigler's Sixth Amendment rights, argue a novel and speculative theory, utterly lacking in evidentiary support and at odds with the theory the State put to the jury, to oppose a postconviction motion.

During cross examination, the State asked Zeigler the following questions at trial:

> Q: I want you to tell me, if you can, sir, how you got all the blood under the armpit of your clothing, Type A blood?
>
> A: The only thing that I can tell you is that during the fight I was grabbing everything I could grab ahold to and swinging with everything that I had. That's the only thing that I can tell you.
>
> Q: You can't tell me how you held Perry Edwards around the neck and clubbed him with your right hand as you held him with your left?
>
> A: No, sir, because I did not do it.

R. 1017; T.T. 2425. In its closing argument, the State made similar statements to the jury regarding Zeigler's clothing:

> You will have the opportunity to examine Mr. Zeigler's clothing. You will see a big blood stain right in the area where Edward Williams said he saw a dark stain. You will see a soaked area of blood under the left armpit of those shirts. That could have gotten there only by having someone in his arm who was Type A blood. He didn't get that crawling around on the floor. Who was bleeding Type A blood?

T.T. 2552-53. *See also* T.T. 2565 (in which the State contended that "[t]he blood on [Mr. Zeigler's] clothes was the victims' blood"); T.T. 1029-31 (in which the

State's forensic expert, Herbert MacDonnell, presented a detailed explanation of why the blood stains on the defendant's shirts were consistent with him committing the murders); T.T. 2552 (in which the State emphasized to the jury that Zeigler supposedly shot himself in the stomach because he had "blood all over him" and had "to do something desperate.").

The State's new argument that Zeigler "had time to change clothes, and that a raincoat and gloves that could have been used to avoid exposure to blood were missing from the crime scene", State Br. 24 n. 3, are flatly at odds with the State's trial theory, in addition to lacking in any evidentiary support. As this Court held in *Hildwin v. State*, 141 So. 3d 1178, 1181 (Fla. 2014), "[t]he State cannot now distance itself from the evidence and theory it relied upon at trial" in resisting relief based on DNA.

In addition, it is well-settled that relief cannot be denied, nor a conviction bolstered, based on pure speculation. *See generally Gains v. State*, 417 So. 2d 719, 722-23 (Fla. 1st DCA 1982) (conviction could not rest upon mere suspicion that defendant was the "wheelman" in a robbery), *pet. for review denied*, 426 So. 2d 26 (Fla. 1983); c.*f. Vecta Contract, Inc. v. Lynch*, 444 So.2d 1093, 1095 (Fla. 4th DCA 1984) (directed verdict should have been entered where evidence amounted to "rank speculation"), *pet. for review denied*, 453 So. 2d 44 (Fla. 1984). Here, the State has failed to identify any evidence that even remotely supports an inference

that Mr. Zeigler (as opposed to anyone else) ever wore a raincoat while committing any of the murders. The State also fails to explain how Mays' blood could have been found on Zeigler's shirts, as prior DNA testing revealed, if Zeigler had changed clothes or otherwise shielded his clothing while committing the murders. Once again, the State argued the opposite at trial, making clear in its closing argument that "[t]he blood on [Mr. Zeigler's] clothes was the victims' blood" – not just that of Mr. Mays. T.T. 2565. Thus the State affirmatively argued at trial that Mr. Zeigler had the blood of Mr. Edwards on his shirt, and thus had not changed clothes or worn a raincoat that would have shielded the transfer of any of the victims' blood.

In light of the foregoing, the State's raincoat theory offers no basis to find that Zeigler's requested DNA testing would fail to establish reasonable doubt of his guilt. Rather, as established in the hearing and in Zeigler's Opening Brief, testing would clearly be probative of innocence and should be granted.

B. Zeigler Demonstrated that Testing On Eunice Zeigler's Clothing Would Produce Evidence That Would Lead to an Acquittal

At the evidentiary hearing, Zeigler established that DNA testing on Eunice Zeigler's clothing could identify whose type A blood – which could not have come from Zeigler, who has type O blood – was smeared and dripped on Eunice, almost certainly by her killer, and could also identify the individual who smeared and dripped that blood on her. According to the State, Eunice could not have been the

source of any of this blood. R. 250, 253. Scientific proof that someone else, who was not Zeigler, was bleeding on Eunice *after* she was murdered would be powerful evidence of Zeigler's innocence.

The State's sole response to this showing is to argue that "it was possible that Zeigler could have hugged his wife sometime that evening and left DNA on her coat." State Br. 28. That is factually incorrect and contrary to the record. As Eikelenboom explained in detail at the evidentiary hearing, mere casual touching, such as would be expected from a hug, would result in a negligible transfer of touch DNA, and would not make it difficult to identify the source of DNA on Eunice's clothing. R. 1114-15. Eikelenboom also explained that finding trace amounts of Zeigler's DNA on his wife's clothing would not be unusual, and would not make it difficult to identify who was *bleeding* and *smearing blood* on the inside of Eunice's socks, shoes, pants and coat. Opening Br. 54-58; R. 244-53. The State's expert did not contest any of that testimony. As such, the State has failed to raise any substantive arguments for why DNA testing on Eunice Zeigler's clothing should not be performed.

C. Zeigler Demonstrated that Testing on Perry Edwards' Fingernails Would Produce Evidence of Reasonable Doubt

The State argues that DNA testing of fingernail scrapings from Perry Edwards would not have probative value and should not be permitted because "there was no testimony presented that investigators recovered any genetic

material from Edwards' fingernails." State Br. 29. It is impossible, however, to know if genetic material has been recovered from a fingernail scraping until the scraping is tested for genetic material. Until then, all any defendant can argue is that, based on the experience of experts, it is likely that genetic material belonging to the perpetrator would have been recovered.

The State also argues in conclusory fashion that DNA testing of Perry Edwards' fingernail scrapings will not be probative of guilt. *Id.* That is contrary to the uncontroverted expert testimony and to case law on the unique significance and relevance of fingernail DNA testing. Eikelenboom testified that "[n]owadays you investigate the fingernails if there is a violent fight", as was the case with Perry Edwards, and that many state laboratories do this "automatically". R. 1081-82. He explained that "[w]e see that often under the fingernails, we find DNA of perpetrators." R. 1082. The State's DNA expert stated that he had no problem with the request. R. 1149. Thus, there is no evidentiary basis for the State's claim that testing Perry's fingernail scrapings for DNA would lack probative value.[1]

[1] Indeed, courts have routinely recognized the significance of fingernail DNA findings, and the State offers no basis to hold differently in this case. *See e.g. Dubose v. State*, 113 So.3d 863, 864-5 (Fla. 2d DCA 2012) (finding a Rule 3.853 motion for DNA testing facially sufficient based on evidence of a struggle and 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," even though there was eye witness testimony to the effect that the defendant was guilty); *Reddick v. State*, 929 So. 2d

It is undisputed that Perry Edwards fought violently with his killer, that fingernail scrapings exist, and that modern DNA testing can be used to identify the source of DNA found in those scrapings. Zeigler should be allowed to use modern technology on this vital evidence to establish his innocence.

III. The State's Argument that Eikelenboom is Insufficiently Qualified is Barred and Meritless

The State argues on appeal that Mr. Eikelenboom – a leading DNA scientist who the State waived any objection to at the evidentiary hearing – was "not qualified to render a reliable opinion" and could not "opine with any amount of credibility that the DNA testing being sought gives rise to a reasonable probability of acquittal" because he had not reviewed every page of the voluminous trial transcript and because "his laboratory in Colorado has no accreditation." State Br. 20-21. None of these contentions has any merit.

34, 36 (Fla. 4th DCA 2006) (reversing denial of Rule 3.853 motion where the victim was beaten 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."); *Schofield v. State*, 861 So. 2d 1244, 1245 (Fla. 2d DCA 2003) (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.").

As an initial matter, the State waived any right to challenge Mr. Eikelenboom's qualifications by failing to object at the hearing and accepting him as an expert. Zeigler presented Mr. Eikelenboom at the March 31, 2016 hearing as an expert in three areas: "DNA testing and analysis, as well as crime scene reconstruction and bloodstain analysis." R. 1053-54, 1060. The State responded that it had "no objection to [Eikelenboom's] expertise," R. 1061, that it would stipulate that Mr. Eikelenboom's curriculum vitae be admitted into evidence, and that "Mr. Eikelenboom certainly has qualifications beyond those of the man on the street and should be allowed to render opinions." R. 1053.

It is well-settled that a party that has not contemporaneously objected to the admission of an expert may not do so for the first time on appeal. As this Court held in *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005), "we consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, [i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." (Internal quotations and citations omitted). "The sole exception to the rule is for fundamental error . . . .". *Id*. *See also F.B. v. State*, 852 So. 2d 226, 229-30 (Fla. 2003) (citing the "general rule requiring a contemporaneous objection to preserve an issue for appellate review").

Not only did the State fail to object to Mr. Eikelenboom's qualification at the evidentiary hearing, but it is clear than any such objection would have been baseless. The State claims that Eikelenboom was "not qualified" to offer opinions on the DNA testing Zeigler requests because he did not review the trial transcript and thus was not able to "opine with any amount of credibility that the DNA testing being sought gives rise to a reasonable probability of acquittal." State Br. 20-21. But Eikelenboom did not testify about whether testing would give rise to a probability of acquittal, nor could he, for that is a legal determination and thus an improper topic for an expert, as this Court has repeatedly held. *See Wickham v. State*, 593 So. 2d 191, 193 (Fla. 1991) (expert properly prevented from "draw[ing] purely legal conclusions" because "[i]t is axiomatic that the resolution of legal issues is properly left to the jury to resolve, using the legal instructions provided by the trial court."); *Gurganus v. State*, 451 So. 2d 817, 821 (Fla. 1984) (legal conclusion "no better suited to expert opinion than to lay opinion and, as such, was an issue to be determined solely within the province of the jury."). *See also Palm Beach Cty. v. Town of Palm Beach*, 426 So. 2d 1063, 1070 (Fla. 4th DCA 1983) ("Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court.").

The State's argument that Eikelenboom did not review adequate materials to form his opinions is also incorrect. Eikelenboom testified that he had reviewed, among other thing, "pictures of the crime scene", "bloodstain reports", and the 2001 DNA testing results, and that he had physically examined the garments he proposed to test, with the exception of Zeigler's shirts. R. 1073-4. He had more than an adequate basis to opine on the scientific principles – none of which were disputed by the State's expert – that were the subject of his testimony.

The State's claim that Eikelenboom's laboratory was not accredited at the time of the hearing is both incorrect and irrelevant. Eikelenboom testified that he conducts his DNA work at his laboratory in the Netherlands, which he stated is "accredited by the Dutch Board of Accreditation", which he explained is a member of the leading accreditation board worldwide, the International Accreditation Board. R. 1121.[2] Any suggestion that the facility in which Eikelenboom conducts DNA testing lacks accreditation is simply false. It is also irrelevant, as Eikelenboom has not conducted any testing in this case, and testified only about recent technological advances and what he would expect to find if the new technologies that are the focus of Eikelenboom's opinions were used to conduct

[2] Both the Netherlands and Colorado laboratories of Eikelenboom's organization, Independent Forensic Services ("IFS"), were accredited by the Laboratory Accreditation Board of the American Society of Crime Lab Directors ("ASCLD") on April 30, 2016. Copies of IFS's ASCLD accreditation certificate can be provided to the Court upon request.

testing of physical evidence he examined in this case. Eikelenboom was well qualified to offer opinions on those topics as was conceded by the State at the evidentiary hearing.

IV. The Court Must Consider All of the Evidence in Evaluating Whether the Requested DNA Testing Would Create a Probability of Acquittal

The State argues on appeal that none of the evidence establishing doubt as to Zeigler's guilt is relevant to Zeigler's DNA Motion, implying that courts should decide DNA testing motions and the critical issue of whether testing would produce a probability of acquittal without regard to any of the other evidence tending to establish doubts as to the defendant's guilt. That is both illogical and contrary to settled law.

As this Court recognized in *Hildwin*, it is not possible to determine if DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability" and thus "would probably produce an acquittal on retrial" without examining "the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through [the defendant's] postconviction proceedings," including "the totality of the evidence". *Hildwin*, 141 So. 3d at 1181.

The approach urged by the State would require the Court to determine the likely effect of the anticipated DNA results on a jury as if the jury would not also be hearing all of the other evidence – of both guilt and innocence – adduced in the

case. That is unrealistic and unworkable. Indeed, this Court has consistently referenced non-DNA evidence of guilt in evaluating Zeigler's prior motions for DNA testing. *See Zeigler,* 654 So. 2d at 1164 (citing as a reason for denying Zeigler's prior DNA testing request 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, Felton Thomas, has since recanted part of his trial testimony); *Zeigler*, 967 So. 2d at 128-29 (denying request for DNA testing and again identifying Thomas' testimony as key evidence of Zeigler's guilt); *Zeigler,* 116 So. 3d at 256 (same). Thus, it is clear that non-DNA evidence is relevant to whether a motion for DNA testing should be granted.

V. The Court Below Erred In Finding The Evidence Not Authentic

The State argues that the trial court properly questioned the authenticity of the evidence Zeigler seeks to test because "[t]he fact that the evidence was authentic at trial does not mean that it is currently authentic after the passage of 40 years." State Br. 31. That is incorrect. Evidence that was authenticated at trial, and has been in the State's custody ever since, necessarily remains authentic today, and the court below erred in denying testing on this basis.

As Zeigler demonstrated in his Opening Brief, the court below misconstrued Rule 3.853's authenticity requirement, focusing on the reliability of anticipated testing results instead of the authenticity of the item containing DNA. That is

inconsistent with Rule 3.853, which states merely that the trial court should determine "[w]hether it has been shown that physical evidence that *may* contain DNA still exists" and "[w]hether 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." Fla. R. Crim. P. 3.853(c)(5) (emphasis added). That language does not allow a court to deny testing in an old case simply because of the possibility that evidence handling procedures in the pre-DNA era could have resulted in contamination. Were the law otherwise, Rule 3.853 would effectively prohibit DNA testing in all old cases – the opposite of its intended function of making DNA testing available to defendants who were tried before DNA testing was available.

Moreover, the requirements for authentication "are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fla. Stat. § 90.901 (2016). Here, there is no question that the items Zeigler seeks to test "may" contain DNA and are what they purport to be. Thus, there is no basis to deny testing on account of a lack of authentication. The State's argument that "[i]t is highly unlikely that any viable evidence would remain considering the fact that over four decades has passed" is both speculative and refuted by the expert testimony, and thus cannot form a basis to question the

authenticity of the evidence Zeigler seeks to test. State Br. 22. Eikelenboom testified that "there would [not] be any problem for us to determine the source of blood" using modern technology, and Baer testified that there is "no" reason DNA results could not be obtained from the evidence at issue. R. 1110-11, 1147. Indeed, the evidence in this case proves the experts' point, as good DNA profiles were already obtained, using antiquated technology, when Zeigler obtained limited DNA testing in 2001.

The possibility that trace amounts of DNA could have been deposited on the evidence by individuals who handled it since the murders – a possibility that exists in every case – does not render the evidence inauthentic, either, and certainly does not offer a reason not to allow testing to be conducted. Until testing is performed, contamination is nothing more than a theoretical possibility. Moreover, the presence of trace quantities of DNA from individuals who may have handled it following the murders would not affect the significance of, among other things, not finding *any* of Perry or Virginia Edwards' DNA on Zeigler's clothing, or finding the DNA of Mays or Felton Thomas on Eunice Zeigler's clothing.[3]

[3] The State's argument would fail even if it were construed as a tampering challenge, for it is well-settled that proof that evidence is not what it purports to be, such as discrepancies in its description or weight, are needed to render physical evidence inauthentic, and that a mere possibility of tampering is not sufficient. *See Taplis v State*, 703 So. 2d 453, 454 (Fla. 1997).

VI. The Court Should Have Allowed Zeigler to Subpoena Felton Thomas

As discussed above, the Court is required to consider all of the evidence in a criminal case in deciding whether DNA testing should be authorized, as this Court has done in considering Zeigler's prior DNA motions. *See supra* Point IV. This Court has repeatedly referenced Thomas' testimony as being of particular relevance to Zeigler's entitlement to DNA testing. Now that Thomas has recanted that testimony, Zeigler should have been afforded the opportunity to present Thomas's corrected account for the Court's consideration. Zeigler's request is not, as the State claims, an attempt to get Thomas to recant; Thomas already recanted in a recorded conversation, the transcript of which is before the Court. R. 448-528. Zeigler was thus entitled to have Thomas' statements placed under oath.

CONCLUSION

For the reasons set forth herein, the circuit court's Order denying Zeigler's DNA Motion should be vacated, and this case should be remanded with directions for the court below to issue an order granting the request for testing.

Dated: January 3, 2017

Respectfully submitted,

/s Javier Peral II

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 3, 2017, a true and correct copy of the foregoing Initial Brief of Appellant was served on Kenneth S. Nunnelly, Assistant State Attorney, Office of the State Attorney at knunnelly@sao.9.org and Vivian Singleton, Assistant Attorney General, Office of the Attorney General at Vivian.singleton@myfloridalegal.com via e-service notification through the Florida Courts E-Filing Portal.

DATED this 3rd day of January 2017.

/s Javier Peral II

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), because Times New Roman 14-point font has been used throughout, in body text and in footnotes.

DATED this 3rd day of January 2017. */s Javier Peral II*