IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.
Appellant,

v. CASE NO. 84,066

HARRY K. SINGLETARY,
Secretary, Florida Department
of Corrections,
Appellee.

_____/

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

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

On pp. 1-3 of his brief, Zeigler sets out a discussion of the reasons why his motion for DNA testing should have been granted. This argument properly belongs in the argument portion of his brief, and the state does not concede that any of Zeigler's hyperbolic argument is correct. Moreover, the state does not concede that the state's trial evidence (as to guilt) was "purely" circumstantial, nor does the state concede that DNA typing of any of the blood samples found at the scene of the murders would exculpate Zeigler. However, the state does admit that DNA typing was not an available process at the time of Zeigler's conviction. For the reasons set out on pp. 14-19 of the answer brief, the state respectfully submits that the legal argument contained within Zeigler's "preliminary statement" is not persuasive.

## STATEMENT OF THE CASE

### Procedural History

On pp. 3-7 of his brief, Zeigler sets out the lengthy procedural history of this case. Insofar as the case history that is set out on pp. 3-4 is concerned, that is a substantially correct compilation of the prior proceedings in this case. However, to the extent Zeigler argues on p. 4 of his brief that the relevant proceedings in this appeal include the records in the three prior appeals, that assertion is incorrect. This matter is before this court for adjudication of the claims raised on appeal from denial of Zeigler's 1994 motion to vacate

sentence. (PR 125-130). While the prior appellate records in this case are pertinent to the procedural bar issues presented in this proceeding, Zeigler is not free to relitigate matters which have previously have been decided adversely to him, nor is he free to relitigate matters which are precluded by one or more procedural bars.

To the extent that Zeigler complains, on pp. 6-7 of his brief, about the state's response to his 3.850 motion, those statements are mere surplusage. If Zeigler believed that some issue existed with regard to this discussion, it should have been raised in the argument portion of his brief rather than being set out in its present location. To the extent that Zeigler suggests, in Footnote 1 to his brief, that anything improper occurred in connection with the filing and service of the state's response to his motion, that matter is not properly presented as an issue, and its inclusion in the statement of the case is again surplusage. To the extent that Zeigler complains, in Footnote 1, that he did not have the opportunity to submit a written response to the state's procedural bar defenses, those comments have nothing to do with any matter before this Court for two reasons. First, Zeigler does not raise this complaint as an appellate issue in the argument portion of his brief and the reason for its inclusion in a footnote is unclear. Second, the state respectfully submits that, while Zeigler has steadfastly refused to recognize the existence of any procedural bar to litigation of any of his claims, Zeigler has even now failed to suggest why the procedural bars are not applicable to him. Zeigler has not yet done that which he complains he did not get the chance to do.

## STATEMENT OF THE FACTS

The proceeding now before this court involves Zeigler's appeal from the denial, on June 24, 1994, of his 3.850 motion which attacked only his sentence of death. (PR 125-130). That sentence, which was imposed on August 7, 1989, followed resentencing proceedings conducted following this court's April 7, 1988 vacation of his death sentence based upon a Hitchcock error. Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988). That sentence was affirmed on direct appeal on April 11, 1991. Zeigler v. State, 580 So. 2d 127 (Fla. 1991). The only issues before this court concern that resentencing proceeding.

### The Guilt-Phase Facts

On direct appeal from Zeigler's conviction and sentence of death, this court summarized the facts in the following way.

On Christmas Eve, December 24, 1975, Eunice Zeigler, wife of defendant (hereinafter referred to as wife), and Perry and Virginia Edwards, parents-in-law of defendant (hereinafter referred to as Perry and Virginia), were shot to death in the W. T. Zeigler Furniture Store in Winter Garden, Florida. In addition, Charles Mays, Jr., (hereinafter referred to as Mays), was beaten and shot to death at the same location. Times of death were all estimated by the medical examiner as within one hour of 8:00 P.M. The defendant was also shot through the abdomen.

The state's theory of the case may be summarized as follows:

Edward Williams had known defendant and his family for a number of years. Williams testified that in June 1975 defendant inquired of him about obtaining a "hot gun." Williams then went to Frank Smith's home and arranged for Smith to purchase two RG revolvers. The revolvers were delivered to defendant. Also, during the latter part of 1975 defendant purchased a large amount of insurance on the life of his wife. Thus was shown the means and the motive. Mays and his wife came to defendant's furniture store during the morning of December 24 and Mays agreed to meet defendant around 7:30 P.M. The store was closed around 6:25 P.M.

Mays left his home around 6:30 P.M. He went to an Oakland beer joint and saw a friend, Felton Thomas, who accompanied Mays to the Zeigler Furniture Store.

The theory of the state's case is that defendant had two appointments on Christmas Eve, one with Mays and one with Edward Williams. Prior to these appointments he took his wife to the store and in some manner arranged for his parents-in-law to go there. He killed his wife, Eunice, quickly, and for her, unexpectedly, since she was found with her hand in a coat pocket, shot from behind.

Because of the location of her body, Virginia was probably trying to hide among the furniture. Perry probably surprised defendant with his strength and stamina as they struggled for some time. After defendant subdued Perry and rendered him harmless, defendant shot him. Considering the fact that a bullet penetrated Virginia's hand, the state said it was likely she was huddling a protective position when she was executed.

Defendant then left the store, returning to meet with Mays who had arrived there at about 7:30. He was probably surprised to see the presence of another man, Felton Thomas, with Mays. He took Thomas and Mays to an orange grove to try the guns. The state says that the purpose of the trip was to get the two to handle and fire the weapons in the bag. From the grove he returned to the store, but was unsuccessful in getting Mays or Thomas to provide evidence of a break-in. He did, however, get Thomas to cut off the lights in the store. The three returned to the defendant's home. Defendant got out, went to the garage, came back and took a box of some kind to Mays and told him to reload the gun. They returned to the store. Defendant could not persuade Thomas to enter the store, so Thomas lived. When Thomas disappeared, the defendant returned to his home and picked up Edward Williams. Defendant had killed Mays.

Defendant was successful in getting Williams partially inside the back hallway. Defendant put a gun to Williams chest and pulled the trigger three times but the gun did not fire. Williams said, "For God's sake, Tommy, don't kill me," and ran outside, refusing to return to the store. The state says that the empty gun was as much a surprise to defendant as it was to Williams. The state says that in all probability defendant thought he was holding the gun that Mays had shot in the orange grove and which defendant told Mays to reload.

When he was unable to get Williams into the store, the defendant became desperate and conceived the idea that he would appear un-involved if he happened to be one of the victims.

Accordingly, he shot himself and then called Judge Vandeventer's residence where he knew the police officers would be.

The defendant denies that he had any contact with Smith or purchased any guns from him. He says that the increase in the amount of the insurance policy was pursuant to advice on an estate plan. Defendant says that his wife, Perry, and Virginia were killed during the course of a robbery; that Mays was involved in the robbery but was killed by his confederates; that he was shot by the burglars and left to die. The jury obviously did not believe the testimony of the defendant. To have believed his story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams and would have had to have found no significance in the other substantial evidence. Zeigler v. State, 402 So. 2d 365, 367-368 (Fla. 1981).

Zeigler's convictions have never been set aside, and those convictions became final in 1982 when the United States Supreme Court denied certiorari review. Zeigler v. Florida, 456 U. S. 1035 (1982).

## The 1989 Resentencing Proceedings

In 1988, this court vacated Zeigler's death sentence based upon a Hitchcock violation. Zeigler v. Dugger, 524 So. 2d 149 (Fla. 1988). This court directed that the resentencing proceedings be held only before the trial judge because the jury's advisory recommendation was a sentence of life imprisonment. Id., at 421. Zeigler was again sentenced to death, and, on or about March 9, 1990, filed his initial brief on

appeal from that sentence. In that appellate proceeding, Zeigler raised the following issues, taken verbatim from his brief:

> I. The Death Sentence must be vacated, and the jury's recommendation of life imprisonment adopted, because the Circuit Judge's determination that "No Reasonable Person Could Differ" with his sentence is contrary to the record and not supported by adequate findings and is consequently arbitrary and capricious and deprives Zeigler of due process of law in violation of the Florida and United State Constitution
>
> A. In the circumstances of this case, the jury's Advisory sentence should be given each greater weight than usual
>
> B. Especially in view of the non-statutory mitigating evidence adduced in the resentencing proceeding, there is no basis whatever for concluding that "No Reasonable Person Could Differ": with the sentence of Death
>
> C. The jury was entitled to take into account the relative strength of its conviction about defendant's guilt in arriving at its advisory sentence; and any uncertainties it may have had in that regard form a reasonable basis for differing with the Death Sentence
>
> II. A fair application of the statutory aggravating factors to this case does not support the conclusion that "No Rational Person" could differ with the Death Sentence
>
> A. The determination that Charles Mays' murder was "Heinous, Atrocious or Cruel" is wrong as a matter of fact and law
>
> 1. The record does not support this conclusion by the trial judge
>
> 2. Fla. Stat. § 921.151(5) (h) is vague and overbroad on its face and has been applied in an inconsistent, arbitrary and capricious manner in

violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 9, 16 and 17 of the Florida Constitution.

B. The resentencing Judge committed error in concluding that Eunice Zeigler and Charles Mays were killed for pecuniary gain, and he improperly limited the defense in seeking to adduce relevant evidence on that point

C. It was error as a matter of law to conclude that the murder of Charles Mays was for the purpose of avoiding lawful arrest, since he was neither a Policeman nor a witness.

D. Imposition of the Death Sentence on the ground, among others, that defendant's contemporaneous conviction in the same trial of two first degree and two second degree murders, all committed at the same time and place, constituted "Previous" conviction of another capital felony under § 921.141(5) (b), Fla. Stat. was arbitrary and capricious and a denial of due process under the Florida and United States Constitutions.

III. The Circuit Court's offhand dismissal of the evidence of non-statutory mitigating factors was arbitrary and capricious, unsupported by adequate findings of fact and contrary to the weight of the evidence

At the conclusion of the sentencing proceedings, the trial court imposed the death penalty finding in aggravation that:

1. Mays' murder was especially heinous, atrocious, or cruel;
2. Both murders were committed for pecuniary gain;
3. Mays' murder was for the purpose of avoiding lawful arrest; and
4. Zeigler had been previously been convicted of another capital felony or a felony involving the use of violence.

[Footnote omitted] Zeigler v. State, 580 So. 2d at 128. The trial court also stated, in the sentencing order, that the cold, calculated, and premeditated aggravating circumstance would have been found but for the belief of the trial judge that the application of that aggravator would be an ex post facto violation. Id. As statutory mitigation, the trial court found no significant prior criminal history, and also considered various proffered items of non-statutory mitigation. Id. The trial court concluded that "no reasonable person could conclude that the mitigating circumstances outweigh the proven aggravating circumstances". Id. In affirming the trial court's sentence of death, this court affirmed the trial court's finding of four aggravating circumstances, and further held that the cold, calculated, and premeditated aggravating factor could and should also be applied to these murders. Zeigler v. State, 580 So. 2d at 130. This court found that the trial court properly weighed the proffered mitigating evidence, and further found that the rejection by the trial court of the jury's advisory sentence was proper under Florida law. Id., at 130-131.[1].

The 1994 3.850 Motion

On or about March 7, 1994, Zeigler filed a 3.850 motion collaterally attacking his sentence of death. That 3.850 motion raised the following issues taken verbatim from the pleadings;

1. Limitation of Sentencing Hearing Issues;
2. Failure to Consider Residual Doubt;

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[1] This court expressly found that the result would be the same with or without the cold, calculated, and premeditated aggravator. Id., at n.9.

3. Unconstitutional Jury Override;
4. Failure to conduct meaningful appellate review of jury override;
5. Failure to conduct proportionality review;
6. Invalid aggravating circumstance--previous conviction of a violent felony;
7. Invalid aggravating circumstance--avoiding lawful arrest;
8. Invalid aggravating circumstance--pecuniary gain;
9. Aggravating circumstances--heinous, atrocious, and cruel;
10. Actual innocence;
11. Unconstitutional System of Capital Punishment.

(PR 42-95). Zeigler also filed a motion for release of evidence and for the appointment of an expert (in the area of DNA typing) which has been the subject of much discussion in Zeigler's initial brief. (PR 96-100). Following oral argument on June 6, 1994, the trial court entered its order denying Zeigler's 3.850 motion and his motion for release of evidence and for the appointment of an expert. (PR 125-130). Zeigler gave notice of appeal from the denial of his 3.850 motion on July 20, 1994. (PR 131). The record was certified as complete and transmitted on August 15, 1994. (PR 144).

## SUMMARY OF ARGUMENT

The 3.850 Trial Court properly denied Zeigler's motion for release of evidence as being both procedurally barred and time barred. Zeigler sought the release of various items of physical evidence so that he could conduct (or attempt to conduct) DNA typing on that evidence. While DNA evidence was held admissible in the state of Florida in 1988, Zeigler did not raise any issue concerning DNA until 1994. Because Zeigler waited six (6) years following the approval the use of DNA evidence in this state, Zeigler is time barred. Zeigler delayed beyond the Rule 3.850 (b) time limitations, and has offered no credible reason to explain that delay. Moreover, Zeigler has not suggested how the DNA typing that he claims to want done would have any affect on the outcome of this case. The DNA cases referred to in Zeigler's brief were prosecutions in which identity was an issue, but that is of no help Zeigler because his presence at the scene of the murders has never been disputed. Even if it is possible at this late date to conduct any DNA typing, the results of that analysis would not be exculpatory. Moreover, Zeigler's motion for DNA typing is a successive petition inasmuch as the claim was not raised in a timely manner in the last 3.850 petition which dealt with guilt phase issues. The claim set out in Zeigler's brief is properly denied on successive petition grounds as well as on procedural bar grounds.

Zeigler's claims concerning the constitutionality of the sentencing court's rejection of the jury's advisory sentence, the application of the avoiding lawful arrest aggravating

circumstance, the application of the previous conviction of violent felony aggravator, and the Espinosa-based claim are all procedurally barred because they could have been, should have been, or were raised on direct appeal. The 3.850 trial court found each of these claims to be procedurally barred, and that holding, which is in accord with settled Florida law, is due to be affirmed in all respects.

Zeigler's claims that this court did not conduct meaningful appellate review of the jury override, and that this court failed to conduct a proper proportionality review were properly summarily dismissed by the 3.850 trial court under settled Florida law. To the extent that Zeigler claims that he is "actually innocent" of the crimes for which he was convicted, Zeigler has offered no evidence to support this claim. Instead, he has attempted to incorporate the matters which have previously been litigated in the trial court and before this court, and decided adversely to him. Zeigler's conviction became final in 1992 when the United States Supreme Court denied certiorari review, and the time for raising guilt phase issues expired long ago. Likewise, Zeigler's claim that the Florida death penalty act is unconstitutional is not a claim that is properly raised in a 3.850 proceeding. The Florida death penalty act has repeatedly been found constitutional, and Zeigler has presented no argument that would suggest any need for reconsideration of that long-settled precedent.

The 3.850 trial court properly ruled that no 3.850 motion attacking the performance of counsel at the 1989 resentencing

proceeding would be entertained in the future. Zeigler was represented at the resentencing proceedings by the same attorneys who now represent him. However, the evidence at the resentencing proceeding was basically that which was presented at the original penalty phase in 1976 plus additional evidence. This court has previously determined that original trial counsel was not ineffective in his performance at the original penalty phase. While that sentence was subsequently vacated based upon Hitchcock error, it stands reason on its head to suggest that original trial counsel, who persuaded the jury to recommend a life sentence, was not ineffective, but resentencing counsel, who had the benefit of years of preparation and additional evidence, rendered prejudicially deficient performance. Moreover, Zeigler's strategy, which is readily apparent, is to build in an avenue for delay at some point in the future. That is, of course, not a legitimate strategy, and this court should not sanction its use. Zeigler has never attempted to identify what potential ineffectiveness claims exist as to the resentencing, nor have his present attorneys ever attempted to withdraw, nor have they ever requested that additional counsel be appointed to present only the ineffectiveness of counsel claims going to the resentencing in this 3.850 motion. Zeigler's present attorneys could have done any of those things, but chose not to. That was their choice, and they should not be allowed to build in additional delay through such tactics.

## ARGUMENT

### I. ZEIGLER'S MOTION FOR RELEASE OF EVIDENCE WAS PROPERLY DENIED AS UNTIMELY

On pp. 16-27 of his brief, Zeigler argues that he should be allowed to conduct DNA testing on certain items of physical evidence. This claim was set out as claim 10 in the 3.850 motion, and was also raised in the form of a separate "motion for release of physical evidence". (PR 96-100). [2] The 3.850 trial court denied the motion for release of evidence (PR 125) and found claim 10 to be procedurally barred as well as time barred. (PR 129). Both of those rulings are correct and should not be disturbed.

In arguing that he should have been permitted to reopen the guilt phase of his capital trial, which became final in 1982, Zeigler presents an impassioned, shotgun-like argument to the effect that he should be allowed to conduct DNA testing on various items of physical evidence. While Zeigler vigorously attacks the state's "sense of decency and justice" and purports to invoke the right to due process through lengthy references to authority which is not binding on this court, his argument collapses when the facts are evaluated fairly.

It is a matter of historical fact that the guilt phase of Zeigler's capital trial became final in 1982 when the United States Supreme Court denied certiorari review. Zeigler v. State, 402 So. 2d 365 (Fla. 1981), cert. denied, 456 U.S. 1035 (1982). It is also a matter of historical fact that Zeigler has been

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[2] The citation from "PR ___" refers to the record on appeal from the denial of Zeigler's 3.850 motion.

before this court on six (6) subsequent occasions. For purposes of the DNA issue, the key proceeding is the 3.850 motion which was ongoing in March of 1991. That proceeding dealt solely with guilt phase matters, and contained no claim relating to DNA. Zeigler v. State, 632 So. 2d 48 (Fla. 1993). Zeigler raised no claim relating to such testing until March of 1994, when he filed the 3.850 motion which is the subject of this appeal.

In denying Zeigler's motion for testing, the 3.850 trial court found that, even though DNA typing was accepted as admissible evidence in Florida in 1988, Zeigler did not raise the issue until 1994. (PR 129). Those findings are likewise matters of historical fact which are not subject to challenge. However, Zeigler attempts to excuse his lack of diligence by claiming to have an "inherent right" to conduct discovery through new scientific methods. That hyperbole cannot obscure the fact that Zeigler sat on his hands for six (6) years after Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988) sanctioned the use of DNA typing. Zeigler could have amended his earlier 3.850 motion (which addressed only guilt phase issues) to include the DNA issue, but did not. Because Zeigler failed to plead his claim in a timely fashion, that claim is time barred. See, e.g., Adams v. State, 543 So. 2d 1244 (Fla. 1989).

Despite Zeigler's protestations to the contrary, the tools were available to raise the DNA issue in 1988, and it certainly could have been presented in his last 3.850 motion which dealt with guilt phase issues. Zeigler was dilatory in raising his request for DNA typing, and he should not be heard to complain.

He clearly delayed well beyond the time limitations set out in Rule 3.850 (b), and he has not offered any credible reason for that delay.

The results of any DNA typing would conceivably be "new evidence" as that term is generally used. However, the crucial component, and the dispositive issue, is whether the "new evidence" "could not have been ascertained by the exercise of due diligence." F.R. Crim. P. 3.850 (b) (1). By virtue of his six (6) year delay in presenting this claim, Zeigler has failed even the most lenient definition imaginable of "due diligence". Andrews decided the DNA issue in 1988, and Zeigler's claim that it was reasonable for him to await the "endorsement" of DNA typing by the National Academy of Sciences rings hollow. However highly regarded that entity may be, it neither controls nor determines the admissibility of evidence in the State of Florida. Andrews decided that question in 1988, and Zeigler failed to avail himself of that development. His palpable lack of diligence forecloses the opportunity to pursue DNA typing at this late date.

Zeigler also argues that because Andrews was a District Court of Appeals decision, it is of less authoritative value than would be a decision of this court. That argument ignores the fundamental principle that a District Court of Appeal opinion is the law in the state unless changed by this court. Andrews clearly held that DNA typing was admissable evidence in this state, and Zeigler should have moved promptly had he been sincere in his desire to pursue this avenue.

In some ways, the situation presented by Zeigler's request for DNA typing is analogous to the situation presented in Adams v. State, supra, where Adams allowed the time limitation to expire prior to raising his Hitchcock claim. Like Adams, Zeigler had the tools available to him to raise the DNA issue in 1988, but failed to do so. That failure bars further litigation of this claim. Even if the admissability of DNA typing is regarded as a significant change in the law, and the state does not concede that it is, the time for raising that claim began to run in 1988, with the release of Andrews. Giving Zeigler the benefit of the more lenient time construction allowed in Adams, Zeigler's time ran out in 1991. Zeigler waited three (3) years after that before he even mentioned DNA typing as a potential issue. Those tactics were his choice, and he should not be heard to complain because his hand was called. The 3.850 trial court should be affirmed.

An additional problem associated with Zeigler's motion for DNA typing is more mundane: Zeigler has not suggested how the testing he wants done would affect the outcome of this case. The Andrews case was a rape prosecution in which the identity of the perpetrator was at issue and could be conclusively resolved by DNA typing. Id. The same holds true for the Bloodsworth case annexed (in summary form) to Zeigler's 3.850 motion. (PR 105). Likewise, identity appears to be at issue in the "highly publicized California trial" referred to on pp. 11-12 of Zeigler's brief. However, the significant difference between those cases and Zeigler's case is that Zeigler has never denied

being at the crime scene, and DNA typing cannot demonstrate that he was not the perpetrator regardless of the result of that typing. Under the particular facts of this case, DNA typing would establish nothing: regardless of the results, it will not be exculpatory under any circumstances. There is no dispute that Zeigler's blood, as well as the blood of his four victims, was present at the crime scene. Under those circumstances, and in light of the testimony which conclusively established Zeigler's presence and participation in the murders, Zeigler v. State, 402 So. 2d at 367-368 (Fla. 1981), there is no doubt that DNA typing (if it is even possible at this late date) would establish nothing. Zeigler's argument about what the testing would show is no more than speculation which curiously was not raised in a timely manner. The 3.850 trial court's procedural bar holding is due to be affirmed in all respects.

On p. 27 of his brief, Zeigler argues that, if this claim is regarded as a successive petition claim, then he is still entitled to relief. The lower court did not expressly base its decision on successive petition grounds, but, even if it had, that ruling would be due to be affirmed, and is an additional and independently adequate basis for affirmance. To the extent that the 3.850 trial court's ruling is construed as being based on an abuse of procedure, that ruling is clearly proper for the reasons set out at the pp. 14-16, above. Contrary to Zeigler's claim, he has abused the 3.850 procedure, and denial of his claim was appropriate. See, e.g., Spaziano v. State, 570 So. 2d 289 (Fla. 1990); Tafero v. State, 561 So. 2d 557 (Fla. 1990);

Harich v. State, 542 So. 2d 980 (Fla. 1989); Foster v. State, 614 So. 2d 455, 463-464 (Fla. 1992). There is no reason that the DNA claim could not have been raised in a timely manner and pursued during the 1991 3.850 proceeding. Denial on successive petition grounds is appropriate, and the state respectfully suggests that this court should deny Zeigler's claim on these grounds in addition to the other independently adequate grounds for affirmance of the lower court's ruling.

## II. THE 3.850 TRIAL COURT PROPERLY DENIED, AS PROCEDURALLY BARRED, ZEIGLER'S CLAIMS THAT WERE, OR COULD HAVE BEEN, RAISED ON DIRECT APPEAL

On pp. 28-32 of his brief, Zeigler complains that the 3.850 trial court improperly denied, on procedural bar grounds, claims III, VI, VII, and IX. (PR 127-128). Despite Zeigler's protestations to the contrary, the 3.850 trial court applied settled Florida law in finding these claims to be procedurally barred.

Ground III in Zeigler's 3.850 motion is a challenge to the constitutionality of the sentencing court's override of the jury's advisory sentencing recommendation of life. (PR 59-64). Zeigler's claim, as understood by the state, is that this Court failed to reevaluate the record, thereby resurrecting a Tedder claim different from the override issue raised on direct appeal from resentencing. That contention is squarely rebutted by this court's opinion on direct appeal from resentencing. Zeigler v.

State, 580 So. 2d 127, 131 (Fla. 1991).[3] In any event, Zeigler raised this claim on direct appeal, and this court affirmed the death sentence. Id. That is a procedural bar which precludes 3.850 relief, Engle v. Dugger, 576 So. 2d 696 (Fla. 1991), and, moreover, this court's affirmance of Zeigler's death sentence is the law of the case. Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988).

Zeigler also argues that the 3.850 trial court's finding of a procedural bar as to claim VII (concerning the avoiding lawful arrest aggravating circumstance) was error. Apparently, Zeigler's argument is that because "this court ha[d] never before considered a situation such as this where one of the victims was murdered in order to make it appear that that victim committed the crimes actually committed by the defendant", Zeigler v. State, 580 So. 2d at 129, this court expanded the application of that aggravator in an unprecedented fashion. Therefore, according to Zeigler, this issue could not arise until after this court issued its opinion. That argument is mere sophistry based upon a refusal to recognize the inherent defects in that argument.

There is no doubt that Zeigler challenged the application of this aggravator on direct appeal. Zeigler, supra, at 129. Florida law is settled that Rule 3.850 proceedings are not to be used to relitigate matters decided on direct appeal, Engle,

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[3] This claim is also contained in the contemporaneously filed petition for Writ of Habeas Corpus, and is addressed, in the context of that petition, in the contemporaneously filed answer.

supra, and the 3.850 trial court properly applied settled Florida law in finding this claim procedural barred. That finding should be affirmed. Moreover, to the extent that Zeigler argues that he could not anticipate the application of this aggravating circumstance, such an argument requires that he completely ignore the original direct appeal opinion in this case, wherein this court also upheld the application of that aggravator. Zeigler v. State, 402 So. 2d at 376. Zeigler's claim that he could not reasonably anticipate this court's ruling is specious in that the aggravating circumstance was affirmed, on the undisputed facts of this case, in 1982. The fact that Zeigler's original death sentence was set aside based upon a Hitchcock error changes nothing, and the procedural bar holding is due to be affirmed in all respects.

The second reason that this claim does not state grounds for relief is because the claim Zeigler raises on appeal is not the same claim which was contained in the 3.850 motion. (PR 78-81). Florida law is settled that claims not raised in the 3.850 trial court are not cognizable on collateral appeal. See, e.g., Doyle v. State, 526 So. 2d 909 (Fla. 1988).

The third reason that this claim does not state any basis for relief is because the version of the claim set out in Zeigler's brief is based upon an interpretation of this court's direct appeal opinion that is incorrect. Rather than expanding the definition of the "avoiding lawful arrest", aggravator, this court did no more than apply settled precedent to the bizarre facts of this case. Zeigler v. State, 580 So. 2d at 129. The

fact that this court commented that it has never before confronted such a situation does not mean that the aggravator was expanded. It was not, and any contrary conclusion is possible only through an unreasonable reading of this court's opinion. Moreover, Zeigler never argued, on direct appeal, that to apply the avoiding lawful arrest aggravator to the facts of this case would in fact amount to an expansion of the definition of that aggravating circumstance. That failure to argue the issue now set out in his 3.850 appeal is a procedural bar which precludes any relief. The 3.850 trial court's procedural bar finding is due to be affirmed in all respects.

On pp. 30-31 of his brief, Zeigler argues that he is entitled to relief based on his claim that the "previous conviction of violent felony" aggravator is invalid. (PR 72-78) (Claim VI). The 3.850 trial court found this claim to be procedurally barred. (PR 128). That finding is in accord with settled Florida law and should be affirmed in all respects.

Claims VI and VII were raised in some fashion on direct appeal. However, the claims set out in the 3.850 motion were not raised on direct appeal from resentencing. See, Zeigler v. State, FSC No. 74,663, Initial Brief at 27-28. That is a procedural bar under settled Florida law. See, e.g., Hardwick v. Dugger, 19 F.L.W. S 433 (Fla. Sept. 16, 1994). Moreover, to the extent that these claims overlap with the direct appeal claims, Zeigler is attempting to use the post-conviction proceeding as a second appeal. That practice is clearly prohibited under settled precedent. See, e.g., Torres-Arboleda

v. Dugger, 636 So. 2d 1321 (Fla. 1994). The 3.850 trial court properly found this claim procedurally barred, and that finding should not be disturbed.

Alternatively, and secondarily, this claim lacks merit because the claim Zeigler seeks to raise is essentially the claim that was rejected in King v. State, 390 So. 2d. 315, 320-321 (Fla. 1980), and reiterated in Correll v. Dugger, 523 So. 2d 562, 568 (Fla. 1988) and Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992). This court has consistently applied the prior violent felony conviction aggravator in the fourteen years after King, and there is no basis for reconsideration of that well-settled precedent. To the extent that Zeigler argues that Turner v. Dugger is authority for overlooking his procedural default, that argument predicated upon a misunderstanding of the role of state habeas corpus, and a misreading of Turner. This court did not overlook (or fail to apply) a procedural bar in the Turner case.

On pp. 31-32 of his brief, Zeigler argues that the 3.850 trial court should not have found his Espinosa-based claim procedurally barred. Moreover, in a remarkably misleading piece of advocacy, Zeigler claims that application of Espinosa is retroactive. That assertion is palpably incorrect. See, e.g., James v. State, 615 So. 2d 668 (Fla. 1993).

On direct appeal from resentencing, Zeigler argued "that the facts do not support the Judge's finding that Mays' murder was especially heinous, atrocious, or cruel." Zeigler v. State, 580 So. 2d at 128. On appeal from the denial of his 3.850 motion, Zeigler argues that this claim "is a challenge to the

heinous, atrocious, or cruel aggravating circumstance based on the holding of Espinoza v. Florida [sic]." Initial Brief at 31. Apparently, Zeigler is attempting to graft the Espinosa decision onto the particular facts of this case. The 3.850 trial court properly denied this claim for two independently adequate reasons.

First, this claim was not raised on direct appeal from resentencing. In that proceeding, Zeigler argued that the facts did not support finding the heinous, atrocious, or cruel aggravator. That is not the same claim as the claim set out on collateral attack, and, in accord with settled Florida law, this claim is procedurally barred because it could have been but was not raised on direct appeal. See, e.g., Hardwick v. Dugger, 19 Fla. Law Weekly S433 (Fla. Sept. 16, 1994); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Medina v. State 573 So. 2d 293 (Fla. 1990); Mikenas v. State, 467 So. 2d 359 (Fla. 1984). The 3.850 trial court's denial of relief on procedural bar grounds should not be disturbed. Moreover, Florida law is settled that a defendant cannot benefit from Espinosa in the absence of a timely objection. Zeigler did not raise such a timely objection and is therefore procedurally barred, even assuming the Espinosa decision applies. Even if this court construed Zeigler's claim to have been raised on direct appeal, that would not change the result. Even if this claim is regarded as having been so raised, that claim is procedurally barred from relitigation in this proceeding under settled Florida law. See, e.g., Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992); Clark v. State, 460

So. 2d 886, 888 (Fla. 1984); Meek v. State, 382 So. 2d 673 (Fla. 1980).

Alternatively and secondarily, this claim does not provide a basis for relief because the cases upon which Zeigler relies are inapplicable to his case. There is (or should be) no dispute that Espinosa deals solely with the adequacy of the heinous, atrocious, or cruel jury instruction which was given in that case. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). Likewise, there is no dispute that, in this case, the jury is not a part of the equation because no jury was impaneled at the resentencing proceeding. Zeigler v. State, 580 So. 2d at 128. Because no jury was involved, Espinosa simply has nothing to do with this case. Zeigler is trying to put a square peg into a round hole by arguing to the contrary. This issue has no basis in the facts or in the law, and is most accurately described as a non-issue. To the extent that some other assertion may be made in connection with this issue, it cannot be discerned from Zeigler's brief, and certainly is not elucidated in any cogent legal argument. In addition to being procedurally barred, this claim is frivolous.

III. THE 3.850 TRIAL COURT PROPERLY FOUND CLAIMS IV, V, X, AND XI TO BE INAPPROPRIATELY RAISED IN 3.850 PROCEEDINGS

On pp. 32-35 of his brief, Zeigler argues that claims IV, V, X, and XI should not have been summarily denied by the lower court. (PR 128-129). Those claims, taken verbatim from the petition, are as follows:

> IV. Failure to conduct meaningful appellate review of jury override (PR 64-66);
> V. Failure to conduct proportionality review (PR 67-72);
> X. Actual innocence (PR 88-89);
> XI. Unconstitutional system of capital punishment (PR 89-90).

As is readily apparent, claims IV and V attack this court's decision rendered on direct appeal of this case. Florida law is settled that attacks on this court's direct appeal decisions are properly summarily dismissed. Eutzy v. State, 536 So. 2d 1014, 1015 (Fla. 1988). The 3.850 trial court properly decided these claims, and that ruling should be affirmed.

In ground X of the 3.850 motion, Zeigler argues that he is "actually innocent" of the crimes for which he was convicted. (PR 88-89). In support of this claim, Zeigler invokes Herrera v. Collins, 113 S.Ct. 853 (1993). However, the critical difference between the facts in Herrera and the facts in this case is that Herrera came forward with some "facts" in support of his claim of innocence. Herrera v. Collins, 113 S.Ct. at 872. Those facts had never before been litigated in any court. Id.

In contrast, Zeigler has done no more than incorporate by reference matters that have already been litigated and decided against him in his prior direct appeal and post-conviction proceedings. Because those matters have already been fully

litigated and resolved in favor of the state, it is a non-sequitur to assert that "actual innocence" is even implicated based upon those previously-decided facts. Zeigler has not proffered a single new fact to support this claim, and the trial court properly found this claim to be both procedurally barred and time barred. (PR 129). Zeigler's conviction became final in 1982, and the time for raising guilt phase issues is long past. To the extent that Zeigler may attempt to incorporate the DNA typing issue into this claim, that issue is of no help to him for the reasons set out at pp. 15-20, above. To the extent that Zeigler claims that "analogous claims" have been entertained in "any number of cases", that suggestion is erroneous. Reed v. State, 640 So. 2d 1094 (Fla. 1994) is in no way analogous to this case because Zeigler, unlike Reed, challenges the sufficiency of the evidence. Zeigler lost on that claim long ago, and cannot resurrect it now. See e.g., Zeigler v. State, 402 So. 2d at 368; See also, Meek v. State, 556 So. 2d 1318 (Fla. 4th DCA 1990), rev. denied, 581 So. 2d 167 (1991). Whether or not sufficiency of the evidence claims are cognizable in 3.850 proceedings is not the issue: Zeigler has proffered nothing to cast doubt upon the evidence in the first place. Claim X is no more than an insufficiently pleaded smoke screen which attempts to dress up a time-barred claim as something that it is not. The 3.850 trial court's denial of relief should be affirmed.

In claim XI Zeigler argues that the Florida capital sentencing statute is unconstitutional. The 3.850 trial court found this claim to be improperly raised in a 3.850 proceeding.

(PR 129). That ruling is in accord with settled Florida law, and should not be disturbed on appeal. See, e.g., Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (challenge to constitutionality of death penalty act not cognizable on collateral review). The 3.850 trial court alternatively ruled that this claim is meritless because the Florida death penalty act has repeatedly been held to be constitutional. (PR 129). That finding is also well supported by settled Florida law. See, e.g., Vining v. State, 637 So. 2d 921 (Fla. 1994). To the extent that Zeigler argues that the death penalty act is unconstitutional based upon Justice Blackmun's dissent from the denial of certiorari in Callins v. Collins, 114 S. Ct. 1127, 1128 (1994), that argument is frivolous. The law is settled that a grant of certiorari has no precedential value whatsoever. Ritter v. Smith, 811 F. 2d 1398, 1404-05 (11th Cir. 1987) (footnote omitted), cert. denied, 483 U.S. 1010 (1987). That dissenting opinion is not the law, and it is certainly not binding on this court. To the extent that Zeigler suggests that this court is somehow required to consider Callins, that suggestion is ludicrous. To the extent that Zeigler asks this court to adopt the "persuasive logic" of Callins, that claim is not properly briefed inasmuch as Zeigler has not even set out what Callins says, much less presented any argument (cogent or otherwise) for its applicability to Florida. This claim is wholly meritless.

## IV. THE 3.850 TRIAL COURT PROPERLY DECIDED ZEIGLER'S ATTEMPT TO RESERVE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR YET ANOTHER 3.850 PROCEEDING

On pp. 35-37 of his brief, Zeigler argues that the 3.850 trial court improperly ruled that it would not entertain a subsequent 3.850 motion raising a claim of ineffectiveness of counsel at the resentencing proceeding. The trial court properly ruled that, under the unique facts of this case, a subsequent 3.850 motion raising claims of ineffectiveness of counsel at resentencing would not be entertained. (PR 126-127).

### A. The procedural posture of this case

Zeigler's present attorneys have represented him since before the 1988 state habeas corpus proceeding, which resulted in this court vacating Zeigler's death sentence based on Hitchcock error and remanding the case to the trial court for a new sentencing proceeding. Zeigler v. State, 524 So. 2d 491 (Fla. 1988). Zeigler was represented by the same attorneys during the new sentencing proceeding, and on appeal therefrom. Zeigler v. State, 580 So. 2d at 128. During argument on the present 3.850 motion, Zeigler's attorney asserted that, despite attempting to do so, they had been unable to locate replacement counsel. (PRT 27-29.)

### B. The Resentencing Evidence

At the resentencing proceeding, the trial court found the following aggravating circumstances: 1) heinous, atrocious, or cruel as to the murder of Mays; 2) that both murders were for pecuniary gain; 3) that Mays' murder was for the purpose of

avoiding lawful arrest; and 4) prior conviction of violent felony. Zeigler v. State, 580 So. 2d at 128. On appeal, this court also found that the cold, calculated and premeditated aggravating circumstance was applicable. Id., at 131. In mitigation, the trial court found that Zeigler had no significant history of prior criminal activity. Id. Zeigler also presented nonstatutory mitigation in the form of evidence of his good character, his good prison record, and his church and community involvement. Id., at 130-131. This court upheld Zeigler's death sentence. Id. at 131.

C. The "Reserved" Ineffectiveness of Counsel Claim

Zeigler's argument is that, because his 3.850 attorneys also represented him at resentencing, he is entitled to (potentially) file another 3.850 motion challenging the effectiveness of his resentencing counsel. This he can do, he claims, because any other result would require present counsel to challenge their own performance. However appealing this claim may seem in the abstract, under the particular facts of this case, this claim does not withstand scrutiny.

First, any claim of "constructive" ineffectiveness of counsel should have been raised in this motion. There is no impediment of any sort to a claim by counsel that his own representation was rendered ineffective because of some outside interference. Strickland v. Washington, 466 U.S. 668 (1984). Zeigler is unquestionably barred from raising a constructive ineffective assistance of counsel claim at some point in the future, and this court should expressly so hold.

Second, to the extent that Zeigler has attempted to reserve the right to challenge the performance of resentencing counsel in a subsequent 3.850 motion, that claim fails for three independently adequate reasons. Initially, it is significant that Zeigler's original sentencing lawyer presented substantially the same evidence that was presented at the resentencing proceeding itself. See, e.g., Zeigler v. Dugger, 524 So. 2d 419, 421-422 (Fla. 1988) (McDonald, C.J., dissenting); See also, Zeigler v. State, 402 So. 2d at 376. The original penalty phase evidence convinced the jury to recommend a life sentence, a strong indicator of effective representation. See, e.g., Francis v. State 529 So. 2d 670, 671 (Fla. 1988). This court has already passed on the ineffective assistance of counsel component as it relates to the original sentencing proceeding, Zeigler v. State, 452 So. 2d 537 (Fla. 1984), and it makes no sense to suggest that even though original sentencing counsel was not ineffective, resentencing counsel could some how be ineffective when substantially similar evidence was presented and, if anything, more evidence (such as a good prison record) was put on at resentencing. When the hyperbole is stripped away, it becomes apparent that Zeigler is only seeking to build in yet another avenue to delay execution of his sentence of death.

Another component of this issue, which further points out the reason behind Zeigler's attempts to save his ineffectiveness assistance of counsel claim for a later day, is collateral counsel's failure to even suggest what ineffective assistance claims may potentially exist. Zeigler's present attorneys are

certainly capable of identifying what ineffectiveness claims may exist, and they should identify those potential claims for this court and for their client. If they will not do so, their strategy of delay becomes clear beyond doubt, thereby indicating that, at some point in the future, yet another set of lawyers will file yet another 3.850 motion which purports to point out numerous deficiencies on the part of resentencing counsel. That result is an abuse of the 3.850 process that this court should not tolerate. It would seem, if present counsel truly believed that any legitimate ineffectiveness claim existed, that those claims would be identified and that counsel would have sought to withdraw. That has not happened, and the object is clearly delay. The lower court's order should not be disturbed.

Alternatively and secondarily, the issue that Zeigler seeks to raise is not yet ripe for decision because nothing indicates that a claim of ineffective assistance of counsel at resentencing will ever be raised. If the issue comes up, the circuit court's ruling can be reviewed by extraordinary writ, which is the appropriate method of review, anyway. However, until such time as the issue becomes a real one, Zeigler is doing no more than asking this court to rule in a vacuum. That is inappropriate, and the lower court's ruling should not be disturbed.

Finally, to the extent that Zeigler argues that the record does not conclusively establish that no right to relief exists, that claim ignores a critical aspect of the issue. There can be no doubt that Zeigler's present lawyers could have moved to withdraw from the representation when the resentencing appeal was

final and requested that the court appoint counsel so that new counsel could raise any colorable ineffectiveness claim in a timely fashion. Moreover, present counsel could have called the trial court's attention to any potential ineffectiveness claims and requested that co-counsel be appointed to present the ineffectiveness component of the 3.850 motion. Zeigler did neither of those things, even though both were valid and legitimate courses of action. Contrary to Zeigler's assertions, future delay is the readily apparent strategic reason for the current posture of this case. A built-in opportunity for delay in the future is improper, and Zeigler should not be allowed to profit from such tactics. This court should expressly hold that Zeigler is procedurally barred from presenting ineffective assistance of counsel at resentencing claims in some future 3.850 motion for the reasons set out above.

## CONCLUSION

Based upon the foregoing, the State respectfully requests that the lower court's denial of relief be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to: Dennis H. Tracey, III, and John Houston Pope, of Davis, Scott, Weber & Edwards, 100 Park Ave., New York, New York 10017, this 30th day of November, 1994.

Kenneth S. Nunnelley
Of Counsel