

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Case No. SC22-_____
L.T. No. 88-CF-5355,
No. 88-CF-5356

Appellant,

v.

WILLIAM THOMAS ZEIGLER, Jr.,

Appellee.

_____/

**EMERGENCY MOTION TO STAY THE TRIAL
COURT'S ORDER RELEASING
EVIDENCE FOR DNA TESTING**

The State of Florida hereby moves for a stay of the order entered by the trial court on December 19, 2022. *See Fla. R. App. P. 9.310(a).* That order authorizes the clerk of court to release evidence in this long-final capital murder case for DNA testing, but does not purport to have made the findings required by Florida Rule of Criminal Procedure 3.853 and Section 925.11. Instead, over the objection of the Attorney General, the trial court permitted the testing pursuant to an agreement between the defendant and the State Attorney's Office for the Ninth Judicial Circuit.

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As explained below, a stay is warranted to prevent the State’s appeal of that order from becoming moot. And timing is of the essence—the trial court has already denied a stay of its order, and short of a stay, the circuit court clerk may release the evidence any day and without warning to the Attorney General.¹

BACKGROUND

1. In 1976, William Zeigler was convicted of the first-degree murders of Eunice Zeigler, his wife, and Charlie Mays, a friend, as well as the second-degree murders of his in-laws. *Zeigler v. State*, 654 So. 2d 1162, 1163 (Fla. 1995). “Zeigler admitted that he was at the scene of the crime, and there is no dispute that his blood as well as the blood of the four victims was present at the crime scene.” *Id.* at 1164. As this Court has previously remarked, “in 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.” *Id.*

2. After a previous round of postconviction DNA testing failed to exonerate Zeigler, on two occasions this Court rejected his

¹ Given this fact, as well as the impending holidays, this Court may wish to consider imposing an administrative stay of the trial court’s order pending briefing and decision on this motion.

renewed requests for testing, concluding that “even if the DNA results comported with the scenario most favorable to Zeigler, he still would not have been able to show that the evidence would have probably produced an acquittal,” *id.*, and that Zeigler “has failed to demonstrate how the results of the additional DNA testing would give rise to a reasonable probability of acquittal or a lesser sentence.” *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013).

3. Yesterday, December 19, 2022, the trial court issued an order purporting to grant a joint stipulation between the Ninth Judicial Circuit Office of the State Attorney and Zeigler authorizing the clerk of court to release evidence for additional postconviction DNA testing. It did so over the objection of the State’s co-counsel, the Office of the Attorney General. *See* § 16.01(6), Fla. Stat.

4. Though postconviction DNA testing is governed by Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes, which set out various requirements before testing shall be ordered, the trial court did not make the findings necessitated by rule. *See* Fla. R. Crim. P. 3.853(c)(5). Instead, the trial court merely cited the so-called joint stipulation.

5. Subsequently, the trial court denied the State’s motion to stay its order pending appellate review in this Court.

6. The State, acting through the Attorney General, see § 16.01(4), Fla. Stat., has now appealed the DNA-testing order. See Fla. R. Crim. P. 3.853(f) (“An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered.”); Fla. R. App. P. 9.140(c)(1)(J) (similar).²

REASONS FOR GRANTING THE STAY

7. In deciding whether to grant a stay pending appeal, an appellate court considers the moving party’s likelihood of success on the merits and the likelihood of harm should the stay not be granted. *State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980). Both factors support a stay in this case.

8. To begin with, a stay is necessary to prevent the State’s appeal from becoming moot; to ensure finality; and to bar the

² Should the Court conclude that it lacks jurisdiction under those rules, the State would request that it treat the notice of appeal and eventual initial brief as either an all-writs petition or a petition for relief under Florida Rule of Appellate Procedure 9.142(c). See, e.g., Response to Motion to Dismiss, *State v. Sireci*, SC21-1467, at *19–23 (filed Nov. 24, 2021).

release of evidence to a third-party laboratory for unauthorized testing. Release of the evidence in this case could moot the State's appeal, and might occur at any moment because the trial court has denied the State's request to pause the effect of its order. Release of the forensic evidence in this case also harms the State, the public, and the victims of Zeigler's crimes, all of whom are entitled to finality. *Cf. Sireci v. Florida*, No. 6:02-cv-1160, 2009 WL 651140, at *30-31 (M.D. Fla. Mar. 12, 2009) (contrasting the "minimal" "risk of an erroneous deprivation of [Appellee's] purported liberty interest" (given the substantial evidence of guilt) with the State's need to "ensur[e] closure for victims and survivors"). The circuit court's order frustrates that important principle by allowing Zeigler to continue litigating his conviction and death sentence outside the confines permitted by this Court and the Legislature in Rule 3.853 and Section 925.11. And though Rule 3.853 safeguards the integrity of forensic evidence by requiring that "DNA testing shall be ordered to be conducted by [FDLE] or its designee" unless the movant shows "good cause," Fla. R. Crim. P. 3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat. (similar), the order below authorizes the

release of evidence to a non-FDLE laboratory.

9. Zeigler, on the other hand, will suffer no harm if this Court grants the requested stay. Zeigler is incarcerated on death row and not under an active death warrant. There is no hearing scheduled for which the requested evidence is relevant. Zeigler has repeatedly requested DNA testing in the past, and even when he did obtain testing he was unable to rebut the substantial evidence of guilt presented at trial—including multiple eyewitnesses—that proved he committed four murders. He has been consistently unable to show how further testing would exonerate him.

10. The State is also likely to prevail on the merits in this appeal.

11. Contrary to the trial court's conclusion, the State Attorney had no authority to unilaterally waive the requirements for testing under Rule 3.853 and Section 925.11 over the Attorney General's express objections. The Legislature has made the Attorney General "co-counsel of record" alongside the State Attorney in capital collateral proceedings. § 16.01(6), Fla. Stat. The State Attorney thus may not unilaterally bind the State in capital

postconviction matters over the objection of the state official co-designated to work on those matters. That conclusion comports with basic principles of agency law, under which co-agents like the Attorney General and State Attorney may act jointly—not unilaterally—in cases where one has not delegated its authority to the other. The joint stipulation therefore did not authorize the circuit court’s order.

12. Absent a valid stipulation, the order conflicts with Rule 3.853 and the underlying statute. Rule 3.853 permits DNA testing only where the defendant establishes a “reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.” Fla. R. Crim. P. 3.853(c)(5)(C); *see also* § 925.11(2)(f)3., Fla. Stat. That requirement protects the finality of valid criminal convictions. But Appellee did not even attempt to make that showing. Nor could he. As this Court has twice found, Zeigler “has failed to demonstrate how the results of the additional DNA testing would give rise to a reasonable probability of acquittal or a lesser sentence.” *Zeigler*, 116 So. 3d at 258; *see also Zeigler*, 654 So. 2d at 1164.

13. Testing would thus do little more than delay justice yet again to the victim's family and to the public in this long-final case. On top of that, the testing ordered by the circuit court would risk the corruption of evidence, because the order allows testing by a private lab instead of the Florida Department of Law Enforcement (FDLE) as Rule 3.853 requires. *See* Fla. R. Crim. P. 3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat.

14. The State acknowledges its unsuccessful appeal in *State v. Sireci*, SC21-1467. There, however, the defendant raised several procedural threshold arguments that are unavailable to Zeigler in this proceeding, *see* Ans. Br., *State v. Sireci*, SC21-1467, at *22–25, 51–63 (filed Mar. 24, 2022), and which may have formed the basis for the Court's unelaborated per curiam affirmance of the trial court's DNA-testing order. Order, *State v. Sireci*, SC21-1467 (Fla. July 1, 2022). That ruling is not binding on the merits. *See, e.g., Dep't of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 312 (Fla. 1983). The Court should therefore issue a stay here so that it can resolve the important merits questions presented by this appeal—questions which have already begun to recur.

CONCLUSION

The State respectfully requests that this Court stay the trial court's DNA-testing order until it can rule on the merits of the State's appeal. And given that the evidence at issue may be released at any point, potentially mooted the State's appeal, and given the impending holidays, this Court may wish to consider imposing an administrative stay of the trial court's order pending briefing and decision on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO STAY THE TRIAL COURT'S ORDER RELEASING EVIDENCE FOR DNA TESTING has been furnished electronically to: Counsels for Defendant, Dennis H. Tracey, III, Javier Peral, II and David R. Michaeli, 390 Madison Avenue, New York, NY 10017, **dennis.tracey@hoganlovells.com**, **Javier.peral@hoganlovells.com** and **david.michaeli@hoganlovells.com**, and **Elizabeth.cochrane@hoganlovells.com**; John Houston Pope, 1 Beach Dr. SE, Suite 303, St. Petersburg, FL 33701, **jhpope@ebglaw.com**; Ralph Hadley, III, Esq., Tabitha Smith and Benjamin C. Iseman, Esq., **rhadley@maynardcooper.com**, **tasmith@maynardcooper.com** and **biseman@maynardcooper.com**, P.O. Box 1961 Winter Park, Florida 32790-1961; Counsel for the State Attorney Offices, Jacqueline N. Brown, 415 N. Orange Ave, Orlando, FL 32801, **jbrown@sao9.org**, **gmiranda@sao9.org** and **SDyehouse@sao9.org**; Kenneth Nunnelley, **knunnelley@sao5.org**,

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