IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1264
(Lower Tribunal Case No. 85-499 CF)

PAUL C. HILDWIN,

Petitioner-Appellant,

v.

STATE OF FLORIDA,

Respondent-Appellee.
_____/

BRIEF OF *AMICUS CURIAE* THE MIAMI CHAPTER OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER-APPELLANT PAUL C. HILDWIN

Nina Morrison
Barry Scheck

The Innocence Project, Inc
100 Fifth Ave, 3rd Floor
New York, NY 10011
Telephone: (212) 364-5384
Facsimile: (212) 364-5341
e-mail: nmorrison@innocenceproject.org

Attorney for The Innocence Project, Inc.,
as *Amicus Curiae*

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SUMMARY OF THE ARGUMENT

This case provides a critical test of the truth-seeking obligation that the Constitution imposes on police and prosecutors. New DNA test results have proven, beyond any doubt, that the most critical "facts" presented to the jury that convicted and sentenced Appellant to death were wholly false. Some of the "false facts" were no doubt presented in good faith – but others, it appears, were not. In both respects, the critical nature of the DNA evidence mandates reversal under both Constitutional and statutory law. And because the State has inexplicably failed to act on these extraordinary DNA results for two years – neither to award Mr. Hildwin a new hearing, nor to take basic investigative measures that could identify the true perpetrator of the crime – it now falls on this Court to act.

Specifically, the new DNA results directly contradict the trial testimony of an FBI serologist, whose tests had placed the defendant among just 11% of the white male population that could have contributed semen and sweat stains -- all detected on critical items of evidence recovered from the same vehicle as the victim's nude corpse. Whether or not the FBI correctly interpreted these results at the time, the key scientific "fact" that the jury relied upon – that the defendant (but not the prime alternate suspect) was among the small pool of potential donors who could have been the

source of this evidence – is now known to be false. Indeed, it is undisputed that both the semen-stained underwear and the sweat-stained washrag come from the same male, and that male is not Paul Hildwin.

This dramatically reshapes the trial record, in two respects. First, the DNA squarely rebuts the FBI's expert scientific testimony, which was the only objective evidence that arguably tied Appellant to the victim's violent assault and murder (as opposed to the simple theft of her property). Second, the DNA rebuts a series of damning "admissions" that police officers, in sworn testimony, claimed had come from Appellant's own lips. These admissions appeared, at the time, to reveal Appellant's knowledge of details that "only the perpetrator could know," and to impeach his own testimony. In particular, they included one officer's claim that Appellant stated that the killer had "wiped his face" with "a white rag." By proving beyond any doubt that the stains on that rag came from another man, the DNA results sever any link between Appellant and that rag – and strongly indicate that this "admission," and possibly others, were sheer fabrications. If such testimony was fabricated to conform to the crime scene evidence, that is clear Constitutional error, requiring *vacatur* if there is any reasonable likelihood that it contributed to the jury's verdict.

And there is more. Although two years have passed since the DNA results were reported, the Attorney General's office has inexplicably failed to take simple action to identify the true perpetrator, or otherwise corroborate the defendant's claims, namely: (1) enter the unknown male DNA profile into state and federal DNA databank, which could yield a "hit" on a convicted serial offender, or (2) test that DNA against the prime alternate suspect, the victim's live-in-boyfriend – who was among the last to see her alive, and suspiciously failed to report her disappearance for days.

The prosecution cannot, of course, be faulted for relying in 1986 on the FBI's opinion that Mr. Hildwin shared rare blood group substances with the perpetrator. But it can, and must, be required to remedy what DNA has revealed to be false and even perjurious trial testimony, and to take simple action that could catch the real killer. As the remainder of this *amicus* brief shows, this inaction places the State outside the norms of government officials nationwide – all but a small minority of whom have embraced the opportunity DNA presents to exonerate the innocent and identify the guilty. This case is thus more than just the first opportunity this Court will have to interpret Florida's new DNA testing statute in the 3.850 context; it is also a critical opportunity to ensure that the Due Process is served by those laws.

INTEREST OF *AMICUS CURIAE*

The Innocence Project, Inc. ("the IP") is a nonprofit organization providing free legal assistance to persons who seek access to postconviction DNA testing, and a resource center on DNA evidence. The IP has represented or assisted more than two-thirds of the 154 persons in the U.S. exonerated through postconviction DNA testing to date. It is currently handling over 90 active cases nationally, including over a dozen in Florida.

Past clients include all three Florida men exonerated through post-conviction DNA evidence to date – Frank Lee Smith and Jerry Frank Townsend (imprisoned for capital crimes that DNA proved were all committed by the same serial murderer), and Wilton Dedge (who, in 2004, was the first exonerated under the new DNA law, after 22 years in prison).

As the nation's leading authority on post-conviction DNA litigation, the IP has an interest in ensuring the effective use of DNA evidence, both to exonerate the innocent and to apprehend the guilty. It is for this reason that, when the IP learned that the State had not put the unknown DNA profile from this case into the DNA databank, we immediately wrote to the Assistant Attorney General and urged that it be done. The State failed to respond until the day before this *amicus* brief was due to be filed. Remarkably, it professed ignorance as to whether DNA results obtained by Orchid Cellmark, the private laboratory ordered by the Court to conduct the

DNA testing, could be uploaded into CODIS; nor did the State so much as affirm its willingness to enter the profile into CODIS if, indeed, its eligibility were confirmed. In truth --as Appellee well knows -- Cellmark is a fully accredited DNA laboratory regularly retained by the State of Florida itself precisely because its results can be uploaded into CODIS. All that is required here is for the State to forward the test results to a CODIS-participating government laboratory – which Appellee has, tellingly, failed to do for two years. (*See* Correspondence annexed as composite Exhibit A.)

ARGUMENT

I. By revealing that the critical "facts" told to the jury which convicted Appellant of capital murder were false, the new DNA evidence clearly satisfies both statutory and Constitutional standards for relief from his conviction and sentence

The landmark post-conviction DNA testing law enacted by the Florida Legislature in 2001, and the corresponding Rule, provide that DNA testing shall only be ordered if a defendant shows "a reasonable probability that [he] would have been acquitted . . . if the DNA evidence had been admitted at trial." Fl. St. §§ 925.11(1)(a); Fl. R. Crim. P. 3.853(c)(5)(b). It further deems any exculpatory DNA results to be "newly discovered evidence," permitting a motion for a new trial under Rule 3.850 within two years.

The new trial standard under Rule 3.850 is governed by *Jones v. State,* 591 So.2d 911, 915 (1991) – namely, whether a jury, weighing the new

evidence alongside the trial record, would "probably acquit on retrial." Whether the two tests are identical – that is, whether those, like Appellant, who have already shown that their cases meet the "reasonable probability of acquittal" standard of Rule 3.853 necessarily satisfy *Jones* – is not specified in the Rule. But it is a question this Court need not resolve today, because established law gives two independent grounds for reversal.

First, as the deliberations of the juries in the simulated retrials vividly confirmed, the FBI's link between Mr. Hildwin and the underwear/washrag was the key evidence against him in 1986. Now, proof that he was not the man who deposited this semen and sweat leaves the state without any evidentiary link between him and the violent circumstances of the victim's death – and makes his acquittal more than "probable" under *Jones*. Second, the tests reveal that Mr. Hildwin was not the man who "wiped his face off" on the crime scene washrag -- disproving the most damning "admission" attributed to him at trial. As such, the DNA tests raise a disturbing inference that the officers fabricated one or more statements to link him to crime scene evidence that only the police and the true perpetrator even knew existed. The established Constitutional ban on such conduct mandates reversal, and provides an ideal vehicle to apply these rules in the DNA context.

A. *Jones v. State* and newly discovered DNA evidence

A brief summary of the trial evidence and the parties' theories of the case puts these legal issues into context. It was undisputed that the victim's nude, strangled corpse was found in the trunk of her car several days after she was last seen. It was also undisputed that Mr. Hildwin had ridden in the car with her before her death; that he had tried to cash a check in her name; and that other property of hers (a radio and ring) were found in his home. He claimed, however, that he had merely hitched a ride with her and her boyfriend when his car broke down; that during the ride, the couple stopped the car and began to argue violently, with the boyfriend accusing the victim of infidelity and trying to choke her; and that, rather than intervene, he furtively grabbed a checkbook and ring from her purse, and a radio from the car, and fled. He swore that she was alive at that time, and must have been killed by the boyfriend that day, or by another man at a later date.

The prosecution, by contrast, contended that the victim was alone in her car with the defendant; that he assaulted her, tore off her clothes and violently choked her to death; stuffed her nude corpse in the trunk; stole her purse (later recovered from the woods); drove to town to cash a stolen check; and abandoned the vehicle with the victim in the trunk. During the assault, the State contended, he ejaculated on a pair of her underwear; and after he killed her, mopped his brow with a washcloth -- leaving both items

in the vehicle's back seat. Although the victim's body was too decomposed to determine at autopsy whether she had been raped – thus precluding the State from making out the elements and charging Mr. Hildwin with any sex crime – there was overwhelming circumstantial evidence of rape.[1]

In support of its theory, the State offered expert testimony of the FBI's serologist, who opined that both stains could only have been deposited by a "non-secretor," just 11% of the population; and that Mr. Hildwin, but not the victim's boyfriend, Bill Haverty, was among that limited group. The State also presented the jury with a series of damning admissions that had allegedly been made by the defendant to police while at the county jail. The alleged statements were substantially "corroborated" by the apparent presence of the defendant's own bodily fluids on crime scene items. One

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[1] Not only was the victim found nude, but her legs were spread apart and over her head (with gruesome photos of that contortion shown to the jury). Her torn bra was found in her abandoned purse, in a manner which indicated that it had been ripped from her body. Most powerfully, there was the semen-stained underwear, which, as the prosecution argued in summation, was especially "interesting" because "these panties were found in the car on top of the laundry . . . . not in the laundry [bag], on top of the laundry" – the clear implication being that they were not an item taken from the bag of clothes laundry, but were pulled from her body and discarded by the man who then raped and killed her. It is hardly any wonder, then, that the assumption the victim was raped has pervaded the case since its inception, notwithstanding the fact that Appellant was never charged with nor convicted of the crime. Indeed, this assumption was evident in this Court's decision on direct appeal, when it held that the trial evidence proved Appellant had "raped and slowly killed his victim," as well as by the 1996 resentencing jury, whose first question was, "Was the victim raped?

statement, in particular, referenced the sweat-stained rag from the victim's car, as the prosecutor dramatically noted in summation:

> This wash rag had saliva from a non-secretor consistent with Paul Hildwin, the defendant, [and] not consistent with Bill Haverty.
>
> And before we go any further, remember the statement that the defendant made to Investigator Phiffer that after – after [she] was choked to death, the man that did it wiped his face with a white rag.

TT.972 (emphasis supplied).[2] In that testimony, the officer had alleged that Appellant claimed to have seen another man wipe his brow with that "white rag" course of a violent argument with the victim. And the same officer claimed that Appellant made the telling admission that "the person that did this has a tattoo of a cross on his back"– a distinctive mark which, as the jury was shown, Appellant actually possessed, but Haverty did not. A third inculpatory statement, which also conformed to the apparent state of the crime scene evidence, was also attributed to him: that the victim was wearing "blue shorts" when Appellant saw her struggling and fled the scene.

It was in light of the parties' radically conflicting theories, then, that the "science" that linked Appellant to the underwear and washrag was so devastating to his defense. As noted by the "mock jurors" in the recent simulated trials, every other item of trial evidence proved only that he was

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[2] Although *amicus* does not have a copy of the Record on Appeal, on request, counsel for Appellant agreed to provide copies of certain trial excerpts and the record below. All "TT" cites are to the 1986 trial transcript.

guilty of theft -- which, while hardly making him a model citizen, is a far cry from capital murder. But the jury that heard the now-discredited serology testimony back in 1986 had every reason to disbelieve defendant's version of events based on the "science" they were presented. For if all he did was steal her property and run, what on earth would his semen be doing on the clothing of this nude, dead woman? And if he did not kill her, how could he have possibly known that the man who did left a white rag, stained with sweat, near the corpse? If she was wearing blue shorts when he fled the area, why was her underwear, stained with Appellant's own semen, found inside those shorts? And since that the police officers' claims about the defendants' other admissions were corroborated by the FBI's scientific evidence, isn't it also believable that Appellant admitted "the murderer" had a cross-shaped tattoo on his back, just like his own?

Given this web of critical, interrelated evidence, it is disturbing that the State would now discount the most probative items, merely because they do not come from Appellant. Certainly, they did not do so at trial. After the testimony of the FBI's expert (whose findings were not disclosed until trial began) was admitted over the heated objection of the defense, the prosecutor's summation carefully guarded against reversal on this issue. But that lone, rather transparent disclaimer ("ladies and gentlemen, I'm not

asking you in any way, shape, or form to convict the defendant, Paul Hildwin, based on those panties or on that washrag") was buried amidst far stronger claims about the evidence – ones the jury surely did not ignore.[3]

Most likely, the man who left these stains was the rapist/murderer, and that man is not Paul Hildwin. But the Court need not be convinced of that ultimate fact to find the DNA results dispositive in the *Jones* analysis. For the DNA does more than negate the most damning evidence against him. It also provides powerful support for his trial defense, and an alternative defense involving a third-party perpetrator. This is so even if the FBI correctly excluded the victim's boyfriend as the source of this semen – although they may well not have.[4] For the defendant's claim that he

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[3] *See, e.g.,* T.973: "While 11 percent of the population are non-secretors, remember it would have to be a non-secretor like defendant in the same place at the same time with the same opportunity to be the same because it makes those odds look high for someone other than the defendant."

[4] In the last six months alone, two IP clients – Brandon Moon and George Rodriguez – were freed from prison after it was revealed that the serologists who tested critical trial evidence in the mid-1980s had made serious errors in assessing the secretor status of the evidence and/or individuals. (*See* "Bad Test Took 17 years of His Life," Chicago Tribune, Dec. 21, 2004; "DA Says Flawed Lab Work Led to Rape Conviction," Houston Chronicle, Sept.30, 2004.) In the Moon case, it was revealed that one of three seminal stains said to come from a "non-secretor" actually came from the victim's husband, a secretor. The false exclusion was likely due to the analyst's failure to consider that the lack of blood-group antigens in his test results did not necessarily mean the sample came from a non-secretor, but may have been due to degradation. Given that in the Hildwin case, the FBI analyst

witnessed the boyfriend fly into a jealous rage would be immeasurably strengthened by the presence of a 3rd man's semen on the victim's panties, *i.e.,* it would give the boyfriend a powerful motive. Alternatively, the true killer may have been the unknown man who left those semen and sweat stains – whether he was someone with whom she was having a consensual affair, or a deranged stranger who abducted her that day.

The fact that the State has failed to put this profile into CODIS or compare it to the boyfriend precludes a full inquiry into either scenario. But surely, it should not preclude a jury from considering them on retrial. Furthermore, the State's failure to take action that is uniquely within its own power entitles Appellant – both at retrial, and under *Jones* – to the inference that the results would be adverse to the State, much as if the unknown male DNA were a "missing witness" the State had failed to identify and produce. *See, e.g., Martinez v. State,* 478 So.2d 871, 872 (Fla. App. 3rd Dist. 1991).

In *amicus'* work as counsel on hundreds of DNA cases, it is virtually unheard of for such critical testimony to be proven false by DNA tests, yet not result in *vacatur* of the underlying conviction. Indeed, the dearth of

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gave no explanation for his summary conclusions, and evidence was in the backseat of a car in the Florida sun for several days before the body was found, there is a distinct possibility that the FBI made the same error here. *Amicus* is now seeking to obtain the underlying data from the FBI's analysis, to confirm whether its conclusion that the evidence came from a "non-secretor" is supported by the actual test results.

published decisions on point can be explained by the fact that virtually all fair-minded prosecutors, when faced with similar results, agree at least that a new trial is due – leaving no dispute on the merits for the courts to resolve.

This has been true not just in dozens of cases where the State candidly acknowledges a defendant's innocence in light of the previously-unavailable DNA evidence. It also includes ones in which prosecutors merely concede they are legally bound to vacate a conviction, although they may opt for retrial.[5] And it includes capital murder cases in which prosecutors initially

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[5] *See, e.g.,* "DA Says Inmate Should be Freed," Houston Chronicle, Oct. 1, 2004 (consenting to vacate conviction of George Rodriguez of Houston, Texas, who served 18 years in prison for rape, after DNA excluded him from pubic hair evidence used at trial, and revealed serologist's trial testimony was false); *Brewer v. State*, 819 So.2d 1169 (Miss. 2002) (remanding for evidentiary hearing on new trial for Mississippi death row inmate Kennedy Brewer, convicted of strangulation of child, after DNA tests revealed semen on girl from another male) *and* "DNA Wins Inmate New Trial," The Clarion-Ledger, Sept. 6, 2002 (reporting prosecutor's consent to vacate Brewer's conviction, remarking, "If you follow the law on newly discovered evidence, [the DNA] would be possibly something that would change the jury's verdict"); "DNA tests gain release of 2 in '76 rape, slaying," Chicago Tribune, May 24, 2003 (DA consents to vacate convictions of Michael Evans and Paul Terry, after semen from unknown male detected in DNA tests on victim's clothing and swabs). Copies of motions and orders vacating each judgment are on file with *amicus*. Notably, the newly-discovered evidence laws pursuant to which the above convictions were vacated are virtually identical to this State's *Jones* standard. *See, e.g., Wilson v. Satei*, 633 S.W.2d 889 (Tex. 1982) (vacate if new evidence "would probably bring about a different result on retrial"); *Brewer*, 819 So.2d at 1173 ("will probably produce a different result or verdict"); *Illinois v. Waters*, 328 Ill.App.3d 117 (2002) ("would probably change the result").

disputed the defendant's innocence, but then entered the DNA profile into CODIS, yielding a "hit" on the true perpetrator.[6] Further precedent for *vacatur* can also be found in published decisions by courts granting new trials based on other newly discovered forensic evidence – even where the science at issue is far less advanced and persuasive to juries than DNA. *See, e.g., People v. Jackson*, 283 N.W.2d 648 (Mich. App. 1979) (new evidence that semen on victim's underwear likely came from a non-secretor, while defendant was a secretor, would "render a different result probable on retrial"); *Alabama v. Banks,* 845 So.2d 9 (Ala.2002) (reversing defendant's conviction for murder of his wife's newborn baby, based on new medical evidence that wife's prior tubal ligation likely precluded the alleged pregnancy, contradicting medical evidence at trial); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint, alleged at trial to be defendant's, which excludes him as source).

B. The Due Process Clause and fabricated "admissions"

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[6] *See, e.g.,*"In Same Case, DNA Clears Convict and Finds Suspect," NEW YORK TIMES, September 6, 2003 (DNA from 1985 rape/murder of Maryland girl results in CODIS hit on man who committed crime, for which Kirk Bloodsworth had been convicted and sentenced to death); DNA Frees Arizona Inmate after 10 Years in Prison, ARIZONA REPUBLIC, April 9, 2002 (DNA from saliva on Arizona murder victim's bite mark yielded CODIS hit on convicted sex offender, freeing innocent death row inmate Ray Krone).

A second ground for *vacatur* derives from the Due Process Clause of the 14th Amendment, and its longstanding ban on the State's use of fabricated evidence to obtain a conviction. Because the new DNA tests indicate that one or more "admissions" were deliberately and falsely attributed to Appellant at trial, his conviction and sentence cannot stand.

It has been 70 years since the U.S. Supreme Court first ruled that the 14th Amendment prohibits the "deliberate deception of court and jury" in criminal trials. *Mooney v. Holohan,* 294 U.S. 103, 112 (1935). Since then, the Court has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs,* 427 U.S. 97, 103 (1976) (emphasis added); *see also Napue v. Illinois,* 360 U.S. 264, 269 (1959). This is so when a prosecutor knowingly presents false testimony, *see, e.g., Giglio v. U.S.*, 405 U.S. 150, 153 (1972), and also when, unbeknownst to the prosecutor, any other State official fabricates such evidence. *See Mooney,* 294 U.S. at 114; *Rivers v. Martin*, 484 F. Supp. 162, 164 (W.D. Va. 1980).

The "admissions" attributed to Appellant at trial appear to fall in the latter category. In particular, the stained washrag was a detail from the crime scene about which only the perpetrator and police knew. The

professed link to Appellant was "corroborated" by the fact that the FBI put him among just 11% of the potential-donor population. And the exclusion of the victim's boyfriend seemed to impeach the defendant's testimony that it was he, not Appellant, who struggled violently with the victim that day.

The combination of these "admissions" and the serology evidence surely had a devastating impact on the jury –exposing the defendant's "intimate knowledge" of the murder by referencing items he himself had stained, and further pegging him as a liar. Now, of course, we know otherwise. DNA has proven that appellant was not, in fact, the man who wiped his brow with that rag, or ejaculated on the victim's underwear in her shorts. As that gives him no independent basis to know of the stains' existence, he could not have "admitted" as much to the police. The troubling but inescapable conclusion is that these were fabricated statements, tailored to non-public details about the crime scene to bolster their credibility. And it further calls into grave doubt the other, non-forensic "admissions" in these officers' testimony, *i.e.,* that "the murderer" had a distinctive, cross-shaped tattoo identical to the defendant's own.

This is not the first time that DNA has exposed the falsity of key details in an innocent suspect's "confession." Indeed, the credibility of such admissions are often bolstered by the fact that they contain details that "only

the perpetrator could know" – with DNA later revealing that the errors were fed to the suspect by the police, whether inadvertently or intentionally.

Christopher Ochoa of Texas, for example, gave a detailed confession to a 1988 rape and murder. He spent a decade in prison before the real perpetrator, Achim Marino, confessed to the crime in 1999, with subsequent DNA tests confirming his guilt and exonerating Ochoa. Ochoa's original false confession had included a statement that the victim was raped anally as well as vaginally, consistent with the 1988 autopsy – yet Marino denied that fact. A later review of the autopsy photos revealed that a rectal probe had been used to take the victim's temperature, and caused the contusions that the M.E. had mistakenly viewed as anal rape – but not before the original error was incorporated into Ochoa's "confession."[7] Similarly, ***Eddie Joe Lloyd of Michigan*** gave a taped confession to a 1985 rape/murder which included non-public details about the crime, including a green bottle inserted into the victim's rectum. Another element of the confession, however, was that he "left his underwear" in a nearby tree. But in 2002, when DNA tests proved that semen in the victim came from another man, it turned out that the underwear in the tree was a pair of *women's* underwear, with no

[7] *See* Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002; Memorandum from Jim Fealy, Assistant Chief of Police, *Austin Police Department*, (January 25, 2001), at 8 (on file with *amicus*).

connection to the perpetrator. And even more egregious is the case of ***Earl Washington of Virginia***, a black man who gave a series of confessions to a 1982 rape/murder of a white woman before he was exonerated by DNA in 2000. Included in one of his early confessions was the "admission" that he cut himself and bled on the victim's blanket. At that time, the police had received a serology report indicating that a blood stain on the blanket contained a rare genetic marker found only in blacks. When they later tested Washington's blood, however, he did not have this marker. The serologist's report was quietly revised to delete any reference to the marker at issue.[8]

The Hildwin DNA results are equally revealing. They expose the falsity of the claimed "admissions," and mandate a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Augurs,* 427 U.S. at 103. The cumulative effect of the new evidence further entitles him to an adverse inference regarding the integrity of the police investigation as a whole – including other statements (*i.e.,* the "tattoo on his back") the same officer attributed to him. *See Kyles v. Whitley,* 514 U.S. 419, 436-38, 447 (1995).

II. Affirmance of the decision below would run counter to the purpose of Rule 3.853, and jeopardize future efforts to exonerate the innocent and apprehend the truly guilty

[8] Police reports from Washington and Lloyd cases; on file with *amicus.*

As noted by one Justice of this Court when the State's DNA testing law was enacted, "DNA testing offers a unique opportunity to lend credibility and certainty to a case for guilt or innocence. . . . [T]here is virtual universal agreement as to the value of this testing." *In re Amendment to Fla. Rules of Crim. Pro. Creating Rule 3.853,* 807 So.2d 633, 636 (Fla.2001) (Anstead, J., concurring). That consensus is reflected in the rapid enactment of 38 state and federal post-conviction DNA testing laws in recent years; and the broad endorsement of its use across the political spectrum.[9]

Yet this view is not, apparently, shared by a handful of this State's top law enforcement officials -- at least when it comes to cases on their own dockets. Notably, is this same (Daytona Beach) division of the Attorney General's that repeatedly invoked procedural bars to prevent Wilton Dedge, the State's first exoneree under Rule 3.853, from even getting a hearing on his DNA test results. In *Dedge*, the State told an incredulous panel of the 5th District Court of Appeal that it would not matter if Mr. Dedge were "absolutely innocent," because that, in the State's view, was simply "not the

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[9] *See, e.g.,* "U.S. Targets DNA Backlog," Chi. Trib., Aug. 2, 2001 (quoting statement of former Atty. Gen. John Ashcroft: "DNA is nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent");

issue."[10] That ludicrous claim was summarily rejected by the Court, and widely derided by commentators.[11] The failure of these same lawyers to run the DNA profile from the instant case in CODIS now suggests that they would even jeopardize public safety to avoid Mr. Hildwin's exoneration.

This case comes at a critical juncture for the new DNA law. Allowing Appellant's death sentence to remain undisturbed in the face of DNA tests that rebut the "science" on which he was convicted would drastically undermine the Rule's purpose and intended scope. For if even these DNA results are deemed insufficient to merit a new trial, the lower courts may view the bar to relief as so high as to make futile countless other meritorious requests for DNA testing in the first instance. That would deprive untold numbers of innocent defendants their best chance at exoneration -- and the State the opportunity to use this technology for its own worthy goals. This Court should find otherwise, and grant Appellant relief.

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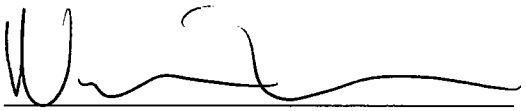
[10] "Still Behind Bars, Despite DNA Evidence," *Miami Herald,* May 9, 2004.
[11] *See, e.g.,* "The Dedge Debacle," FLORIDA TODAY (editorial) (calling on Governor to conduct an independent investigation into prosecutor's conduct), Aug. 13, 2004; "State Fought to Keep Innocent Man in Prison," MIAMI HERALD, Aug. 15, 2004 ("Prosecutors did everything in their power to keep [Dedge] in prison, , and he'd be rotting there still if they'd had their way"); "Innocence Lost" (editorial), ST. PETERSBURG TIMES, Aug. 22, 2004 ("When prosecutors are uninterested in evidence of a defendant's innocence, they have lost their professional way. They should not only lose their jobs but their license to practice law").

Respectfully Submitted,



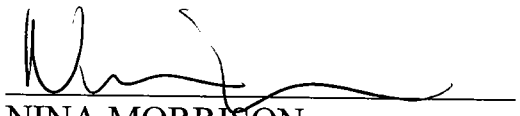
NINA MORRISON
BARRY SCHECK

INNOCENCE PROJECT, INC.
100 Fifth Ave., 3rd Floor
New York, NY 10011
Telephone: (212) 364-5357
Facsimile: (212) 364-5341
e-mail: nmorrison@innocenceproject.org

Attorneys for the Innocence Project, Inc.,
as *Amicus Curiae*

CERTIFICATE OF SERVICE

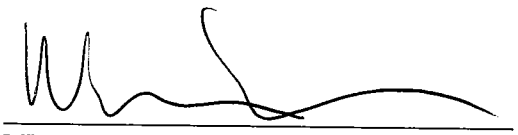
I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by first class U. S. mail this 20th day of January, 2005, to: Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118.



NINA MORRISON

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief, amounting to 20 pages of text, has been submitted in Times New Roman 14-point font and that it otherwise complies with the font requirements of Rule 9.210(a)(2).



NINA MORRISON

COMPOSITE EXHIBIT A

INNOCENCE PROJECT

Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011
Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

Nina Morrison, Esq.
Staff Attorney
Tel.: (212) 364-5357

January 4, 2005

By first class mail

Kenneth Nunnelly
Asst. Attorney General
Office of the Attorney General
444 Sea Breeze Boulevard, 5th Floor
Daytona Beach, FL, 32118

Re: State v. Hildwin/CODIS databank search

Dear Mr. Nunnelly:

As you know from our telephone conversation this fall, our office sought leave of the Florida Supreme Court to appear as *amicus* in Mr. Hildwin's pending appeal from the denial of his 3.850 motion, and the Court granted that motion. In anticipation of filing our brief later this month, we have reviewed the lab reports concerning the recent DNA test results on the semen-stained underwear and sweat-stained washcloth recovered from the vehicle where the victim's corpse was found; at trial those stains were said to be consistent with Mr. Hildwin's status as a non-secretor (but not with the victim's boyfriend, who was a secretor) through conventional serological analysis. The new DNA tests, as you know, revealed a single, unknown male DNA profile on both items that comes from someone other than Paul Hildwin. We asked David Hendry, counsel for Mr. Hildwin, whether that profile had ever been uploaded into CODIS (the combined state/federal convicted-offender and unsolved-crime DNA databank) for comparison to other profiles, and he said that it was his understanding it had not been.

We now write to ask whether that is in fact that case, and if not, to urge your office to upload the profile immediately – which, as you know, can usually be done in a matter of minutes. We have been informed that your office now takes the position that the male DNA profile obtained on these items is unrelated to the victim's assault/murder, and that you continue to believe that Mr. Hildwin was the perpetrator of the crime. But we hope you would agree that if the DNA profile comes back to match a violent offender in the databank – particularly someone with a history of rape and/or murder involving similar *modus operandi* – that would be highly relevant to the case, and, indeed, is information that your office and the general public would

want to know before Mr. Hildwin is executed. Unfortunately, the notion that this might occur here is not farfetched. As you may recall, the first two DNA exonerations in the State of Florida – Jerry Frank Townsend and Frank Lee Smith – were cases in which the same DNA evidence led to the true perpetrator, a serial killer named Eddie Lee Moseley, who not only confessed to the crimes for which Townsend and Smith were wrongfully convicted (and, in Smith's case, sent to death row), but is someone whom police now believe were responsible for as many as *sixty* other rapes and/or murders in the state, several of which occurred while others were in prison for Moseley's crimes.

Please let us know at your earliest convenience whether you will agree to upload this profile into CODIS. We are, of course, available to discuss the merits of Mr. Hildwin's case at any time should you so desire. Given that we all share the unquestionable goal of using modern DNA technology to exonerate the innocent and bring the truly guilty to justice, we trust that your office's actions in this case will not lead to stonewalling, but will be motivated only by a zealous pursuit of the truth, wherever it may lead.

Sincerely yours,

Nina Morrison
Staff Attorney

Barry Scheck
Co-Director

c: Attorney General Charlie Crist
David Hendry, Esq.

CHARLIE CRIST
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Capital Collateral Daytona Beach

KENNETH S. NUNNELLEY
Senior Assistant Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone (386) 238-4990, SunCom 380-4990
Fax (386) 226-0457, SunCom 380-0457

BY FAX

January 19, 2005

Ms. Nina Morrison, Esq.
100 Fifth Ave., 3rd Floor
New York, NY 10011

Re: State v. Hildwin

Dear Ms. Morrison:

On January 14, 2005, this Office received the January 4, 2005, letter inquiring whether the Florida Attorney General's Office will upload the profile generated by DNA typing of a washcloth and underwear recovered from the vehicle where the victim's body was discovered.

Although the DNA profile at issue was the result of DNA typing conducted at Hildwin's request under the *Florida Rules of Criminal Procedure*, Hildwin objected to the Florida Department of Law Enforcement conducting the testing, and the trial court, as a result of Hildwin's request, ordered any testing be conducted by Orchid Cellmark, a laboratory Hildwin selected.

The federal statute which established CODIS also established which laboratories are eligible to submit profiles for inclusion in the CODIS system. Apparently, Orchid Cellmark, **the laboratory selected by Hildwin**, is **not** eligible to submit profiles to the CODIS system. Consequently, your request is therefore not available.

In addition to Orchid Cellmark's ineligibility to submit profiles to the CODIS system, there remains the issue of the suitability of these profiles for inclusion in that database.

The Office of the Attorney General is not exempt from the CODIS guidelines, and cannot simply ignore or circumvent these requirements. Naturally this office will continue to determine whether there is a possibility of submitting the Orchid Cellmark profile to CODIS, but, until you have provided some evidence or

authorization that allows the submission of the aforenoted profile, the facts remain undisputed that this laboratory is not eligible to make any submissions.

As of this date, there appears to be no reason for any delay in the prosecution of the pending appeal.

Sincerely,

Kenneth S. Nunnelley
Senior Assistant Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118
(386)238-4990
Fax - (386)226-0457

INNOCENCE PROJECT

Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011
Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

Nina Morrison, Esq.
Staff Attorney
Tel.: (212) 364-5357

January 20, 2005

By facsimile and first class mail

Kenneth Nunnelly
Asst. Attorney General
Office of the Attorney General
444 Sea Breeze Boulevard, 5th Floor
Daytona Beach, FL, 32118

Re: State v. Hildwin/CODIS databank search

Dear Mr. Nunnelly:

We received your fax yesterday afternoon regarding our inquiry and request for a CODIS databank search of the unknown male DNA profile obtained in the Hildwin case. Your response was, to say the least, disappointing. We are of course well aware that Orchid Cellmark is not a government laboratory, and thus – like all private laboratories -- cannot *directly* upload DNA profiles into CODIS. But as you and your colleagues surely know, Cellmark is a fully accredited private laboratory, whose DNA results are regularly uploaded *by state and local crime laboratories* into the databank to apprehend and prosecute perpetrators of crime – including by the State of Florida on a regular basis. All that is required is for the prosecuting authority to forward the necessary information and authorization to the FDLE or other participating government laboratory with instructions that it be done. Indeed, it is *precisely because* Cellmark's results are CODIS-eligible that the State of Florida regularly contracts with that lab to perform testing in its own cases, both to relieve the FDLE's backlog and to conduct testing using methodologies that the FDLE is not yet equipped to perform. This is true both in post-conviction cases and in ongoing criminal prosecutions. For example, as you and your colleagues may recall, two years ago our office obtained a last-minute stay of execution in the Amos King case from Governor Bush so that advanced DNA testing could be attempted on crime scene evidence. Although the evidence in that case proved to be too degraded to get an interpretable result, Cellmark was one of the labs approved by the Governor's counsel to conduct a portion of the testing on an expedited basis – again, in no small part because such results could (and would) be immediately entered into CODIS if Mr. King had been excluded.

We were similarly surprised and disappointed by your assertion that there was no "evidence" that the actual profile obtained by Cellmark in the Hildwin case met the CODIS requirements. As is clear from Cellmark's January 29, 2003 report, the test results on the sperm fraction of the semen-stained underwear yielded a full complement of two alleles at 12 of the 13 standard CODIS loci, and one allele at the 13th locus. Any lawyer remotely familiar with DNA testing and CODIS' requirements would know that this result more than satisfies the minimum threshold for database entry. And if by some chance you still required further confirmation of the validity of the results (which, so far as we understand, you have not challenged in the two years since they were reported), we have no doubt that a simple phone call to Mr. Hildwin's counsel (or, failing that, a motion to the court) would have provided to you with ready access to the underlying data.

We respectfully renew our request that you enter this profile into CODIS without further delay, and of course, if there is any further information that our office can provide to assist you, please do not hesitate to contact us.

Sincerely yours,

Nina Morrison
Staff Attorney

Barry Scheck
Co-Director

c: Attorney General Charlie Crist
David Hendry, Esq.