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

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INTEREST OF THE *AMICUS CURIAE*

The interest of *Amicus Curiae* FACDL-Miami is set forth with particularity in its Motion for Leave to File *Amicus Curiae* Brief of December 16, 2004, and adopted here in *haec verba*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The trial judge below applied the *Frye* test to expert testimony offered in support of Paul Hildwin's motion pursuant to Rule 3.850. In so doing, the judge -- in our respectful submission -- forced a round peg into a square hole. The *Frye* test is properly employed by trial courts to screen lay juries from evidence that would be misleading or unfairly prejudicial. Where there is no jury, there can be no screening. A judge resolving a question of fact the resolution of which is consigned exclusively to him (as, for example, in a post-conviction proceeding) is not bound by the rules of evidence. Presented with scientific evidence (neoteric or otherwise), he should accord that evidence such weight as he deems appropriate. The trial judge's decision to exclude the evidence here on *Frye* grounds was error.

In the alternative, the evidence in question -- the fruits of "mock trials" -- should have been received under this Court's *Hadden* doctrine.

ARGUMENT

I. THE *FRYE* TEST IS GENERALLY INAPPLICABLE TO NON-JURY DETERMINATIONS, SUCH AS THE DETERMINATION BY A TRIAL COURT WHETHER A DEFENDANT'S POST-CONVICTION MOTION MEETS THE *JONES* STANDARD.

Prior to the scientific and industrial progress of the 18th and 19th centuries, and the development of the law of evidence during the same period, there was little law (and little need for law) on the subject of scientific and expert testimony. The standard upon which neoteric scientific or technical evidence was to be evaluated for admission at trial was a question about which the law of the 18th and 19th centuries was, confessedly, a little fast and loose. One common-law commentator observed, "The competency of the expert is a preliminary question for the judge, and is one upon which, in practice, considerable laxity prevails." Sidney L. Phipson, The Law of Evidence p. 363 (1898). Wigmore, writing half-a-dozen years later, states unhelpfully that the "only true criterion is: On *this subject* can a jury from *this person* receive appreciable help?" John Henry Wigmore, 3 A Treatise on the System of Evidence in Trials at Common Law §1923, p. 2559 (1904) (Hereinafter "Wigmore at ___"). (Emphasis in original.)

The rate of scientific advance in 1904 (the year Wigmore released his monumental treatise) may seem glacial by today's standards, but it was unprecedented

in its day. Inventors and industrialists were the heroes of the age. The power of science to benefit mankind, barely tapped, seemed unlimited. Those who could release that power were worthy of veneration – including veneration by jurors. But with science developing at such a dizzying pace, disagreements between scientists about everything from the descent of man and the evolution of species to whether the vast empty spaces of the universe were actually filled with "ether" were inevitable.[1] How was the law to take account of such disagreements?

It was against the foregoing background that *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) was decided. In the course of affirming a conviction in which the trial judge excluded evidence from an early form of lie-detector, the *Frye* court, without citation to authority, made the now-famous observation that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance

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[1] As early as 1873, a leading American commentator observed:

> By the Anglo-American practice, a party is entitled to call on trial any expert he may select; and he is not likely to select any whose views will not promote his cause. It so happens that among the present large body of experts, there is little trouble in discovering one or more by whom is maintained the particular psychological theory of which the party on trial stands in need. It is an old truth that there is nothing so absurd but that some philosopher may be found by whom it is affirmed.

Francis Wharton, Wharton and Stille's Medical Jurisprudence p. xi (3d ed. 1873).

in the particular field in which it belongs." *Id.* at 1014. Whether or not the captioned language has served the legal system well or ill is a fair topic for debate. What is not open to debate is that the *Frye* holding was concerned with the power and duty of the trial judge to screen (and, when appropriate, exclude) evidence offered for consideration by a lay jury on the issues of fact raised by the trial. In this sense the so-called *Frye* test is simply a specimen or example of a larger principle: It is the duty of the trial judge to determine whether the unfairly prejudicial effect of proffered evidence exceeds its probative value, and to exclude it when it does.[2] Because the larger principle is so universally accepted in Anglo-American law, the *Frye* court would no doubt have been surprised to have been told that it had propounded novel doctrine.[3] Then as now, judges and lawyers believed that lay juries were in danger of being unduly

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[2] *See, e.g.,* Fla. Stat. §90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.").

[3] Certainly the judges of Florida would have been surprised to have been told that the *Frye* court had propounded novel doctrine. *Frye* went uncited in Florida for three decades, making its first appearance in Florida law in *Kaminski v. State*, 63 So.2d 339 (Fla. 1953). *Kaminski* involved the question whether a witness could be asked if he had taken, or been willing to take, a lie detector test. In the course of resolving that question, this Court made reference to *Frye* for the proposition that lie-detector test results themselves were inadmissible. *Kaminski*, 63 So.2d at 340. As late as 1980, *Frye* had been cited a grand total of three times in all of Florida jurisprudence. *See Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968); *Johnson v. State*, 166 So.2d 798 (Fla. 2d DCA 1964).

influenced by, and unduly accepting of, the testimony of an elaborately-credentialed scientist whose argot they could not be expected to understand. Accordingly, the *Frye* test requires, in effect, circumstantial evidence that the probative value of the testimony exceeds its unfair prejudice, the circumstantial evidence being the general acceptance of the scientific technique or methodology in the scientific community to which it applies. The decision whether probative value outweighs unfair prejudice is, in this as in every similar context, consigned to the trial judge. The weight to be given the evidence once the court deems it admissible is, in this as in every similar context, consigned to the jury.

That oracle of the law, Sir Edward Coke, attributes to even more ancient authority, Bracton, the maxim that *ad quaestionem facti non respondent judices, ad quaestionam juris non respondent juratores*.[4] If by *quaestionem facti* Coke refers to the ultimate issues of fact, the issues of fact which the verdict will resolve, of course the maxim is true. If by *quaestionem facti* Coke means to embrace all issues of fact, the maxim is surely false. Many important factual questions are resolved by the court

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[4] Whether Bracton propounded this maxim, or even heard of it, is a nice question. Professor Thayer insists that the attribution to Bracton is erroneous and muses, "Coke seems to have spawned Latin maxims freely. Is this also his?" James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law, p. 185-6 n.4 (1898) (hereinafter "Thayer at ___").

before, during, and after trial.[5] To speak of applying the *Frye* test to such determinations is to allege that a judge must conduct a hearing at which he considers evidentiary artifact X in order to determine whether he will consider evidentiary artifact X; in other words, it is to speak gibberish.

A variety of decisions, many of them factual in whole or in part, must be made by the trial judge in the course, or at the threshold, of a criminal trial. In passing upon, for example, an objection on grounds of racial, religious, or gender discrimination to the exercise of a peremptory challenge in jury selection, *see Melbourne v. State*, 679

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[5] Nor is any good purpose achieved by arbitrarily characterizing these determinations as questions of law simply because the judge resolves them. An 1879 revision and codification of British criminal procedure proposed, under the doctrine of attempts, to provide that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation ... and too remote to constitute an attempt ... is a question of law." Thayer at p. 202 (*citing* Report of Criminal Code Bill Commission (1879), Draft Code §74). Professor Thayer quotes "a valuable letter of Chief Justice Cockburn, addressed to the Attorney-General" criticizing the foregoing provision as follows:

> To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law. ... The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge.

Thayer at p. 202.

So.2d 759 (Fla. 1996) and progeny; or on a challenge to the competence of a witness, or a question as to the existence of a privilege, *see* Fla. Stat. §90.105(1); or in adjudicating a motion to dismiss, *see* Fla.R.Crim.P. 3.140(o) or 3.190; or a motion for joinder, or for severance, *see* Fla.R.Crim.P. 3.150 or 3.152; or a motion to suppress, *see* Fla.R.Crim.P. 3.190; or a motion for change of venue, *see* Fla.R.Crim.P. 3.240;[6] or in determining whether *corpus delicti* has been made out as a condition prevenient to the admission of a defendant's confession, *see, e.g., Gantling v. State*, 26 So. 737 (Fla. 1899) ("[T]he court must decide in the first instance whether the evidence of the *corpus delicti*, is *prima facie* sufficient to authorize the introduction of a confession by the accused in evidence"); or in evaluating the materiality of an allegedly false statement in connection with a perjury prosecution, *see State v. Ellis*, 723 So.2d 187 (Fla. 1998); or in determining whether to compel the prosecution to identify or produce its confidential informant, *see Garcia v. State*, 548 So.2d 284 (Fla. 3d DCA 1989); the judge will necessarily be called upon to resolve questions of fact. No jury will assist

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[6] Motions for change of venue are obliged to be supported by affidavits of the moving party and at least two others, stating the facts on which the motion is based. There is no reason that one such affidavit could not be – and every good reason why, in a case in which the movant can afford it, such an affidavit would be – prepared by a social scientist who had been commissioned to conduct a venue survey. Such venue surveys are increasingly common, and the social scientific principles that underlie them are part and parcel of the body of doctrine upon which the "mock trials" proffered by Paul Hildwin were posited.

him in doing so. He will not be acting as a gatekeeper, standing between unfairly prejudicial evidence and the jury; and the rules which he employs in discharging his gatekeeper function (such as the *Frye* rule) will be inapplicable. Closely akin to the question of the admissibility of a scientific witness is the question of the admissibility of a child witness. In the former instance, it is the excessive complexity of what the witness understands that may result in confusion and unfair prejudice; in the latter, it is the excessive simplicity or insufficiency of what the witness understands that may result in confusion and unfair prejudice. In both instances, the rule is the same: it is for the court, in the exercise of its gatekeeping function, to pass upon the admissibility of the proffered testimony. If the court excludes or limits the evidence, the jury will not receive it, or will receive it as limited. If the court admits the evidence in whole or in part, it is for the jury to assign it the appropriate evidentiary and probative weight. *See, e.g., Palazzolo v. State*, 754 So.2d 731 (Fla. 2d DCA 2000).

The reason for rules of evidence generally, and for exclusionary rules of evidence such as *Frye*, is the existence of the lay jury as trier of fact. *See* Thayer at p. 2 ("It is th[e] institution of the jury which accounts for" such rules); Fla. Stat. §90.403 ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading *the jury*, or needless presentation of cumulative evidence."). (Emphasis added.) As to those questions of

fact, or mixed questions of fact and law, consigned to the judge's determination, these exclusionary rules are inapplicable. There is no gatekeeper function to discharge when there is no one on the other side of the gate. Fla. Stat. §90.105(1) is properly interpreted in conformity with FRE 104(a), *see Saavedra v. State*, 421 So.2d 725 (Fla. 4th DCA 1982), which provides that, "In making [such] determination[s the court] is not bound by the rules of evidence except those with respect to privileges." All Florida "commentators and at least one recent decision have properly held that the omission of this sentence [from §90.105(1)] does not negate the inherent ability of the trial judge to disregard the rules of evidence in determining preliminary questions of admissibility." Charles Ehrhardt, Florida Evidence §105.1 p. 36 (2001 ed.) (fn. omitted).

The trial court below, in rejecting Mr. Hildwin's 3.850 motion, refused on *Frye* grounds even to consider the "mock trials" and the social-scientific opinions based upon those "mock trials." In the court's words:

> Results from a jury in a mock trial, conducted post trial, do not provide an accurate or reliable basis on which to determine that a different result would have occurred at trial, and do not meet *Frye* standards for admission of scientific evidence. Rather, it is this Court's opinion that the mock trial result offered by Defendant is an unscientific, condensed, simulated trial, without scientific controls, all conducted years after the real trial ended, which attempts to offer opinion testimony as to a question of law. Defendant confuses a ruling based on a question of law with an evidentiary hearing, and attempts to invade the province of

the Court on what is really an issue of law.

April 28 Order, ROA Vol. III, p.00429 at ¶4 c, p. 8. It is no criticism of the trial court to say that the foregoing paragraph can be interpreted in a number of ways.

The first sentence of that paragraph seems to suggest that the trial court deems it necessary that any scientific evidence to be considered in connection with a 3.850 application such as Mr. Hildwin's must be *Frye*-tested and *Frye*-approved. If that is what the trial court meant to say, we respectfully submit that the trial court erred as a matter of law.

But the second sentence of that paragraph could be read to suggest, alternatively, that the court considered Mr. Hildwin's proffered "mock trial" results and related social scientific opinions and conclusions without regard to *Frye*, and simply chose to afford these evidentiary items no weight. Admittedly, this is a somewhat strained interpretation of the trial court's language, particularly taking the above-captioned paragraph as a whole. If, however, this interpretation is the intended one, *Amicus* finds no fault with it. We ask only that this Honorable Court make clear, both in this case and for future reference, that the *Frye* procedure is not intended to be applied to a trial court's evaluation of evidence submitted in support of a 3.850 petition.

The third and final sentence of the captioned paragraph is troubling, characterizing as it does the *Jones* determination as a pure question of law. (The last

clause of the second sentence contains the same characterization.) With great respect to the trial court, we submit that this characterization is erroneous. Although *Jones* announces a legal standard (i.e. probability of acquittal on retrial), the determination whether that standard has been met is a mixed question of fact and law, requiring the trial court to weigh and balance the evidence. That, in any event, is how this Court has always treated the *Jones* determination. *See, e.g., Wright v. State*, 857 So.2d 861 (Fla. 2004); *Brown v. State*, 846 So.2d 1114 (Fla. 2003); *Trepal v. State*, 846 So.2d 405 (Fla. 2003); *McLin v. State*, 827 So.2d 948 (Fla. 2002); *Swafford v. State*, 828 So.2d 966 (Fla. 2002). The trial court's assertion that the issue before it was "really an issue of law" as to which evidence in the form of "opinion testimony" was irrelevant, inadmissible, and invasive of "the province of the Court" does not, we submit, comport with a proper understanding of *Jones*.

The choreography of the "probable acquittal on retrial" test of *Jones* is no different than that of the judicial determinations considered hereinabove at pp. 6 to 8. In each such situation, the court acts as trier of fact – not as to the ultimate issue, but as to a discrete issue as to which a known standard of law (e.g. "probable acquittal on retrial") provides the rule of decision. Because the judge is the trier of fact for such a purpose, there is no need for him to act as a gatekeeper: There is no one on the other side of the gate. There isn't even a gate. Rules, such as *Frye*, that oblige the judge to

act as a gatekeeper, are inapplicable. The judge must consider evidence for its legal and logical relevance and probative value, subject only to the limitations of Due Process and the U.S. and Florida constitutions.[7]

Here, Paul Hildwin sought relief pursuant to Rule 3.850 based upon newly-discovered DNA test results, which test results were exculpatory in nature. In order to demonstrate that these test results were *sufficiently* exculpatory and *sufficiently* probative (when taken in conjunction with the existing record) to necessitate relief, he employed the services of a social scientist who conducted two mock trials. In one such mock trial, the jurors were told of the existence of the exculpatory DNA evidence; in the other, they were not. The jurors in the former trial acquitted; those in the latter trial convicted. Mr. Hildwin offered these results (bolstered by comment by the social scientist) as proof that he would probably be acquitted at a retrial in which the exculpatory DNA test results were offered. Clearly Mr. Hildwin did not intend to offer the mock trial evidence *at* his retrial. He offered it to the trial judge to persuade the judge he was *entitled* to a retrial.

In making that determination, the court had no *Frye* analysis to conduct; and to the extent that the court rejected the proffered evidence for lack of *Frye*-testing, it erred. That there exists *some* logical nexus between Hildwin's *probens* (the mock trial

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[7] And the doctrine of privilege. *See supra* p. 9.

results show acquittal when DNA evidence is presented, conviction when it is not) and his *probandum* (therefore it is probable that he will be acquitted at a retrial in which DNA evidence is presented) is irrefragable. How forcible that nexus is, taken in the context of all record evidence, is what the trial court should have considered (and, in fairness to the trial court, may be some part of what it did consider). The jurisprudence of *Frye* is not directly applicable to such a decision, and we ask that this Honorable Court make that clear.

II. THE PROFFERED EVIDENCE – THE VIDEOTAPES OF THE "MOCK TRIALS" AND THE OPINIONS AND CONCLUSIONS OF THE SOCIAL SCIENTIST WHO SUPERVISED THOSE "MOCK TRIALS" – SHOULD PROPERLY HAVE BEEN CONSIDERED BY THE TRIAL COURT IN RESOLVING MR. HILDWIN'S 3.850 MOTION.

A. The videotapes

We can make short work of the videotapes.

The videotapes, like most demonstrative evidence, were direct evidence of what they were offered to prove, *viz.* that lay jurors, when presented with the facts of Mr. Hildwin's trial plus the newly discovered fact of the exculpatory DNA testing, were likely to acquit; whereas lay jurors not presented with the DNA results were likely to convict. If the trial court was concerned that an insufficient foundation existed for the videotapes, it was entitled to demand proof that the videotapes fairly and accurately

depicted the "mock trials" and jury deliberations. Mr. Hildwin would then have been obliged to come forward with such proof, and could easily have done so.

A final reference to Wigmore: Prof. Wigmore coined the ungainly locution "autoptic proference" to refer to a category of evidence that is even more direct than what is customarily thought of as direct evidence. If a witness testifies that he saw the bank robber, and that the bank robber had tattoos on his forearms, the witness's percipient evidence is direct. If the defendant then stands and bares his forearms for the jury's inspection, the evidence is "autoptic proference." The jury is relying, not on the ocular evidence of a witness, but on its own ocular evidence. 1 Wigmore at §24, pp. 80 *et. seq*. Here, the videotapes were a species of "autoptic proference:" the trial court could observe them and reach its own conclusions. It would be difficult to give an example of something a trial judge would be better qualified to see with his own eyes and evaluate with his own mind than a videotape of two trials. The videotapes should have been received just like any other photographic evidence.

B. The reports and conclusions of Prof. Moore

The balance of the "mock trial" evidence consisted of reports prepared by Prof. Harvey Moore and his colleagues, and conclusions expressed by Prof. Moore. Even if the trial court had been exercising its gatekeeper function for the benefit of a lay jury, the reports and conclusions of the social scientists at issue here would have been

admissible under the *Hadden*[8] rule governing expert testimony based exclusively or substantially on the expert's own experience.

Even in this modern, high-tech world in which we live, not all forms of expertise are based on scientific or academic research. Fla. Stat. §90.702 expressly recognizes that "a witness [may be] qualified as an expert by knowledge, skill, experience, training, *or* [formal] education." (Emphasis added.) In *Hadden*, this Court considered the applicability of *Frye* to experience-based expertise.

Hadden came before this Court on the following certified question:

> In view of [this] Court's holding in *Townsend v. State*, [635 So.2d 949 (Fla. 1994)] does *Flanagan v. State*, [625 So.2d 827 (Fla. 1993)] require application of the *Frye* standard of admissibility to testimony by a qualified psychologist that the alleged victim in a sexual abuse case exhibits symptoms consistent with those of a child who has been sexually abused?

Id. at 574. The Court answered the question in the affirmative. *Id*. at 575. In *dictum*, the Court commented on *dictum* appearing in *Flanagan, supra*.

> We did point out in *Flanagan* that the *Frye* standard for admissibility of scientific evidence is not applicable to an expert's pure opinion testimony which is based solely on the expert's training and experience. ... While an expert's pure opinion testimony comes cloaked with the expert's credibility, the jury can evaluate this testimony in the same way that it evaluates other opinion or factual testimony. ...

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[8] *See Hadden v. State*, 690 So.2d 573 (Fla. 1997).

> When determining the admissibility of this kind of expert-opinion testimony which is personally developed through clinical experience, the trial court must determine admissibility on the qualifications of the expert and the applicable provisions of the evidence code.

Hadden, 690 So.2d at 579-80. Although the above-captioned paragraph was *dictum* upon *dictum*, judges and lawyers in Florida continue to behave as if it were the holding of the case. *See, e.g., Irving v. State*, 705 So.2d 1021, 1022 (Fla. 1st DCA 1998) ("The Florida Supreme Court in *Hadden* held that an expert's pure opinion testimony which is based solely on the expert's training and experience is not subject to the *Frye* test").

The distinction drawn in *Hadden* is easy neither to state nor to apply. Perhaps the best phrasing of the rule appears in *Holy Cross Hosp., Inc. v. Marrone*, 816 So.2d 1113, 1117 (Fla. 4th DCA 2001), *review dismissed*, 832 So.2d 104 (Fla. 2002):

> "Pure opinion" refers to expert opinion developed from inductive reasoning based on the expert's own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others.

Arguably, this formulation is drawn from the language of 90.702: a witness who is found to qualify as an expert by virtue of his "knowledge, skill, experience, training" may testify as to his own opinions or conclusions; a witness who is found to qualify as an expert by virtue of his formal education may testify to the general principles and

shared opinions that make up the received wisdom of his academic or professional discipline. On this basis, Prof. Moore should have been permitted to offer his opinions and conclusions to the trial court. As Mr. Hildwin demonstrates in his own pleadings, Prof. Moore is an experienced jury consultant, and has done "mock trial" work for many lawyers on many occasions. His "knowledge, skill, experience [and] training" qualify him to describe to the trial court the "mock trial" procedures, the reason those procedures were employed, the results of the "mock trials," and the opinions he holds about the significance of those results (bearing always in mind that the trial court will attach as much or little significance to Prof. Moore's evidence as it deems appropriate).

In receiving experience-based expert testimony trial courts should be even more than usually sensitive to the problems of "verifiability" and "junk expertise." Here, however, those problems are entirely absent.

Although Prof. Moore bases his description of the "mock trials" and his conclusions therefrom on his own experience, his experience in turn is based on his academic training. As Mr. Hildwin's own brief makes clear, Prof. Moore is a well-respected academician. The methodology he employs in conducting and evaluating "mock trials" is based on general principles drawn from the social sciences. Additionally, his methodology is carefully documented at every step. The trial court

is free to scrutinize it. The prosecution is free to criticize it. If it were flawed procedurally, or at odds with the experience or training of other experienced social scientists or jury consultants, the prosecution would have had no difficulty showing that to be the case.

Nor does Prof. Moore's work in this case bear the indicia of "junk expertise." True, Prof. Moore was retained and paid by Mr. Hildwin's lawyers, but this is not a disability; if all experts who were compensated by the parties seeking to employ their testimony were disabled by that fact, there would be no expert testimony at all. Prof. Moore and his colleagues are independent actors, not employees or colleagues of Hildwin's lawyers. They are available to be retained by lawyers of all kinds to assist in the preparation of cases of all kinds – including assistant state attorneys preparing criminal prosecutions.

It goes further than that: Social scientists such as Prof. Moore are not merely *available* to be retained by lawyers of all kinds in Florida; they *are* retained by lawyers of all kinds in Florida. And their services are of particular interest and importance to criminal lawyers (prosecution and defense), including the membership of FACDL-Miami. Given the extraordinary volume of criminal litigation in Florida and particularly in Miami-Dade County, it is imperative that lawyers avail themselves of information that will enable them to counsel their clients whether to take a plea rather than go to trial, or

will enable them to try their cases in the most focused, forcible, and expeditious fashion. Social scientists such as Prof. Moore provide such information. It is far, far too late in the day to dismiss such information as voodoo or the reading of tea leaves; prosecutors and defense attorneys, civil lawyers as well as criminal lawyers, recognize that the sort of information provided by Prof. Moore in this case is reliable and therefore valuable. Yet the trial judge gave it the back of his hand, dismissing it as irrelevant, incompetent, and invasive of the province of the trial court. In so doing, he did the criminal justice process a disservice.

CONCLUSION

WHEREFORE, *Amicus Curiae* FACDL-Miami makes this, its brief in support of Petitioner Paul C. Hildwin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

____
MILTON HIRSCH

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief has been submitted in Times New Roman 14-point font and that it complies with the font requirements of Rule 9.210(a)(2).

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MILTON HIRSCH