IN THE SUPREME COURT OF FLORIDA

PAUL HILDWIN,

Case No. SC04-1264

Appellant,

v.

STATE OF FLORIDA,

Appellee.
____________________/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This appeal is from the Circuit Court's denial of Hildwin's *Florida Rule of Criminal Procedure* 3.851 amended successive motion, which was filed on August 26, 2003, seeking relief from the sentence of death imposed following this Court's grant of sentence stage relief in Hildwin's prior post-conviction appeal. The primary issues contained in Hildwin's *Initial Brief* (which are also the subject of two *amicus* briefs) concern DNA test results and the admissibility of "evidence" based upon simulated ("mock") jury deliberations. Despite the histrionics of Hildwin's brief, the DNA issue is not complex, and is easily decided based upon settled Florida law. When the "new" DNA evidence is considered alongside the evidence from trial as *Jones* requires, there is no reasonable probability of a different result because Hildwin's trial testimony rendered the DNA evidence irrelevant to the issue of guilt.[1]

THE *AMICUS* BRIEFS

The "Innocence Project" has filed an *amicus* brief on Hildwin's behalf which argues, for 20 pages, that the Circuit Court was wrong when it ruled that the post-trial DNA evidence

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1Hildwin and his *amicus* have not disclosed the fact that this case was not defended as a "who-done-it." This case was defended on the theory that "Haverty did it." Rather than presenting a complex theory to the jury, this case presented the jury with a straight credibility choice between Hildwin and Haverty. The DNA evidence has no effect on that decision.

did not show that Hildwin was innocent of the crime for which he was convicted and that there was no reasonable probability of a different result had the DNA evidence been admitted at Hildwin's capital trial. This *amicus* brief does nothing more than repeat the arguments made in Hildwin's *Initial Brief* -- no particular assistance is given to this Court by this brief, which is nothing more than an attempt to evade the 100-page limitation to which Hildwin is subject.[2]

Likewise, the *amicus* brief filed by the Florida Association of Criminal Defense Lawyers (FACDL) provides no particular assistance to this Court. The resolution of the issue of the admissibility of "mock jury" results at the post-conviction stage is not aided by this brief, which, like the "Innocence Project" brief, is nothing more than an attempt to evade the page limitations established by this Court for *Initial Briefs*.

STATEMENT OF THE CASE AND FACTS

In this Court's decision on direct appeal from Hildwin's conviction and death sentence, the facts were summarized in the following way:

> Appellant was arrested after cashing a check purportedly written to him by one Vronzettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had

2Hildwin's *Initial Brief* is 100 pages long.

been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.

The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.

The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.

Appellant made two pretrial statements that are

> pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.
>
> During the penalty phase the state introduced evidence that appellant previously had been convicted of violent felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.
>
> In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Hildwin v. State, 531 So. 2d 124, 125-126 (Fla. 1988) (*Hildwin I*).[3]

On appeal to this Court after resentencing, Hildwin argued

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[3] Hildwin was not charged with sexual battery, and the State did not argue, at trial, that the victim had been sexually battered. The medical examiner testified that there was no evidence of sexual assault. (TR300). In closing argument, and in his *Initial Brief*, Hildwin argued that, in the words of this Court, "the victim died during an especially physical, but nonetheless consensual, sexual encounter." *Hildwin I*, at 128. This Court concluded that the evidence demonstrated that the victim had been raped -- **Hildwin did not challenge that finding in his motion for rehearing.**

that the taking of the victim's property was an afterthought to the murder. This Court stated:

> At oral argument, Hildwin's counsel speculated that Hildwin took Cox's property as an afterthought to what began as a **consensual sexual encounter**, but ended in Cox's death.

Hildwin v. State, 727 So. 2d 193, 195 n. 1 (Fla. 1998) (*Hildwin II*). (emphasis added). **This is the same argument that Hildwin made at the guilt stage of his capital trial and in his first appeal to this Court.**

The post-conviction proceedings.

On or about August 26, 2003, Hildwin filed an amended successive *Florida Rule of Criminal Procedure* 3.851 motion challenging the death sentence he received on resentencing. After conducting a *Huff* hearing and considering the written arguments of the parties, the Circuit Court issued an order denying Hildwin's successive motion to vacate. (R422). The Circuit Court found that there was no *Giglio* violation with respect to the secretor/non-secretor evidence; that the "newly discovered" DNA evidence did not show that Hildwin would probably be acquitted on retrial; that the "fatal variance" claim is procedurally barred and, alternatively, meritless; that *Jones* sets out the proper standard for evaluating "newly discovered" DNA evidence; and, that the "catch-all" claim is

procedurally barred, and, alternatively, meritless. (R423-30).[4] The Circuit Court's findings are discussed in detail in the argument section of this brief.

Hildwin gave notice of appeal on June 18, 2004. The record was certified as complete and transmitted on September 16, 2004. Hildwin filed his *Initial Brief* on January 19, 2005. The *amicus* briefs were filed on January 20, 2005.

SUMMARY OF THE ARGUMENT

The Circuit Court properly denied relief on Hildwin's claim that "newly discovered" DNA evidence entitled him to relief. The DNA evidence is inconsistent, and irreconcilable with, Hildwin's testimony at the guilt stage of his capital trial. That testimony must be considered in assessing a new evidence claim under *Jones*, and, when the DNA evidence is properly considered using that standard, that evidence is irrelevant to any fact in issue. Moreover, the DNA evidence is not admissible because it is neither relevant nor material to the offense -- it is simply extraneous to the crime. The Circuit Court properly applied *Jones*, and determined that when the "new evidence" is considered along with the evidence from trial, that evidence would **not**

4In connection with the final claim, the Circuit Court found that "mock trial" evidence is not admissible on the question of whether there is a reasonable probability of a different result if the DNA evidence had been available and admitted at Hildwin's capital trial. (R429).

"probably produce an acquittal on retrial." That is the controlling standard, and the Circuit Court properly applied it in denying relief.

The Circuit Court properly found that the "mock trial evidence" that Hildwin sought to utilize to support his "new evidence" claim was inadmissible because it did not satisfy the *Frye* test for admissibility of scientific evidence. The Circuit Court did not abuse its discretion in reaching that conclusion, and there is no basis for reversal. Moreover, the "mock trial evidence" ignores the *Jones* standard because it did not consider the evidence from Hildwin's trial, and because it improperly attempts to present testimony about matters that inhered in the trial jury's verdict. That sort of testimony is inadmissible under settled Florida law, and was properly excluded in this case.

The Circuit Court correctly held the "fatal variance" claim procedurally barred because that claim could have been, but was not, raised at trial, on direct appeal, or in Hildwin's prior post-conviction proceedings.

The "cumulative error" claim is no more than a repackaging of the *Brady* claim that this Court decided adversely to Hildwin in his prior post-conviction appeal. The Circuit Court correctly found that claim to be procedurally barred.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED RELIEF ON THE "NEWLY DISCOVERED EVIDENCE" CLAIM, AND THAT DENIAL OF RELIEF IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

On pages 7-65 of his brief, Hildwin argues that the Circuit Court's order denying relief on the "newly discovered DNA evidence" claim should be reversed. Despite the hyperbole of Hildwin's brief, the Circuit Court's denial of relief is supported by competent, substantial evidence, and should not be disturbed. *Melendez v. State*, 718 So. 2d 746, 747 (Fla. 1998).[5]

The legal standard for "newly discovered evidence" claims.

This Court has described the legal standard by which "newly discovered evidence" claims are evaluated in the following way:

> (1) that the newly discovered evidence was unknown to the defendant or the defendant's counsel at the time of trial and could not have been discovered through due diligence, **and** (2) that the evidence is of such a nature that it would probably produce an acquittal upon retrial. *See Mills v. State,* 786 So. 2d 547, 549 (Fla. 2001); *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998). . . .
>
> Turning to the second prong of the newly discovered evidence test, the lower court concluded that O'Kelly's alleged confession to Hutto probably would not produce an acquittal upon retrial. The court's

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5 While Hildwin did not recognize it, the *Melendez* standard was articulated in the context of a case in which there had been an evidentiary hearing. While there was no evidentiary hearing in this case, the factual basis for the Circuit Court's ruling is found within the record of this proceeding, as well as within Hildwin's prior proceedings. Those facts supply competent, substantial evidence to support the Circuit Court's ruling. An evidentiary hearing would have added nothing because Hildwin cannot change the historical facts (such as his trial testimony).

> ruling was not erroneous. In reviewing a claim of newly discovered evidence, a trial court is required to **"'consider all newly discovered evidence *which would be admissible'* at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.'"** *Jones,* 709 So. 2d at 521 (quoting *Jones v. State,* 591 So. 2d 911, 916 (Fla. 1991)) (emphasis supplied). Initially, we note that Hutto's testimony would not have been admissible at trial, because it constituted inadmissible hearsay. *See Jones v. State,* 678 So. 2d 309, 313 (Fla. 1996).

Kokal v. State, 30 Fla. L. Weekly S21 (Fla. Jan. 13, 2005). (emphasis added; italics in original). Hildwin agrees that the *Jones* standard controls.

The DNA evidence is irreconcilable with Hildwin's testimony at the guilt stage of his capital trial.

At the guilt stage of his capital trial, Hildwin testified that he had been in the victim's car with Haverty and the victim "while they were having an argument, and that when Haverty began beating and choking her, he left." *Hildwin v. State*, 531 So. 2d at 125.[6] Hildwin testified at trial that Haverty admitted killing Miss Cox to him. (TR779). Any mention of this testimony, which was consistent with Hildwin's position that Haverty was the actual killer, is conspicuously absent from Hildwin's brief and

6*Amicus* Innocence Project states, on page 7 of their brief, that "[d]uring the assault, the State contended, he ejaculated on a pair of her underwear . . . ." No citation to the record is contained in the brief, which is hardly surprising since the State never made this argument to the jury.

the *amicus* brief.[7] Haverty testified that he did not even know Hildwin, and, moreover, had an alibi for the time of the murder. (R964, TT316, 327, 328) *Id.* Thus, the jury was confronted with a square credibility choice between Hildwin and Haverty as to this aspect of the case.[8]

Despite the shrill assertions of innocence contained in Hildwin's brief, the DNA evidence demonstrates nothing relevant to the identity of Miss Cox's killer. The State introduced both direct and circumstantial evidence of Hildwin's guilt, and Hildwin defended with testimony that Haverty **admitted** committing the murder Hildwin was charged with. This is not a case, as the defense **now** suggests, that was defended on the theory that the "real killer" is unknown. Hildwin and Haverty were the only candidates for that title, and Haverty's whereabouts at the time of the murder were accounted for. Moreover, **Hildwin never suggested in his testimony that anyone other than Haverty was**

7In a remarkably misleading bit of advocacy, *amicus* Innocence Project restates Hildwin's testimony (without citation to the record) as, "[h]e 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." *Amicus Brief*, at 7. That is **not** what Hildwin testified to. (TR779).

8Substantial, additional evidence of Hildwin's guilt, including his confession to a cellmate and an inculpatory statement to law enforcement, support the guilty verdict beyond a reasonable doubt. This was not a purely circumstantial case, as Hildwin would have this Court believe. The trial court did not give the jury the circumstantial evidence instruction.

responsible for Miss Cox's murder. Based upon Hildwin's testimony that Haverty admitted the murder, the DNA results have no relevance to the issue of guilt because there are only two (2) possible suspects.[9]

Under this Court's decision in *Jones v. State*, 709 So. 2d 512 (Fla. 1998), a newly discovered evidence claim must be evaluated by considering the "new" evidence (which is actually admissible) along with all of the evidence from trial. *Kokal, supra.* Assuming *arguendo* that the DNA evidence is admissible, when that evidence is considered in light of Hildwin's unequivocal trial testimony that Haverty killed Miss Cox (along with all of the other evidence of guilt elicited at trial), there is no reasonable probability of a different result.[10] The most the DNA evidence does is confirm defense counsel's suggestion, in closing argument, that the body fluid evidence was wholly unrelated to the murder.[11] (TR944). That is

9Hildwin told several versions of the events, as this Court pointed out on direct appeal. *Hildwin v. State*, 531 So. 2d at 125. Under the *Jones* standard, his trial testimony is what matters at this point (even though the multiple, conflicting stories are probative of Hildwin's truthfulness).

10Hildwin's trial testimony precludes any claim that the DNA was left by the "real killer" -- he testified, in absolute terms, that Haverty killed Miss Cox. Whatever theories he might now try to advance do not play into the *Jones* analysis.

11 Since the victim was last seen on her way to do laundry, and since the body fluid evidence was found on items located in her laundry bag, defense counsel's argument certainly makes

insufficient to demonstrate a reasonable probability of a different result. The DNA evidence does nothing to establish the identity of Miss Cox's killer, and is not probative of any fact in issue.[12] It does not provide a basis for reversal of Hildwin's conviction. *Jones, supra.*

The admissibility of the DNA evidence.

This case has been briefed, up to this point, on the assumption that the DNA evidence is admissible evidence for *Jones* purposes. However, the State does not concede that that is the case. The evidence from trial shows that the when the victim was last seen, she was leaving her residence to wash clothes. (TR306, 307). When the victim's car was located, her laundry bag was located in the back seat. (TR684-85). The underwear and washcloth at issue here were located **inside** of the laundry bag. (TR685). The victim was found completely nude, in the trunk of her car (except for her shirt, which was left around her neck after it had been used to strangle her). (TR219, 277, 280-81, 284, 295, 935). There is no **physical evidence** that the victim

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sense. And, given the limitations of secretor/non-secretor evidence (which were fully explained to the jury), there is no reasonable probability of a different result when this evidence is replaced with the DNA evidence in the *Jones* analysis.

12 This highlights the problem inherent in using "mock juries" -- the "post-DNA" jury considered a different case, not the evidence already presented as affected by the "new" DNA evidence. That is **not** the *Jones* standard that applies to new evidence claims, and it is not the law in Florida.

was sexually assaulted at all, much less that the sequence of events was such that the killer's semen could have been deposited on the victim's underwear -- in the absence of such evidence, there is no connection between the body fluid evidence and the murder.[13] Given the victim's stated intent that she was going to do laundry when last seen, the circumstances under which her body was found, and the location of the items containing biological evidence in the victim's laundry bag, the probative value of those items is minimal -- there is nothing to suggest that the DNA evidence is even related to the murder, and everything to suggest that it is connected to an unrelated sexual encounter that occurred at some remote time. Hildwin admitted to the trial court that the DNA test results might not even be admissible on retrial (R33) -- the State agrees, and the absence of relevancy of the DNA evidence must be taken into account in the *Jones* analysis.

Hildwin has conceded that he had a sexual encounter with the victim -- because that is so, the DNA evidence is irrelevant because it proves nothing about the circumstances of the victim's murder.

In his closing argument at the guilt stage of his capital

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13 The circumstances under which the victim's body was found are certainly suggestive of a sexual assault -- however, due to decomposition of her body, such an assault could not be verified, and the case was not presented as a sexual assault case -- it was tried as murder case. (R423-4).

trial, Hildwin advanced two theories about the semen and saliva stains. First, Hildwin emphasized that the underwear and washcloth containing biological evidence had been recovered from the victim's laundry (and she was on her way to wash clothes when last seen). (R944). Hildwin argued:

> The State's theory apparently is that after whatever took place, he then neatly cleaned up the scene and put it in the laundry. I submit to you that that is better explained as evidence of a sexual encounter between Miss Cox and some other person, which was the reason she and Mr. Haverty [who Hildwin testified was the real killer] were arguing that morning.

(TR944).[14] In other words, the trial argument was that the biological evidence from the victim's laundry was **not** deposited by her killer, but rather indicated a **motive** for Haverty to commit the murder.[15] Subsequently, Hildwin argued that Miss Cox

> could have been engaged in a sexual act, as I put to you before, something that you and I may not participate in, but, nevertheless, is a reasonable hypothesis because these acts are participated in in this country by people, and that is they try to deprive the brain of oxygen in order to enhance sexual pleasures. I'm not going to try to tell you that that is something good, but I'm going to tell you that that is a reasonable hypothesis here, ladies and gentlemen, of what could have taken place, and it is a reasonable hypothesis if you find it to be true **that would negate first degree murder**.

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14 The victim was killed at a location other than where her body was recovered -- pine needles were adhering to her body, but there were no pine trees close to the location of her body. (TR272, 280, 288-89, 290).

15 Hildwin testified that Haverty admitted killing the victim to him. (TR779).

(R947). This argument is a concession that Hildwin had sexual relations with the victim.[16] Because that is so, under either of Hildwin's guilt stage theories, the DNA evidence is irrelevant.

Moreover, Hildwin's position at oral argument on direct appeal from the resentencing proceeding was that Hildwin took Miss Cox's "property as an afterthought to what began as a consensual sexual encounter, but ended in Cox's death." *Hildwin v. State*, 727 So. 2d at 195 n.1. While this argument was in the context of the applicability of the pecuniary gain aggravator, it still amounts to a concession that Hildwin did, in fact, have sexual relations with his victim. And, in the context of the present proceedings, it demonstrates the irrelevance of the "newly discovered" DNA evidence.

The collateral proceeding trial court properly denied relief.

In its order denying relief on the "newly discovered evidence" claim, the collateral proceeding trial court held:

> a) *Claim I: Newly discovered DNA evidence and the state's presentation during the 1996 resentencing proceedings reveal that the state knowingly presented false and/or misleading scientific evidence, testimony and argument about physical evidence recovered from the crime scene during the guilt phase of Hildwin's trial in violation of Giglio v. United States,* 405 U.S. 150 (1972).

16 Hildwin's guilt stage theory was that Haverty killed the victim (as Hildwin testified), or that Hildwin was guilty only of Third Degree Murder based on "consensual sex [that] got out of hand." (TR950).

(1) At trial, a pair of panties and a washcloth containing semen and saliva found on top of a laundry bag located in the rear seat of the victim's car were introduced into evidence. Both the semen and saliva were from a nonsecretor. Blood samples from the Defendant indicated that he, too, was a nonsecretor. Testimony indicated that only 11% of the white male population were nonsecretors; and that the victim's boyfriend, who the Defendant alleged was a possible suspect, was a secretor. At that time, secretor/nonsecretor identification was the only standard available, as DNA testing had not yet been developed. The evidence presented at the time of trial was the best scientific evidence available at that time, and there is no indication, other than Defendant's bare allegation, that such evidence was misleading, or if it was, that it was presented by the State knowingly and with reckless abandon in an attempt to mislead the jury. The Defendant alleges the State knew that their theory of the crime was false and/or misleading, but there is simply nothing presented by the Defendant to substantiate this claim; and

(2) Photographs of a murder victim are admissible if they assist in explaining to the jury the nature and manner in which the wounds were inflicted, or if they show the manner of death and wounds inflicted. Generally a trial court's decision to admit photographic evidence will not be disturbed absent an abuse of discretion. *Harris v. State*, 843 So. 2d 856 (Fla. 2003). In the instant case, the victim was found in the trunk of her car, strangled, unclothed, with her legs folded over her head. Due to decomposition of the body, a sexual assault could not be verified, but the State presented a photo of the position of the victim's body in the trunk at trial to show how the victim had been killed, as it depicted her own tee shirt wrapped around her neck, which was the cause of her death by strangulation. The photograph was admitted into evidence in the original trial, but was not admitted in the resentencing trial, although the jury did see the photo. The prosecution indicated this was essential as it was the only photograph that showed the item wrapped around the victim's neck, which caused her death. Although graphic, this photo was not misleading; and

(3) Defendant alleges that during the 1996 resentencing proceedings, the State presented their evidence as a murder case, not as a rape case, indicating that the State's action shows they knowingly presented false evidence and a false theory of prosecution at trial. This matter was never prosecuted as a rape case. The Defendant here was never charged with sexual assault; it was prosecuted from the start strictly as a homicide case. Additionally, although resentencing occurred years before a DNA test was run on the evidence submitted, at that time the State reiterated they were not asking for a conviction based on the panties and washcloth, but on the evidence that a murder had been committed. Again, Defendant has made an unsubstantiated allegation for which he has no basis, and he has presented no grounds for a *Giglio* violation, as alleged. *See Giglio v U.S.*, 405 U.S. 150, 93 S. Ct. 763, 31 LEd2d 104 (1972); and

(b) *Claim II: Newly discovered scientific (DNA) evidence shows that Hildwin is actually innocent of the crime and* innocent of *the death penalty, or in the alternative, shows that in light of the new DNA evidence the Defendant would probably be acquitted on retrial, or at the very least, receive a lesser sentence pursuant to Jones and shows that Hildwin's rights under the Fifth, Sixth, Eighth; and Fourteenth Amendments were violated.*

(1) There is no basis to Defendant's claim that the newly discovered DNA evidence shows that he is innocent of the crime, or that he would <u>probably</u> be acquitted on retrial, pursuant to *Jones*. In fact, in this Court's Order on Defendant's Motion for Postconviction DNA Testing, entered on June 10, 2002, wherein DNA testing of four items of evidence was authorized, this Court <u>specifically omitted</u> language that indicated that there was a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if DNA evidence had been admitted at trial. The DNA testing indicates that the semen and saliva on the panties and washcloth did not come from the Defendant. Pursuant to the standards set forth in *Jones,* the Court must reweigh the DNA evidence and analyze it along with the evidence

presented at trial. This Court has done so, and has determined that an acquittal would NOT be probable on retrial, even taking into consideration the newly discovered DNA evidence, which does NOT show that the Defendant is innocent of the crime charged; and

2) Defendant goes into extensive discussion regarding cases where DNA testing was denied, but that is inapplicable here. This Court granted Defendant's request for DNA testing, and although the results indicate that the semen and saliva on the items found on the laundry bag in the victim's car were not Defendant's, that does not translate into a reasonable probability that Defendant would have been acquitted had that DNA evidence been available at trial; and

(3) Defendant alleges the only remaining evidence of guilt is a statement from a "lying jailhouse snitch" who testified for the State; however, he neglects to mention considerable testimony and numerous factors presented at trial which resulted in his conviction, as contained in the trial transcript (TT), including:

The testimony of a cellmate who alleged that Defendant admitted that he had killed the victim and that he was going to "burn" for the murder. (P. 708, TT)

The victim's purse, with some items removed, which was found in the woods where her car was located, as well as her shoes and a piece of moulding from her car, all located in a direct line between her car and the Defendant's house.

Testimony that Defendant had no money when he left his disabled car on the roadside (TT P. 521) and walked toward a convenience store in the area where the victim was traveling, returning to his car approximately 1 1/2 hours later with money which he subsequently used to purchase gas. (TT P. 534)Testimony that Defendant cashed a check drawn on the victim's bank account, which he later admitted he stole from her purse (TT P. 792) and forged and cashed it. (TT P. 399)

Testimony indicating that the teller who cashed the forged check identified the Defendant as the person who cashed it, and that he was driving a car at the time that was similar to the description of the

victim's car. (TT P. 403-407)

Testimony that the forged check led police to the Defendant; and a search of his house turned up a radio and a ring, both of which belonged to the victim (TT P. 489-490); and *(c) Claim III: Mr. Hildwin was denied his rights to adequate notice of the allegations against him and due process and as guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution and the corresponding provisions of the Florida Constitution due to fatal variances and/or constructive amendments between the indictment and the evidence presented at trial.*

(1) Defendant's claim of denial of due process should have been raised in earlier pleadings, and cannot be addressed in this successive motion, and therefore is procedurally barred; and

(2) Even if the claim were not procedurally barred, Defendant presents no clear and identifiable claim. He alleges "fatal variances" between the indictment and the evidence presented at trial, but there is nothing in his motion to substantiate a claim regarding the validity of the indictment. He was indicted for, and tried and convicted on, a charge of first degree murder. He was afforded due process and there were no "fatal variances and/or constructive amendments;" and (d) *Claim IV.- The current standard for newly discovered evidence found in Jones is inappropriate and unconstitutional as applied in the context of the case at bar involving newly discovered DNA evidence.*

(1) Defendant alleges that the *Jones* standard is "speculative" and invites the Court to adopt his (the Defendant's) own standard, which is wholly inappropriate; and

(2) Defendant's allegation that the *Jones* standard is "inappropriate and unconstitutional" has no basis. This Court declines the Defendant's invitation to create a new legal standard beyond *Jones*. The *Jones* case is still good law and has not been overruled; and this Court is obliged to follow the standards set therein; and

(e)Claim V: Mr. Hildwin's convictions are materially

unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and/or improper rulings of the trial court, in violation of Mr. Hildwin's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

(1) As the Defendant, himself states, this claim is a "catch-all." It contains numerous allegations that were or should have been brought in the original appeal or previous motions, and cannot now be again reviewed. This appears to be Defendant's attempt for a second (or third) bite at the apple, and cannot be allowed; and

(2) Interestingly, in Claim IV the Defendant alleges that the *Jones* standard is speculative, inappropriate and unconstitutional, yet in Claim V asks this Court to conduct a "cumulative" *Jones* analysis in reconsidering and vacating his conviction and sentence; and 2) This Court has spent a great deal of time reviewing the transcripts in this case, and has noted the total lack of truthfulness and veracity in statements and testimony of the Defendant, which obviously did not escape the jury. The trial transcript indicates, in part, that:

$ The Defendant told several different versions of how he met up with the victim on the date in question, and what occurred thereafter, sometimes involving other persons in his stories.

$ The Defendant told various stories about whether he was acquainted with either the victim or her boyfriend, at first denying he knew either, then indicating he knew them slightly, then progressing to the point that he indicated the victim was well-enough acquainted with him that she "loaned" him her radio and "loaned" him money, in the form of a check, both of which he later admitted were lies, because he stole those items from her.

$ The Defendant first alleged that the victim's radio had been loaned to him by the victim because his car radio didn't work, then admitted

his car radio did work, but she still loaned him the radio, then finally admitted, after it was found in his home, that he had stolen it.

$ As to the forged check, he first alleged that the victim wrote it out and gave it to him as a loan, then he said that a third party had torn it out of her checkbook and given it to him, and finally he admitted that he had stolen it from her purse, and forged and cashed it.

$ As to the victim's pearl ring, which was found in the Defendant's home, the victim's sister testified that the victim treasured the ring, but the Defendant alleged he found it in the garbage, then later indicated he found it in the victim's checkbook so he stole it along with the check.

$ The Defendant indicated in one of his stories that he was riding with the victim and her boyfriend when they got into an argument and the boyfriend hit her and was choking her, at which time the Defendant left them and walked away, inferring the boyfriend killed the victim. The boyfriend denied even knowing the Defendant.

$ Further, the Defendant indicated that the person who killed the victim had a cross tattoo on his back. The boyfriend had no such tattoo; however, testimony indicated, in fact, that it was the Defendant who had a cross tattoo on his back.

$ The death penalty was discussed at length, starting at voir dire. There were numerous references in the transcript to the charge of murder and the intent of the state attorney to seek the death penalty, so Defendant could not have been surprised.

$ The Defendant denied driving the victim's car, but testimony was presented that a hair found on the left front seat of the vehicle (the driver's seat) matched a hair taken from the Defendant's head.

3) There were numerous conflicting and inconsistent statements, and outright lies admitted to by the Defendant, which, along with

the evidence and testimony presented, were sufficient for the jury to return a unanimous verdict of guilty at trial, even without the secretor/nonsecretor testimony; and

4) As to the issue of admissibility of the videotapes of the mock trials and report and analysis thereof regarding this case, Defendant has asked that this information be considered by the Court; and the State has objected, primarily based on Frye, alleging that said information is inadmissible, irrelevant and incompetent.

(R423-26, 427-28).That result follows settled Florida law, and should not be disturbed.

The *Amicus* brief.

The *amicus* brief filed by the Innocence Project does little more than argue for reversal by repeating arguments that were, or could have been, advanced by Hildwin. The purpose of an *amicus* brief is not to repeat arguments made by the parties. *Ciba-Geigy Limited, BASF A.G., et al.* v. *The Fish Peddler, Inc., et al.*, 683 So. 2d 522 (Fla. 4th DCA 1996). This brief is inappropriate, and is nothing more than an attempt to exceed the page limitation to which Hildwin's brief is subject. In addition, the *amicus* brief is filled with inaccurate, misleading, and blatantly false assertions. Nothing contained in the *amicus* brief calls the correctness of the trial court's ruling into question.

The premise of the *amicus* brief is that the DNA test results demonstrate that various facts presented at trial were "false",

and that the State has "inexplicably failed to act on these extraordinary DNA results for two years." *Amicus Brief,* at 1. What the *amicus* ignores is that, **based upon the available science at the time of Hildwin's trial**, the scientific evidence was completely accurate, and was presented to the jury with a full explanation of the limitations of secretor/non-secretor evidence. (TR692-93). The State could do no more. It is improper for the *amicus* (and Hildwin himself) to refer to that evidence as "false." As the collateral proceeding trial court pointed out, that evidence was "the best scientific evidence available at that time." (R423). The Court went on to find that Hildwin had presented **nothing** to support his claim that the State "knew that their theory of the crime was false and/or misleading." (R423). There is nothing other than sheer speculation to support the allegations of bad faith and fabricated testimony[17] contained in the *amicus* brief.

The second primary component of the *amicus* brief is a series of personal attacks directed at the State -- the foundation for these histrionics is the Innocence Project's false claim that the DNA profile produced by Orchid Cellmark can be "entered" into the Comprehensive DNA Identification System (CODIS) in an

17 The *amicus'* claim that law enforcement fabricated admissions by Hildwin has no place in an *amicus* brief -- it is notable that Hildwin himself did not raise such a frivolous and unsupported argument.

effort to determine if a match to another individual can be obtained.[18] Hildwin made no mention of CODIS until shortly before the *amicus* brief was filed. This "issue" was never before the trial court.

The true facts, which the *amicus* has pointedly ignored, are that **Hildwin** insisted on having the DNA testing conducted by Orchid Cellmark and that that laboratory is **not** a law enforcement laboratory. (Appendix A, Motion, R648, 652). **Because Orchid Cellmark is not a law enforcement laboratory, DNA results obtained by that laboratory are not eligible for submission to CODIS.** (*See*, Letter from FDLE, filed with the Court on January 28, 2005).

The bias of the *amicus* is well-illustrated by the personal attacks on counsel which begin on page four of that brief. The *amicus* falsely asserts that Orchid 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

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18 The *amicus* also criticizes the State for not comparing the DNA found in the victim's laundry to that of her live-in boyfriend, Haverty. The secretor/non-secretor testimony excluded Haverty, anyway. Hildwin never asked for that comparison, and the inclusion of that claim in the *amicus* brief is nothing more than *ad hominem* abuse directed toward the State. In any event, finding genetic material from Haverty in the victim's laundry would prove absolutely nothing. Of course, Hildwin testified at trial that Haverty admitted killing Miss Cox, a fact that is conspicuously absent from the *amicus* brief.

> that is required here is for the State to forward to test results to a CODIS-participating government laboratory - which Appellee has, tellingly, failed to do for two years.

Amicus Brief, at 5. As demonstrated by the January 27, 2005, letter from the Florida Department of Law Enforcement (which was filed with this Court on January 27, 2005), the claims made by the *amicus* are false, as are the various claims and assertions of the *amicus* which are contained in the correspondence attached to their brief.[19]

To the extent that further discussion of the *amicus* brief is necessary, the discussion of the "mock juries" beginning on page 9 is based upon an unscientific experiment which misapplied the *Jones* standard, and which is certainly not a basis for relief. Likewise, the *amicus'* assertion that 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 [of entering the DNA profile into CODIS] would be adverse to the State," is simply absurd. Even if a *Martinez v. State*, 478 So. 2d 871 (Fla. 3rd DCA 1991), inference was applicable to the *Jones* new evidence inquiry, which it is not, the "DNA profile" is not within the power of the State to

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19 Such a basic error concerning the eligibility of a DNA profile for submission to the CODIS database certainly raises questions concerning the true expertise of the *amicus*.

produce -- Hildwin insisted on using a non-CODIS laboratory (over the State's objection), and it borders on bad faith and sharp practice for the *amicus* to attempt to use **Hildwin's** choice as a weapon against the State.[20] The *amicus* has well-demonstrated its position in this case, but that position is based on the false premise that a comparison of the DNA profile generated in this case to the CODIS system is possible -- perhaps recognizing its mistake and attempting to shift blame, the *amicus* resorts instead to personal attacks on counsel for the State. Regardless of the motivation of the *amicus*, nothing advanced in its brief is persuasive.

II. THE CIRCUIT COURT PROPERLY FOUND THAT THE "MOCK TRIAL EVIDENCE" WAS INADMISSIBLE.

On pages 65-82 of his *Initial Brief*, Hildwin argues that the collateral proceeding trial court should have allowed him to introduce expert opinion testimony about "mock trial evidence" as part of his proof under *Jones* that "newly discovered evidence" demonstrates a reasonable probability of a different result.[21] Florida law is settled that the admissibility of

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20 The Third District Court of Appeals called such tactics "the practice of the 'Catch-22" or 'Gotcha!' school of litigation." *Salcedo v. Asociacion Cubana, Inc.,* 368 So.2d 1337, 1338 (Fla. 3DCA 1979).

21 The Miami Chapter of the Florida Association of Criminal Defense Lawyers has filed an *amicus* brief in support of Hildwin's position. That brief, like the *amicus* brief filed by the Innocence Project, presents arguments specific to this case,

evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); G*eneral Elec. Co. v. Joiner*, 522 U.S. 136 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").[22]

The *Frye* component and the *amicus* brief.

The focus of the *amicus* brief is that, in a non-jury context, it is a non-sequitor to apply the *Frye* standard to scientific evidence because that standard is made necessary due to the "existence of the lay jury as trier of fact." *Amicus Brief*, at 8. As the *amicus* puts it, "[t]here is no gatekeeper function to discharge when there is no one on the other side of the gate." *Amicus Brief,* at 9. However trendy that phrase may be, it ignores the true role occupied by the trial judge in any non-jury proceeding -- in every such proceeding, there is "no one on the other side of the gate" with respect to **any** question as to the admissibility of evidence, whether the issue is authentication, hearsay, or any other evidentiary rule. Taken to

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and seems to be little more than an attempt to expand Hildwin's brief by 20 more pages.

its logical conclusion, the *amicus'* position is that the rules of evidence have no applicability to non-jury proceedings. That notion is ill-conceived and illogical.

Despite the arguments to the contrary, the *Frye* standard exists to assure the quality of the evidence presented, just as Rule 804 governs hearsay and Rule 901 requires that evidence be authenticated or identified as a condition precedent to admission. No logical argument can be made that those Rules are inapplicable to bench trials, and no such argument can be made with respect to *Frye*, either.

The Circuit Court order.

The collateral proceeding trial court decided this claim in the following way:

> 4) As to the issue of admissibility of the videotapes of the mock trials and report and analysis thereof regarding this case, Defendant has asked that this information be considered by the Court; and the State has objected, primarily based on *Frye*, alleging that said information is
> inadmissible, irrelevant and incompetent.
>
> a) Defendant attempts to show, through introduction of four videotapes of mock trials, which were conducted post-trial, based on information contained in transcripts of the trial in this cause, that this "sociological evidence" proves that Defendant would have been acquitted at trial if the DNA test results had been available and admitted; and
>
> b) Mock trials are sometimes utilized <u>prior</u> to a trial

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22 In an effort to gain *de novo* review, Hildwin attempts to cast this claim as a pure *Frye* issue. That mischaracterizes the posture of this issue.

to help counsel predict a jury's reaction or the possible outcome of a trial. Shadow juries have also been used during trials to provide daily feedback to counsel to allow them to retool their presentations. *See "The Verdict on Surrogate Jury Research,"* 74-MAR-ABAJ 82, March 1988. Defendant cites to this publication in his brief. However, these are pre-functions, utilized to help attorneys prepare for trial and determine how they will proceed in the actual trial, not a means of getting a second bite at the apple by use of hindsight. This Court is unaware of any court where such "sociological evidence" has been allowed into the record as substantive evidence; and

c)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; and

5) Defendant has failed to show that there is a reasonable probability that Defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial; and

6) In view of the above considerations, this Court finds that:

a) An evidentiary hearing is not necessary, as this Court can make a final determination without an evidentiary hearing; and

b) This Court has determined that Defendant's Motion is legally insufficient; and there is no reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial (R428-29).

Those findings are partly based on *Frye,* which is a valid basis for the denial of admission of this evidence. The Circuit Court also found that the "mock trial" evidence was an improper attempt to invade the province of the Court on an issue of law -- whether there was a reasonable probability of a different result under *Jones* had the DNA evidence been available at the time of trial. That disposition is correct because, at the most fundamental level, the mock juries (and the "expert" who purports to interpret the results) did not follow *Jones*. Stated differently, because the mock juries did not consider the evidence from trial along with the DNA evidence, the results are irrelevant to the *Jones* inquiry and were properly disallowed as evidence. *Kokal v. State,* 30 Fla. L. Weekly (Fla. Jan. 13, 2005). (Mock Trial Report, R106-232).

The mock trial evidence is inadmissible.

In his brief, Hildwin argues that the results of several "mock trials" (which were conducted by an individual who is admittedly opposed to capital punishment to the extent that he "routinely" works *pro bono* for individuals charged with capital crimes) should be admitted as substantive evidence in support of his "newly discovered evidence" claim. (R378). However, rather than considering the evidence from trial along with the admissible new evidence as *Jones* requires the trial court to do,

the mock juries considered a completely **different** presentation with the DNA evidence, complete with hysterical attacks on the integrity of the State. (*See, e.g.*, R109 n.2). The mock jury evidence is wholly speculative, and does not approximate the inquiry that *Jones* requires. *Kokal, supra*.

Jones deliberately uses the evidence at **trial** as the starting point for analysis of a new evidence claim. Any other procedure would be an open invitation to fraud -- the defendant is properly bound by his strategy at trial, and is not, and should not be, allowed to subsequently re-tool his evidence to fit "new evidence." According to Hildwin, this "evidence" will assist the trier of fact by "predict[ing] how **actual** jurors **might** react to certain evidence and what a verdict **may** be in an **actual** trial." (R304-05). By the very terms of Hildwin's brief, the "evidence" that he criticizes the State for daring to object to is, when stripped of its pretensions, no more than unscientific speculation based upon "condensed" trials that apparently were not even conducted by lawyers. For the reasons set out below, Hildwin's "evidence" is inadmissible, irrelevant, and incompetent.

Florida law is settled that "[a] juror is not competent to testify about matters inhering in the verdict, such as jurors' emotions, mental processes, or mistaken beliefs. *See Baptist Hosp. v. Maler,* 579 So. 2d 97, 99 (Fla. 1991); *State v.*

Hamilton, 574 So. 2d 124, 128 (Fla. 1991); *see also* § 90.607(2)(b), *Fla. Stat*. (1999). [footnote omitted]." *Marshall v. State*, 854 So. 2d 1235 (Fla. 2003). The "evidence" that Hildwin would have this Court consider obviously inheres in the actual jury's verdict. Because that is so, this testimony would not be admissible if offered through a juror who actually sat on Hildwin's trial or resentencing proceeding. If an actual juror cannot impugn the verdict with such testimony, and the law is clear that such testimony is incompetent, then it makes no sense at all to suggest that a jury's verdict can be challenged through a "social science" interpretation of the speculative and unsworn actions of "mock" jurors who made their "decision" based on a **three-page condensation** of the evidence against Hildwin.[23]

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[23]For example, the "mock" jurors were not told that the saliva on the washcloth could have come from the **victim** (TR700); that the age of the stains on the washcloth and panties could not be determined (TR700); and that 200 million people are non-secretors (like Hildwin) (TR702). Moreover, the prosecutor in the 1986 guilt stage closing argument **specifically** told the jury that he was not asking "... in any way, shape or form to convict the defendant based on those panties and that washrag...." (R973). Finally, to accept that the genetic material found on the panties came from the killer, one must accept that the victim (or her killer) put her clothes back on after having been raped, and then removed them again before the victim's nude body was disposed of in the trunk of her car by the killer. There is no indication that that occurred. In the absence of these objective facts being before the "mock" jury, it is difficult to understand how this Court can be expected to rely on results obtained following the slanted presentation given to the "mock" jury.

When weighed against the actual trial record of this case, it is improper to suggest that the "mock trials" can legitimately be compared to the actual trial of this case, which, as Hildwin's "expert" admits, lasted for five days, and involved nearly 50 witnesses and more than 60 exhibits. *Experimental Simulation*, (R112).[24] The "expert" testimony that Hildwin would have this Court consider is an improper attempt to impugn the jury's verdict by using a "mock jury" study to introduce incompetent evidence -- this "evidence" is inadmissible for any purpose, and the trial court properly refused to admit it.

The "mock jury" does not satisfy the Frye standard.[25]

In addition to being an improper attempt to impugn the jury's verdict, the "mock trial" evidence does not satisfy the *Frye* standard for the admissibility of scientific evidence, either. As Hildwin repeatedly points out, *Frye* requires the

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24 According to Hildwin's report, the "essence" of the State's case was presented in less than an hour "with no actual witnesses and only two exhibits." *Experimental Simulation*, (R112-13). Hildwin's expert concedes that "[s]uch presentations generally are much less powerful and persuasive than the actual trial." *Id.* How such a watered-down presentation is helpful in any context is not explained.

25 Of course, "it is common experience that different juries may reach different results under any criminal statute." *Westerheide v. State*, 767 So. 2d 637, 654 (Fla. 2000), *quoting Roth v. United States*, 354 U.S. 476, 492 n. 30 (1957); *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury,* 865 So. 2d 561 (Fla. 5th DCA 2004). Because that is so, it seems highly unlikely, at best, that "evidence" of this type can satisfy the *Frye* standard.

proponent of "scientific evidence" to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the case under consideration. *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993). To be admissible, the scientific evidence must have "'attained sufficient scientific and psychological accuracy ... [and] general recognition as being capable of definite and certain interpretation.'" *Stokes v. State*, 548 So. 2d 188, 193 (Fla. 1989), *quoting Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). By its very nature, the "mock jury" fails to qualify as scientific evidence at all, let alone scientific evidence that satisfies *Frye.*

Hildwin seems to take the position that the "scientific principle" for *Frye* purposes is the use of a "mock jury simulation." However, Hildwin has identified **no** case in which such a "mock jury simulation" was considered as substantive evidence. Instead, the cases which discuss "mock juries" do so in the context of their use in pre-trial preparation or as component parts of social science research. *People v. Randolph*, 2003 Mich. App. LEXIS 2216 (2003); *Clayton v. State*, 63 S.W. 2d 201 (Mo. 2001); *State v. Wilkins*, 131 N.C. App. 220 (1998); *see also, McCleskey v. Kemp*, 481 U.S. 279 (1987); *Ballew v. Georgia*, 435 U.S. 223 (1978); *United States v. Piccinonna*, 885 F.2d 1529

(11th Cir. 1989). No court appears to have allowed "mock jury" evidence to be used as substantive evidence of any sort, much less in the "new evidence" context this case presents.

Because Hildwin can identify no Court that has allowed "mock jury" testimony as substantive evidence, he falls short with respect to the general acceptance component of *Frye*. While mock juries may be "generally accepted" trial **preparation** tools, and while mock juries may be useful as a component part of research, their usefulness ends at the courthouse door. Hildwin would have this Court allow him to transform a trial preparation tool into substantive evidence which invades the province of the finder of fact.

Mock juries lack critical factors present in a "real" jury, such as *voir dire*, an oath, and, perhaps most significantly, the realization that what they are participating in is not pretend, but, instead, is very real, with very real consequences to the parties. None of those factors are present in the "mock juries" Hildwin would have this Court use as a basis for reversal of his conviction and sentence, and, because that is so, Hildwin cannot make out the "general acceptance" component of *Frye*.

Moreover, Hildwin cannot demonstrate that the procedures used in this case, **which do not appear to have included any adversarial testing whatsoever**, are generally accepted in the use of mock juries in general or in the particular context of

this case. Hildwin repeatedly tells the Court that mock juries are often used in "high stakes" cases. Assuming the truth of that assertion, it follows that counsel in such a "high stakes" case (which, for the sake of argument, is assumed to be a suit for money damages) wants to receive the most accurate assessment of the case that is possible. To that end, counsel would presumably attempt to fully and fairly present the case to the mock jury in a legally appropriate manner, with adherence to the rules of evidence and without arguing inadmissible or improper matters. Otherwise, the result of the jury simulation would be worthless, because it would not replicate, as nearly as possible, an actual trial.

In the "mock jury simulations" conducted in this case, it does not appear that any attorney participated in the presentation to the "mock juries," and, moreover, various components of the "revised" defense case are either objectionable or an inaccurate representation of the events. Specifically, Hildwin's "revised" case is based on the premise that the State argued this case as a rape case - - that is simply not supported by the record. Moreover, Hildwin cannot resist the temptation to attack the State by accusing them of using false evidence (the secretor/non-secretor evidence) in a prior trial. Whether such argument or evidence is even admissible is highly unlikely, and Hildwin's use of improper

evidence and argument taints the "results" of the "mock jury simulations," and, for *Frye* purposes, demonstrates that the methodology employed in this case does not comport with generally accepted "mock jury simulations." The legally inappropriate and slanted presentations employed by Hildwin taint the "results" to the extent that they cannot meet the "general acceptance" prong of *Frye.*

To the extent that further discussion of the *Frye* component is necessary, "mock jury simulations" are fundamentally different in character from scientific evidence such as DNA evidence evidence, fingerprint evidence, or firearm and toolmark examination. Those "traditional" types of scientific evidence are completely different in character from the "social science" evidence Hildwin would have this Court consider. Despite his efforts to color it to the contrary, the "mock jury simulation" is **not** the result of hard science, but rather is an unscientific and biased product generated after a "staunch opponent of the death penalty"[26] condensed a week-long trial into a three-page summary and presented inadmissible and improper defense arguments to a group of individuals who had been told they were participating in an academic exercise. The "mock jury simulation" cannot satisfy the *Frye* standard, and is

26 *Memorandum of Law*, App. F, at 2 (R378).

inadmissible for that reason in addition to the other deficiencies discussed herein.

The "mock jury simulation" testimony does no more than attempt to tell the Court how to decide the case.

> "There are no facts that count."
> Harvey Moore. (R385).[27]

Under the Rules of Evidence, the testimony of an expert witness is admissible if it will assist the trier of fact in determining a **fact** in issue. § 90.702, *Fla. Stat.* While opinion testimony is not objectionable "because it includes an ultimate issue to be decided by the trier of fact," § 90.703, *Fla. Stat.*, that does not mean that opinion testimony which tells the trier of fact **how** to decide the case is admissible. *See, Martinez v. State*, 761 So. 2d 1074, 1079-80 (Fla. 2000); *Tingle v. State*, 536 So. 2d 202 (Fla. 1988); *Rivera v. State*, 807 So. 2d 721 (Fla. 1st DCA 2002). In this case, Hildwin asserts that there is a "great probability" that he would have been acquitted at trial had the DNA evidence been available to him. *Initial Brief,* at 7. That is, in Hildwin's words, "precisely the issue in" this case, *Initial Brief*, at 13, and is precisely why the "opinion" testimony is inadmissible. Hildwin's "mock trial" evidence is

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27 Harvey Moore is the person who conducted the mock jury proceedings, and is the person Hildwin wants to qualify as an "expert." Given the extremely limited facts presented to the mock juries, Mr. Moore apparently took this statement to heart in this case.

analytically no different from allowing a police officer to testify that, in his opinion, the defendant is guilty, or from allowing a witness to testify that a crime victim was telling the truth. *See Martinez, supra.* That sort of opinion testimony is clearly inadmissible because it does no more than tell the factfinder how to decide the case. Hildwin's "mock jury simulation" testimony is no different because it purports to tell this Court that there is a "great probability of acquittal" with the DNA evidence. That opinion was reached without applying the *Jones* standard at all -- *Jones* requires consideration of the evidence from **trial**, along with the "new" evidence. Hildwin ignored the correct standard and replaced it with a speculative version of how a new **trial** might be conducted. That is not how new evidence claims are evaluated. This opinion testimony is inadmissible, and should not be considered for any purpose.

The "mock jury simulation" is the basis for impermissible opinion testimony concerning a legal conclusion.

> "I don't need to know anything about the system." Harvey Moore. (R386).

In addition to being improper testimony which does no more than attempt to tell the factfinder **how** to decide the case, the "mock jury simulation" testimony also violates § 90.703 because Hildwin wants to offer opinion testimony about a legal

conclusion (*i.e.*, the likelihood of an acquittal) through the testimony of an individual who is not an attorney.28 Hildwin is attempting to offer opinion testimony on a question of law -- that is improper because it invades the province of the finder of fact. *See, Lee County v. Barnett Banks,* 711 So. 2d 34 (Fla. 2nd DCA 1997); *In re Estate of Williams,* 771 So. 2d 7, 8 (Fla. 2nd DCA 2000). The "mock jury simulation" testimony is inadmissible.

This "evidence" is not, contrary to Hildwin's assertion, similar to an attorney testifying in a postconviction proceeding about whether trial counsel was "ineffective" for Sixth Amendment purposes.[29] While such testimony also invades the province of the finder of fact because it is opinion testimony as to a legal conclusion that attempts to tell the Court how to resolve the legal question in the case, an attorney is at least **qualified** to offer a legal opinion by virtue of education and experience.[30] In this case, Hildwin is attempting to offer **lay**

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28 This is not competent evidence because it did not use the *Jones* "new evidence" standard -- instead, Hildwin "retried" the case on a new theory before the mock juries. In doing so, the cumulative nature of the *Jones* standard was completely ignored.

29 The fact that some circuit courts have allowed such attorney testimony does not control the issue -- the testimony at issue in this case is not comparable.

30 When an attorney offers opinion testimony concerning the effectiveness of another attorney, the testifying attorney is

opinion testimony concerning a legal conclusion -- that is improper, and it stands reason on its head to suggest that a **lay** sociologist is qualified to offer an opinion on a legal conclusion. In this case, **lay** "mock" jurors have considered **selected** (and heavily edited) parts of the record and purport to have reached a **legal** conclusion as to whether the "new evidence" would change the outcome at trial. Hildwin wants to present that "legal" conclusion (which is based entirely on hearsay) through the testimony of a sociologist, who is not qualified to offer a legal opinion, either. Hildwin's theory invades the province of the finder of fact, is inadmissible opinion testimony under any interpretation, and should not be allowed.[31]

Would the "mock jury simulation" testimony be admissible if offered by the state?

It is axiomatic that the Constitution does not require one-sidedness in favor of the defendant, and it is equally clear that the rules of evidence are not suspended for the benefit of

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qualified to offer such testimony. The question is whether that testimony invades the province of the factfinder.

31 It goes without saying that Circuit Court judges reach legal conclusions in deciding postconviction cases, and that the defendant has no right to have his collateral proceeding assigned to the judge who presided over his original trial. That, however, is different from what Hildwin seeks to do here -- lay "mock" jurors who did not even hear all of the evidence are not qualified under any circumstances to render an opinion on the effect of any new evidence, and a sociologist is not qualified to do so, either.

a capital defendant. In other words, "[w]e do not have one set of rules for petitioners and their attorneys in capital cases and another set for everyone else." *Jackson v. Crosby*, 375 F.3d 1291, 1300 (11th Cir. 2004) (Carnes, J., concurring). Both Hildwin and the State are entitled to fundamental fairness, and, because that is so, the State poses the question of whether Hildwin and his *amicus* would object to the State presenting evidence of a "mock jury simulation" which reached a result contrary to that reached by Hildwin's study. Or, stated another way, if Hildwin's "mock jury" was found to be admissible, would such a study conducted by the State likewise be admissible? Obviously, if such a study is admissible, it makes no difference which party conducted it. If that is the case, and it requires no leap of logic to conclude that if the defendant could offer such testimony the State could too, then the respect that has traditionally been afforded the verdict of a duly sworn jury no longer exists. If the duly-arrived-at verdict of a jury that was selected following *voir dire*, that heard and observed the witnesses, that was properly instructed on the law by the Court, and that reached its verdict following deliberation can be challenged by a "mock jury" that is not selected by both parties, that hears only a summary of the evidence, and that is not even instructed on the applicable law, then the jury system as it exists is rendered meaningless. The jury itself is the

heart of the judicial system, and Hildwin's theory that a "mock jury" can destroy the verdict of a duly-sworn jury strikes directly at the heart of that system and is fundamentally inconsistent with it. The Circuit Court properly refused all "expert" testimony based upon the "mock jury".

III. THE "FATAL VARIANCE" CLAIM.

On pages 83-91 of his brief, Hildwin argues that the collateral proceeding trial court erred in finding the "constructive amendment/fatal variance" claim procedurally barred. This claim, which relates solely to the guilt phase of Hildwin's capital trial, could have been, but was not, raised at trial, on direct appeal, or in Hildwin's prior post-conviction proceedings. Despite the hyperbole of Hildwin's brief, this claim has never been raised before, whether as a substantive claim, or as one of ineffective assistance of counsel.[32] In denying relief on this claim, the collateral proceeding trial court stated:

> (1) Defendant's claim of denial of due process should have been raised in earlier pleadings, and cannot be addressed in this successive motion, and therefore is procedurally barred; and
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> (2) Even if the claim were not procedurally barred, Defendant presents no clear and identifiable claim. He alleges "fatal variances" between the indictment and

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32 In addition to Hildwin's failure to raise this claim on direct appeal from his conviction, he did not raise it in his first Rule 3.850 motion or in his state habeas corpus petition. *Hildwin I, supra*; *Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995).

> the evidence presented at trial, but there is nothing in his motion to substantiate a claim regarding the validity of the indictment. He was indicted for, and tried and convicted on, a charge of first degree murder. He was afforded due process and there were no "fatal variances and/or constructive amendments."

(R426). Hildwin did not timely raise this challenge to his conviction, and, under settled Florida law, is procedurally barred from raising it now. Rule 3.850(c)(6), *Fla. R. Crim. P.* The collateral proceeding trial court properly denied relief on the alternative grounds of procedural bar and no merit -- that disposition should be affirmed.

IV. THE "CUMULATIVE ERROR" CLAIM

On pages 92-98 of his brief, Hildwin argues that he is entitled to relief based upon "cumulative error" occurring at all stages of his capital trial. This claim appears to focus on what is now described as "new evidence" from Hildwin's prior post-conviction proceeding. However, Hildwin fails to disclose to this Court that what he has now labeled "new evidence" was litigated in the prior proceeding as a *Brady* claim which was decided adversely to him. This claim is procedurally barred, as the circuit court found.

In denying relief on this claim, the trial court stated:

> (e) *Claim V: Mr. Hildwin's convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and/or improper rulings of the trial court, in violation of Mr.*

Hildwin's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

(1) As the Defendant, himself states, this claim is a "catch-all." It contains numerous allegations that were or should have been brought in the original appeal or previous motions, and cannot now be again reviewed. This appears to be Defendant's attempt for a second (or third) bite at the apple, and cannot be allowed; and

(2) Interestingly, in Claim IV the Defendant alleges that the *Jones* standard is speculative, inappropriate and unconstitutional, yet in Claim V asks this Court to conduct a "cumulative" *Jones* analysis in reconsidering and vacating his conviction and sentence; and

2) This Court has spent a great deal of time reviewing the transcripts in this case, and has noted the total lack of truthfulness and veracity in statements and testimony of the Defendant, which obviously did not escape the *jury.* The trial transcript indicates, in part, that:

The Defendant told several different versions of how he met up with the victim on the date in question, and what occurred thereafter, sometimes involving other persons in his stories.

The Defendant told various stories about whether he was acquainted with either the victim or her boyfriend, at first denying he knew either, then indicating he knew them slightly, then progressing to the point that he indicated the victim was well-enough acquainted with him that she "loaned" him her radio and "loaned" him money, in the form of a check, both of which he later admitted were lies, because he stole those items from her.

The Defendant first alleged that the victim's radio had been loaned to him by the victim because his car radio didn't work, then admitted his car radio did work, but she still loaned him the radio, then finally admitted, after it was found in his home, that he had stolen it.

$As to the forged check, he first alleged that the victim wrote it out and gave it to him as a loan, then he said that a third party had torn it out of her checkbook and given it to him, and finally he admitted that he had stolen it from her purse, and forged and cashed it.

$As to the victim's pearl ring, which was found in the Defendant's home, the victim's sister testified that the victim treasured the ring, but the Defendant alleged he *found it* in the garbage, then later indicated he found it in the victim's checkbook so he stole it along with the check.

$The Defendant indicated in one of his stories that he was riding with the victim and her boyfriend when they got into an argument and the boyfriend hit her and was choking her, at which time the Defendant left them and walked away, inferring the boyfriend killed the victim. The boyfriend denied even knowing the Defendant.

$Further, the Defendant indicated that the person who killed the victim had a cross tattoo on his back. The boyfriend had no such tattoo; however, testimony indicated, in fact, that it was the Defendant who had a cross tattoo on his back.

$The death penalty was discussed at length, starting at *voir dire*. There were numerous references in the transcript to the charge of murder and the intent of the state attorney to seek the death penalty, so Defendant could not have been surprised.

$The Defendant denied driving the victim's car, but testimony was presented that a hair found on the left front seat of the vehicle (the driver's seat) matched a hair taken from the Defendant's head.

3) There were numerous *conflicting and* inconsistent statements, and outright lies admitted to by the Defendant, which, along with the evidence and testimony presented, were sufficient for the jury to return a unanimous verdict of guilty at trial, even without the secretor/nonsecretor testimony.

(R427-28). The trial court’s denial of relief should be

affirmed in all respects.

To the extent that further discussion of this claim is necessary, this Court decided the previously-raised *Brady* claim in the following way:

> Hildwin argues that the State withheld exculpatory evidence in derogation of *Brady.* [FN6] Alternatively, Hildwin contends that his trial counsel was ineffective for failing to discover that evidence.
>
> > FN6. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
>
> In order to establish a *Brady* violation, Hildwin would have to prove: (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to Hildwin, a reasonable probability exists that the outcome of the proceedings would have been different. *See Hegwood v. State,* 575 So. 2d 170, 172 (Fla. 1991). In denying Hildwin's *Brady* claim, the trial court concluded:
>
> > There is no indication, based on the evidence presented at the **3.850** hearing, that any evidence was withheld from the Defendant; and certainly no evidence was presented at the **3.850** hearing that any evidence Defense counsel claimed he did not receive and did not otherwise have access to, would have with "reasonable probability" changed the result.
>
> We agree. In fact, five witnesses testified that the State's entire file was made available to defense counsel. The record simply does not support Hildwin's *Brady* claim.
>
> Hildwin's *Brady* claim is no more persuasive recast as an ineffective assistance of counsel claim. In order to prevail on his ineffective assistance of counsel claim, Hildwin must demonstrate that his trial

> counsel's performance was deficient and "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). There was overwhelming evidence of Hildwin's guilt presented at the trial. Therefore, assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that the outcome of the trial proceedings would have been different had this evidence been presented.

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). If there was no *Brady* violation, and the law of the case is that there was not, Hildwin's "new evidence" variant of that claim fails, as well. The collateral proceeding trial court properly denied relief on procedural bar grounds, and that finding should be affirmed.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Circuit Court's order denying relief should 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 has been furnished by U.S. Mail to: **David Dixon Hendry,** CCRC – Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, **Nina Morrison**, Esq., Staff Attorney, The Innocense Project, Inc., 100 Fifth Ave., 3rd Floor, New York, NY 10011, and **Milton Hirsch,** Two Datran Center, Suite 1200, 9130 South Dadeland Blvd., Miami, Florida 33156 on this __________ day of April, 2004.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

____
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