IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1264

PAUL HILDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

Paul Hildwin was originally tried and convicted in 1986 for the first degree murder of Vronzettie Cox and sentenced to death. During the trial, the State utilized biological evidence secured at the crime scene and expert testimony regarding blood-types to argue that the Defendant raped and murdered the victim. In 2001, newly discovered DNA testing obtained in latest rounds of postconviction excludes Paul Hildwin as the donor of subject biological samples (PC current ROA Vol. I, 00065-00068), thus revealing that he was wrongly convicted and is actually innocent of the crime charged.

At trial in 1986, the State argued that panties and a washcloth recovered at the crime scene contained semen and saliva matching the blood characteristics of the defendant. The State informed the jury through expert testimony that the semen and saliva found on the panties and washcloth came from a non-secretor. The State successfully argued that because male non-secretors make up only 11% of the population, Paul Hildwin was obviously the perpetrator due to his status as a male non-secretor. At a resentencing hearing in 1996, the jury inquired, AWas the victim raped?@ This question could not be answered due to the unavailability of DNA evidence. This Court, in analyzing the facts of the case stated on direct appeal, **A[the victim] was brutally attacked, as evidenced by the torn bra found with the body...the evidence points convincingly to a conclusion that the appellant**

abducted, raped, and slowly killed his victim@). Hildwin v. State, 531 So.2d 124 at 128 (Fla. 1988). We know now due to DNA testing that this conclusion is incorrect. The facts of the guilt phase of this case were summarized as follows by this Court on direct appeal:

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 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 a 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.
[Hildwin, Id. At 125-126]

Not mentioned in the above summary was a statement allegedly made to law enforcement wherein the defendant told an Investigator Phifer that after the perpetrator choked the victim, the perpetrator wiped his face with a wash rag. This was emphasized in the state's closing argument at (Dir. ROA Vol. VI 971-2) as the state argued that Paul Hildwin was the actual killer with the tattoo on his back, and Paul Hildwin (a non-secretor) was the actual killer as evidenced by serology testing showing that saliva from a non-secretor was found on the washcloth recovered from the crime scene.

Due to newly discovered DNA evidence in this case, the Defendant should be afforded a new trial, or in the alternative, a full and fair evidentiary hearing based on the newly discovered DNA evidence and mock trial studies showing support for his claims. This appeal concerns the lower court=s AOrder Denying Amended Successive Motion to Vacate Judgment of Conviction and Sentence.@ (PC current ROA Vol. III, 00422-00430). The Defendant urges this Court to reverse the aforementioned ruling and afford the Defendant a fair trial.

Note Regarding References

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Dir. ROA Vol I, 123). References to the record of the most recent postconviction record on appeal are in the form, e.g. (PC current ROA Vol. I, 123). There was a previous collateral postconviction proceeding in this case, and references to the record in the appeal of the trial court=s denial of postconviction relief in that proceeding are of the form, e.g. (PC past Vol I, 123). On appeal, the case was reversed for a resentencing proceeding before a jury. References to the record on appeal of that proceeding are of the form, e.g. (Resentencing, Vol I, 123). Generally, Paul Hildwin is referred to as Athe defendant@ throughout this motion. The Office of the Capital Collateral Regional CounselB Middle Region, representing the defendant, is shortened to ACCRC.@

SUMMARY OF ARGUMENT

ARGUMENT I: Newly discovered DNA evidence establishes that Paul Hildwin is innocent of first degree murder, and the circuit court erred in holding that the newly discovered DNA evidence does not warrant a new trial.

ARGUMENT II: The circuit court erred in refusing to consider the Appellant=s mock

trial exercises and related sociological evidence, primarily based on Frye. This ruling deprived the Appellant of postconviction due process.

ARGUMENT III: The circuit court erred in holding that constitutional claims regarding constructive amendments and fatal variances in the indictment were procedurally barred.

ARGUMENT IV: The cumulative effect of the errors that occurred during Mr. Hildwin=s trial and postconviction proceedings violated his constitutional rights. The circuit court clearly erred in refusing to consider evidence presented at a prior evidentiary hearing, thus depriving him of a required cumulative analysis.

ARGUMENT I

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

Standard of Review.

This Court has outlined two requirements needed to receive relief based on newly discovered evidence.

> First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman v. State, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). In reviewing newly discovered evidence claims, this Court gives deference to the circuit court=s findings of fact if they are supported by competent and substantial evidence. Melendez v. State, 718 So.2d 746, 747 (Fla.1998).

Paul Hildwin has been serving over eighteen years on Florida=s death row for a crime of which he was falsely accused, a crime of which misleading evidence was presented at trial to obtain his conviction. Paul Hildwin did not rape and murder Vronzettie Cox as Aproven@ at trial.

Paul Hildwin has been excluded through 21st Century DNA testing as the donor of biological evidence secured at this 1985 crime scene. This same biological evidence was utilized at trial by the state to secure his wrongful conviction. At trial in 1986, the state informed the jury in their opening statement that Paul Hildwin deposited semen and saliva found on the victim=s panties and washcloth located at the crime scene:

> AFinally taken from that laundry bag was a pair of women=s clothing sitting on top of the laundry bag, a pair of women=s panties and a wash rag. Now, on those panties was some semen and it has the same blood characteristics that the defendant has. And there will be an expert from the FBI to testify to you about that. On the wash rag there are characteristics of human sweat that is consistent with this defendant.@ (Dir. ROA Vol. II 223-4).

Ultimately the jury was told by state witnesses that the biological evidence matched only that 11% of the male population that included Paul Hildwin due to Mr. Hildwin=s unique status as a non-secretor. We now know that the jury was misled to believe, and mistakenly believed, that the biological evidence secured at the crime scene matched the Appellant. If the jury would have heard in rebuttal the information concerning the newly discovered DNA evidence excluding Mr. Hildwin as the source of the DNA, this would have created reasonable doubt and the jury would have

acquitted.[1]

Years ago the Appellant moved that the lower court authorize the release of State=s Exhibits 59 and 60 for the purpose of DNA testing, and the lower court granted this request without objection from the state under Fla. Rule Crim. Proc. 3.853 by order dated June 10, 2002. In accordance with the order, the testing was performed by American Society of Crime Laboratory Directors-certified laboratory Orchid Cellmark rather than FDLE. On January 29, 2003, Orchid Cellmark generated a report which included the finding: APaul Hildwin is excluded as the source of the DNA obtained from [the submitted panties and washcloth].@ (see PC current ROA Vol. I, 00065-00068).

The following is an excerpt from the state=s closing argument:

Inside that purse was a lady=s brassiere. There=s something very interesting about this, and I want you folks to examine this item. This was not taken off. This was not taken off by anyone during a consensual sex act that involved choking. This is not a consensual sex act. Look at the brassiere. This thing has been literally ripped off. There is nothing consensual about this. This is in shreds. You can still see where one

[1]In Jones v. State, 591 So.2d 911 (Fla. 1991), the Florida Supreme Court held that successive Rule 3.850 motions could be premised upon newly discovered evidence of innocence. To establish an entitlement to relief, Athe newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.@ Id at 591 So.2d at 915 (emphasis in original). Given the facts of the instant case, and the arguments of the state regarding rape and murder, weighed against the conclusive new scientific proof that the defendant did not in fact rape and murder the victim, an acquittal on retrial in light of the newly discovered DNA evidence is most probable.

of the hooks is still in the eyelet and the other one is torn completely out and the other one is ripped off. This is not a consensual act. This is one of those arrows that Mr. Lewan threw up in the air.

Agent Reem testified about the blood test, the serology test, the secretor/non-secretor evidence, and he told you that some people are what he calls secretors, meaning that they secrete ABO or ABH factors into their other bodily fluids and others don=t. Eleven percentBonly eleven percent of the white male population are secretors, meaning eighty-nine percent are not. Bill Haverty is a secretor. In other words, his semen and his saliva would exhibit the ABH factors. The defendant, Paul Hildwin, is not a secretor. His saliva and semen would not exhibit the ABH factors. You=ll have the little chart that he made and you can look at it.
What=s interesting about that is that on these panties were foundBthese panties were found in the car on top of the laundry, Sergeant Haygood testified to, not in the laundry, on top of the laundry. These panties contained semen that is consistent with the non-secretor 11 percent of the white male population, consistent with the defendant in this case and not consistent with Bill Haverty. This wash rag had saliva from a non-secretor consistent with Paul Hildwin, the defendant, not consistent with Bill Haverty.

And before we go any further, remember the statement that the defendant made to Investigator Phifer that afterBafter Vronzettie Cox was choked to death, the man that did it washed his face with a white rag.[2]
(Dir. ROA Vol. VI 971-2)

Simply stated, Mr. Hildwin should be afforded a new trial because of the following hypothetical scenario: go back to the time of trial, and let=s say that the state has presented all of it=s evidence, including the testimony from the nurses, the blood

[2]Had the defense been able to present the newly discovered DNA evidence to the jury, they would not have viewed Paul Hildwin=s statements to law enforcement as Aconfessions,@ they would have known that Paul Hildwin was not responsible for the rape and murder of Vronzettie Cox, the state=s theory of the case would have been completely refuted, and the jury would have acquitted.

drawers, the FBI serological experts, the Agent Reems= exhibit (the chart introduced into evidence) which shows that Mr. Hildwin=s blood-type matches that 11% of the non-secretor male population that ripped the bra off of the victim, raped her, then deposited his semen and saliva at the crime scene before he murdered her. Now the state rests. Before the defense opens their case, a report magically falls from the courtroom ceiling and lands on defense counsel table: it=s the Orchid Cellmark DNA Report excluding Mr. Hildwin as the donor of the semen and saliva recovered at the crime scene (PC current ROA Vol. I, 00065-00068). Should counsel use this report and this newly discovered evidence in its defense? Absolutely. Might it make a difference in the case? Absolutely! The report completely refutes all of the state=s scientific and serological evidence presented by the state in advancing their theory of guilt. Continuing with the hypothetical scenario, after the defense presents this DNA evidence to the jury and it is accepted, it=s time for closing arguments. The state stands slowly, and sheepishly attempts the following in closing argument: AForget everything we said in this trial about panties, washcloths, semen, saliva, secretors, and non-secretors. Paul Hildwin is guilty of murder because he was in possession of the victim=s purse and jewelry, and our jailhouse snitch told you that Mr. Hildwin said that he stabbed the victim.@ Now the jury ponders, thinks back on the testimony, and is then reminded by defense counsel in closing argument of the non-refutable exculpatory DNA evidence excluding Paul Hildwin as the donor of the semen and

saliva recovered from the crime scene. Regarding the jailhouse snitch=s testimony, defense counsel reminds the jury that the medical examiner stated that the victim was strangled to death, not stabbed to death. As a matter of fact, there were no stab wounds mentioned at all during the trial. Hypothetically, how would the jury vote? Could 12 people agree after hearing about the newly discovered DNA evidence that Paul Hildwin is guilty of first degree murder, considering that the state placed before them completely misleading scientific evidence and a jailhouse snitch who didn=t even know the cause of death? Would those 12 people even reach a penalty phase proceeding after hearing the newly discovered DNA evidence? Would it make a difference to the jury that the state=s theory of the case is now implausible and impossible due to new and improved science?

At the guilt phase of trial the state introduced a pair of semen-stained women's panties and a saliva-stained wash rag. These items were found on a laundry bag at the crime scene in the victim=s car. State=s Exhibits 60 and 59 respectively (Dir. ROA Vol. IV 697-99). Analysis showed the semen and saliva came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Hildwin, a white male, was found to be a nonsecretor. There was testimony that white male nonsecretors Aprobably@ make up only eleven percent of the population. The prosecution used this evidence in closing argument at the original trial to argue that Hildwin raped and then killed the victim. (Dir. ROA Vol. VI 971-72). At Hildwin=s resentencing proceeding in

1996, after some deliberation, the jury came back with several questions. The jury=s very *first* question was: AWas the victim raped?@ (Resentencing, Vol. XI, 956). Had the exculpatory DNA evidence been available to the jury at the original trial, Paul Hildwin would have been acquitted of first degree murder. Had the exculpatory DNA evidence been available to the jury at the 1996 resentencing proceedings, the jury obviously would have recommended a life sentence considering their first burning question that could not be answered.

It is clear that this case carried with it the explicit allegation of a sexual battery. The state=s theory at trial was rape/murder. The state offered the following at a bench conference:

> AJudge, first of all, I feel that the evidence that=s going to come out in this case showing this victim unclothed with a ligature around her neck, with her legs bent over her head and forced into the trunk of a car, her clothes found in various areas in the county, a reasonable inference can be made that a sexual assault occurred and we certainly intend to argue that if the evidence supports it.@
> (Dir. ROA Vol. I 181).

It became very clear on the first day of trial that the state intended to argue that the victim was raped and murdered by Paul Hildwin. Assistant State Attorney Thomas Hogan stated, AI don=t anticipate standing up or Mr. Cole standing up and screaming sexual battery. But when we get to the point in the trial where enough evidence has been put before the jury within a reasonable inference that a sexual battery occurred, we intend to refer to it.@ (Dir. ROA Vol. I 185). Not only did the state Arefer@ to this

case being a rape/murder, but they made the alleged rape a focus of the trial. Consequently, the jury was deceived and Mr. Hildwin=s conviction was secured through the use of erroneous scientific evidence. Had the jury known of the newly discovered DNA evidence, they would have acquitted Mr. Hildwin.

Florida has no cases directly on point on the issue of whether newly discovered DNA evidence warrants a new trial.[3] But the legal standard for a new trial based on newly discovered evidence is largely consistent throughout the nation, and is consistent with the Florida standard found in Jones. In the case of Commonwealth v. Reese, 663 A. 2d 206 (Pa. Super. 1995), the Superior Court of Pennsylvania affirmed a lower court=s decision granting a new trial for the appellant in light of newly discovered DNA evidence. In Reese, the appellant was found guilty of rape, kidnapping and related offenses.[4]

[3]*But* see Manual v. State, 855 So.2d 97 (Fla. 2d DCA 2003) (reversing order denying motion for postconviction DNA testing because there was a Areasonable probability that defendant would have been acquitted@ had the DNA evidence demonstrated that semen found on a washcloth did not match the defendant=s DNA), and Huffman v. State, 837 So. 2d 1147 (Fla. 2d DCA 2003) (held, notwithstanding other evidence of defendant=s guilt, denial of defendant=s motion for DNA testing was error)

[4]The original trial took place in 1982. The state alleged that the victim was driving her vehicle when another vehicle approached from behind and started flashing its lights. Thinking it was her boyfriend, the victim pulled off the road. The state alleged that the appellant stopped, approached the victim=s car, opened her door, grabbed her wrists and directed that she drive to a remote area. Thereafter, the victim was sexually assaulted.

During the Reese postconviction process, a court authorized the appellant=s request for DNA testing. In part, the court authorized the DNA testing because it had Aexculpatory potential@ and the results would not be cumulative. The DNA testing revealed that the appellant was excluded as the depositor of any of the forensic evidence that was discovered in the case. Accordingly, the court who authorized the DNA testing set aside the appellant=s conviction and ordered a new trial.

The Commonwealth appealed and argued that DNA testing was not appropriate in the first place. The Court rejected this argument. The Court reasoned that although there was an in-court identification by the victim, and notwithstanding that the assailant and the victim were together for a substantial period of time in close proximity during the alleged attack, they were in a dark isolated area, and the victim was unable to describe the assailant=s facial features to the police. The Court also noted the lack of corroborating physical evidence. In the case at bar, the victim was killed so there was no victim identification of her assailant. Moreover, the state=s

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In addition to the victim=s identification of the appellant and other evidence, the evidence included the testimony from a chemist who related that the victim=s underwear was submitted to him for analysis, and tests showed that the underwear contained stains indicating the presence of seminal fluid containing spermatozoa. No further tests were conducted on the panties because at the time (1982) there was no further test available and accepted in the scientific community which could determine if the appellant was the depositor of the semen within a reasonable degree of medical certainty. The appellant was convicted and the case was affirmed on direct appeal.

evidence against Paul Hildwin was entirely circumstantial. Other than the misleading scientific evidence, the state had no physical evidence linking Paul Hildwin to the murder. Reese is a significant case because even though an in-court identification by the victim was made, and even though the semen was not *matched* to the defendant to any degree of probability, the Court found that the exculpatory DNA evidence would be significant enough to create reasonable doubt which could secure an acquittal. They reasoned that had the DNA tests been inculpatory rather than exculpatory, the Commonwealth=s case against the appellant would have been strengthened.

In the case at bar, there obviously was never an in-court identification of Paul Hildwin by the victim. As such, the DNA results in the Paul Hildwin case are even more significant and meaningful than the results in the Reese case when weighed against the circumstantial evidence produced at trial. And perhaps most importantly, at trial in Reese, the chemist did not testify that the semen on the victim=s panties matched that of the defendant=s semen. Rather, the chemist only testified that the panties were stained with generic semen. At the Hildwin trial, an FBI serology expert Agent Reems stated that the victim=s panties and washcloth were stained with semen and saliva matching the characteristics of Paul Hildwin. As such, the newly discovered DNA evidence in the case at bar holds much more exculpatory value than that in the case of Reese.

Any anticipated argument by the state that the Court should consider strategical

changes that the state may make in light of the newly discovered DNA evidence is flawed. Reese explains:

The Commonwealth sought to offer evidence from the police who spoke to the victim after the attack and were advised by her that the assailant complained to her that he was unable to ejaculate during the assault. It also sought to have the court hear testimony from the victim. The Commonwealth wished to establish through her testimony that in 1982, at the time of the crime, she had a live-in boyfriend with whom she was having sexual relations on a regular basis. It was claimed by the Commonwealth that this testimony should be heard by the court because it would rebut the claim that the DNA test results were truly exculpatory. The Commonwealth reasons that if the court were to accept the testimony establishing that the rapist did not ejaculate and that the victim was regularly engaging in sexual intercourse with her boyfriend at the time of the rape, then it would not follow that the DNA test results excluding Appellee as the depositor were exculpatory. Rather, it argues this evidence would offer a reasonable explanation as to why Appellee was not linked through the DNA testing to the seminal fluid obtained following the victim=s hospitalization.

The weakness with the Commonwealth=s argument rests in the fact that the evidence it sought to have the PCRA court review was not evidence which was introduced and heard by the jury trial. The jury was not advised of the assailant=s comment and was not told about the victim=s sexual activity. However the jury did hear testimony in which the victim detailed the attack, and identified Appellee as the attacker. The jury was also advised that seminal fluid samples were obtained from the clothing worn by the victim the night of the attack. The clear implication of the evidence offered at trial was to corroborate the victim=s account of the evening and testimony of a sexual assault by Appellee. Because the jury did not hear evidence of other explanations for the deposit of the seminal fluid, it would have been improper for the PCRA court to have considered it when examining whether the DNA evidence was exculpatory and whether it would likely have resulted in a different verdict if admitted at trial. The narrow issue before the PCRA court properly restricted the evidence during the hearing to that which was relevant to this question. While the Commonwealth=s proposed evidence may in fact be proper rebuttal testimony in a new trial, it was irrelevant to the matter under consideration before the PCRA court.

The award of a new trial in this case was made based upon the exculpatory nature of the DNA test results and the conclusion that this evidence was not cumulative and would likely have affected the outcome of the trial had it been introduced. As stated,

the jury was advised that seminal fluid was found on the victim=s clothing following the attack, but because scientific developments had not yet made it possible to perform accurate and precise DNA testing, the jury was not advised that Appellee could not have been the depositor of the seminal fluid. Nor was the jury advised that the perpetrator did not ejaculate. Because this information is so very critical, it was appropriate for the court to award a new trial. Only under these circumstances can we be assured that the Ainterests of justice@ have prevailed.
[Reese at 209-10]

Just as in Reese, the state should be precluded in its attempts to diminish the significance of the newly discovered DNA evidence by suggesting an alternate theory of prosecution. The evidence presented at trial is the evidence presented at trial, and the state cannot now attempt to wipe the slate clean or create a new evidentiary canvas and argue a theory that diminishes the significance of the newly discovered DNA evidence. Because the newly discovered DNA evidence absolutely rebuts the state=s evidence and arguments presented at trial, there is clearly a probability that this new evidence may result in an acquittal, and therefore Paul Hildwin should be afforded a new trial.[5]

[5]See also People v. Waters, 764 N.E. 2d 1194 (Illinois 2002) (held, trial court=s denial of defendant=s petition for new trial for sexual assault, based on newly discovered DNA evidence from urine stain on victim=s jacket, was improper; the act of urination was at the core of victim=s identification of defendant as one of her attackers, defendant acted with reasonable diligence regarding the DNA evidence, and the DNA evidence did not merely impeach or contradict the victim=s testimony, but was probative of a factual scenario different from that to which the victim testified). Like Waters, the newly discovered evidence in the case at bar is probative of a factual scenario different from that to which law enforcement testified and the state argued. The Court in Waters ultimately concluded, AWe conclude that the trial court abused its discretion in finding that the outcome of the trial probably would not have changed

Explicit references to a sexual assault were conveyed to the jury through the state=s opening statement, demonstrative evidence, graphic and suggestive photographs, key state witnesses, and the state=s closing argument. The message was delivered and the jury was persuaded by misleading scientific evidence presented through a respected expert from the Federal Bureau of Investigation. Due to scientific limitations, the defense was precluded from casting doubt on the state=s seemingly powerful evidence. One thing is absolutely crystal clear: the defendant received a fundamentally flawed and unfair trial. Due process and fundamental notions of fairness and justice require that the defendant be afforded a new trial and an opportunity to present the DNA evidence to a jury; alternatively, the defendant should be afforded a new trial where the state is precluded from relying on the false scientific evidence that was presented at his original trial.

As the state=s case progressed, the defense complained that they did not have an opportunity to depose the witnesses from the FBI regarding the purported blood

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upon a retrial even if the newly discovered DNA evidence were introduced. Accordingly, we reverse and remand for a new trial so that the trier of fact may have the opportunity to consider the DNA evidence. Our ruling, however, in no way limits the State from conducting further investigation of the DNA evidence.@ Id at 1204.

See also State v. Hicks, 549 N.W. 2d 435 (Wisconsin Sup. Ct. 1996) (newly discovered DNA evidence warrants new trial).

evidence. The defense moved to exclude their testimony, and outside of the presence of the jury, the court then heard testimony from witnesses (investigators and secretaries) involved in the prior scheduling of the depositions of the FBI agents that trial attorney Lewan failed to attend for whatever reason. In regards to the anticipated testimony of FBI agents regarding blood evidence, Mr. Lewan stated the following on the record: A...they set [the depositions] and gave me insufficient notice...the reports furnished to me from the FBI regarding the evidence which I am concerned about at this time, which would beBand I=m still not sure what the evidence is. It=s either some evidence of semen or possibly saliva...I was unaware of [the evidence] until the opening statements by the prosecutor that there may be some evidence linking my client. And as of this time, I still don=t know what it is...I think if there is some evidence of some kind of bodily fluid from my client being present, discovery has failed to disclose until this point in the trial, I would consider it extremely prejudicial to my client.@ (Dir. ROA Vol. II 352-4). The judge ruled that a discovery violation had not occurred, and allowed the defense a day to depose the FBI agents.[6]

The misleading scientific blood evidence from the panties and wash rag was

[6]Ultimately, the purported blood evidence was introduced and became a crucial and key piece of physical evidence for the state in their circumstantial case against Paul Hildwin. Now eighteen years later we have learned that this false scientific evidence misled the jury at the original trial.

emphasized and bolstered by the state=s presentation and discussion of a tattered brassiere that was located in the victim=s discarded purse. Detective Danny Spencer testified on direct examination that the victim=s purse was found discarded in a some brush located approximately a quarter mile from the defendant=s home. (Dir. ROA Vol. III 536). The purse was introduced as state=s exhibit number 47 during the testimony of Danny Spencer. Lead Detective Ralph Decker was then recalled to the stand after the testimony of Detective Spencer.

When Detective Decker was recalled to the stand (Dir. ROA Vol. III 543), he described the discovery of a brassiere inside of the victim=s purse. The brassiere was entered as state=s exhibit number 48. In closing argument, the state argued to the jury that the condition of the bra conclusively demonstrated that the bra was violently ripped off of Ms. Cox by Paul Hildwin prior to the sexual assault and murder. The following testimony was presented to the jury when Detective Decker was recalled:

Q: Did you alsoBI show you what=s been admitted into evidence as State=s exhibit 47 [the purse], which was just introduced through the last witness, and ask if you recognize that?

A: Yes, sir, this is the purse.

Q: That purse was turned over to you by who?

A: By John Rolph.

Q: But of your knowledge, who found that purse?

A: Danny Spencer found it.

Q: And were you the one to examine the contents of that purse?

A: Detective Cramer and I examined it jointly.

Q: Okay, sir. Would you please look in the purse and see if there=s any identification in the purse?

A: Our examination of this purse consisted of opening it up, and we removed

one item which we placed on, the whole purse was placed on a white, clean sheet of paper, and we found this (indicating) within the purse.

Q: What does that say?

A: This is a social security card, one of the types you get custom-made, for Vronzettie Ickes, I-c-k-e-s, 275-40-7438.

Q: Replace that, please. I show you what=s been marked State=s Exhibit BB and ask if you recognize that.

A: Number one, this is the white piece of paper we used to examine this document on. My name and all is on it. And as we open it up, we find an item [the bra] I had wrapped in it, which we discovered inside that purse.

Q: This item [the bra] came from that purse?

A: Yes, sir.

Q: Does that item [the bra] appear to be in the same condition as when you retrieved it from the purse, when you retrieved it from item 47?

A: Yes, sir, it is.

Q: Has it changed in any significant way?

A: It [the bra] was wet when I examined it, but it=s dry now.

Q: But that [the bra] did come from the purse?

A: That came from the purse.

THE COURT: State want that into evidence?

MR. HOGAN: Apparently Mr. Lewan has something to say. I move it into evidence, item BB for identification.

MR. LEWAN: If I could have a moment, Judge.

MR. HOGAN: With the Court=s permission, I=m going to move on to other evidence while they=re researching orB

MR. LEWAN: Judge, I will be ready in just a second. May we approach, Your Honor?

(Whereupon, the following proceedings were held at the bench.)

MR. LEWAN: Judge, I object to this, for failure to disclose this to me.

MR. HOGAN: I can. I=d like a hearing, I=d like to put on evidence as to this. I have witnesses to that effect.

MR. LEWAN: Fine.

THE COURT: Let=s do it. We=ll take the jury out.

[Dir. ROA Vol. III 546-8]

The court then proceeded to a Richardson hearing outside of the presence of the jury. The state was attempting to introduce the bra, but the defense was claiming

that the state had failed to disclose this piece of evidence. In response, the state called investigator Bruce Haldeman to establish that the state did in fact share the evidence with the defense. The following exchange took place outside of the presence of the jury:

Q: Did you have an occasion to accompany the Defense attorney in this case, Daniel Lewan, to the Sheriff=s Department with new evidence?
A: Yes, sir.
Q: Do you recall specifically Mr. Lewan viewing a purse that=s been entered in this case, item 47, and more specifically, the contents of the purse, which were probably not in the purse at the time, but more specifically item BB for identification, which is a woman=s brassiere?
A: Yes, sir, I do.
[Dir. ROA Vol. III 549]

After the above exchange, Mr. Lewan argued to the court that although he may have examined a bra, he did not examine the particular bra that the state was seeking to introduce. (Dir. ROA Vol. III 550-1). After some further discussion and a recess, Mr. Lewan withdrew his objection and informed the court:

MR. LEWAN: Your Honor, at this time, I will withdraw the objection. I was confused for a moment because my property receipt, a copy of which here, shows a number with one, because the copier, on the copy I was given, didn=t put the S in their identification. In my notes, the number is W-1, which is the correct number. And, therefore, I do recall now having seen that piece and viewing it in evidence.
(Dir. ROA Vol. III 552)

The state was angered that the defense was accusing them of discovery violations. The state then informed the court that the defense was at fault for failure to ask the necessary questions during the depositions of the detectives:

MR. COLE: Well, Judge, I have a real problem, too, and I=d like to tell the Court. It seems to me that notwithstanding the fact that we have some evidence here, it would seem to me that when **a piece of evidence is found that appears to be as important as this**, such as a purse, that the germaine question might be, **what are the contents of the purse**.[7]

(Dir. ROA Vol. III 553, emphasis added)

The state has argued that the biological DNA evidence is insignificant because standing alone it is meaningless, and because of other purported evidence pointing to Paul Hildwin=s guilt. This argument is flawed because at trial, the state utilized the misleading scientific evidence in conjunction with Paul Hildwin=s purported incriminating statements to law enforcement in advancing their theory of guilt. Therefore, the newly discovered DNA evidence does not stand alone as evidence of innocence. The DNA evidence acts to rebut the state=s theory that Paul Hildwin=s

[7]The above passage from Mr. Cole is crucial in a Jones analysis of the newly discovered DNA evidence in this case. Here the state is informing the court that the purse and the bra contained within the purse are important pieces of physical evidence tending to show purported guilt. As the Court conducts a Jones analysis and evaluates whether the newly discovered exculpatory DNA evidence would probably result in an acquittal on retrial, the Court should take careful note of Mr. Cole=s statement to the Court regarding the significance and importance of the bra evidence. Once again, the state argued to the jury in closing argument that the condition of the bra conclusively showed that the victim=s brassiere was violently ripped from her body by Paul Hildwin during the alleged rape. The state argued that the blood evidence found on the panties and wash rag matched Paul Hildwin, therefore the defendant raped and killed the victim as this evidence was corroborated by the condition of the bra. If the defense was able to present the newly discovered DNA evidence showing that Paul Hildwin did not rape and kill the victim, a jury would have certain if not reasonable doubt, and would vote for acquittal on retrial.

statements to law enforcement were Aconfessions.@ Paul Hildwin never confessed to this crime. Nonetheless, his statements to law enforcement were utilized at trial by the state to advance the theory that Paul Hildwin was the actual perpetrator of the rape and murder, in part because he Aknew too much.@ As such, the newly discovered DNA evidence discredits the state=s evidence and theory further, as well as corroborates Paul Hildwin=s testimony that William Haverty was the actual killer. Given the state=s high burden of proof in a criminal case, a jury on retrial need not be convinced that Paul Hildwin is innocent in order to find him not guilty. All a jury needs is one reasonable doubt as to his guilt. For example, the state argued that Paul Hildwin informed the police that when the perpetrator of this crime was finished with the murder, he wiped the sweat off of his face onto a washcloth (the same washcloth that was introduced into evidence with accompanying non-secretor significance; and the same washcloth that was recently tested by Cellmark and found not to contain the DNA of Paul Hildwin). The state then presented misleading arguments advancing the theory that the non-secretor blood evidence showed that Paul Hildwin was somehow confessing to this crime by his statement regarding the wiping off of sweat, due to the fact that he was a matching 11% non-secretor. The other statement to law enforcement the state utilized as evidence against Paul Hildwin is the statement that he indeed saw the perpetrator, and the perpetrator had a tattoo on his back. Then the state demonstrated to the jury that Paul Hildwin had a tattoo on his back, and argued

again that Paul Hildwin was Aconfessing@ to the murder. Because the state focused so much on the washcloth and sweat, the panties and semen, and the non-secretor evidence, the DNA evidence would show a jury on retrial that they should not be misled by state=s far-fetched theories of pseudo-confessions in this case.

Another key aspect of the state=s theory regarding the Aconfessions@ is that law enforcement agents testified that Paul Hildwin informed them that he saw that the victim was wearing blue shorts on the day of the crime. The state utilized the statements from Paul Hildwin through the testimony from Detective Ralph Decker regarding Paul Hildwin=s knowledge of the blue shorts, and they stretched these Aconfessions@, the shorts, the panties inside the shorts, and the non-secretor evidence into a now scientifically-rebutted theory that Paul Hildwin tore the shorts off of the victim, sexually assaulted her, deposited his semen on the panties, deposited his seat on the washcloth, then murdered her. DNA evidence has proven the state=s theory wrong, therefore reasonable doubt resonates and a jury would now acquit. *But the legal standard under Jones does not require the certainty of an acquittal in light of newly discovered evidence, only the probability of an acquittal*. Jones does not even require that an acquittal be more likely than not in light of newly discovered evidence. As testified by Paul Hildwin, he saw the blue shorts on the victim, he saw William Haverty on top of the victim choking her, and he left the scene. Paul Hildwin did not rape, strangle or kill Ms. Cox. Paul Hildwin=s testimony is corroborated by the newly

discovered DNA evidence and is additional evidence that creates reasonable doubt in this case. The state=s presentment of the Aconfessions@ regarding the blue shorts and the panties by Paul Hildwin was damaging circumstantial evidence of guilt at the 1986 trial. The lasting image impressed upon the jury was that Paul Hildwin raped and killed the victim as evidenced by his knowledge of her intimate clothing coupled with the non-secretor evidence. The newly discovered DNA evidence completely casts doubt on the reliability of the outcome of the original trial. The weight to be afforded the newly discovered DNA evidence must be analyzed in the context of the powerful and misleading evidence presented at trial, not in a circumstantial biological vacuum.

Any current anticipated argument of the state claiming that in a retrial setting, the state would refrain from presenting a rape murder theory, therefore the new DNA evidence would become insignificant at retrial, is flawed. Under Jones, the Court is required to conduct an analysis of the weight of the newly discovered evidence as compared to the weight of the evidence ***introduced at trial*****.** As the newly discovered evidence is considered in conjunction with the evidence presented at trial, the Court is to evaluate whether the evidence is of such a nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512 (Fla. 1998) at 521, citing Jones

v. State, 591 So. 2d 911 (Fla. 1991).[8] Jones does not authorize the analysis to include speculation into possible strategical changes that might be made by the state in a retrial setting in light of newly discovered evidence. It requires that the newly discovered DNA evidence be evaluated and compared to the evidence which was previously presented at the original trial.

The state=s rape/murder theory has been conclusively disputed by the newly discovered DNA evidence. In light of this, a jury would now acquit Mr. Hildwin considering the evidence presented, the state=s arguments to the jury, the circumstantial nature of the case presented, and the conclusive DNA evidence rebutting the state=s case theory. The state argued that the perpetrator ripped the bra off of the victim, raped her, deposited semen on her panties, deposited saliva on a wash rag, then murdered her. Newly discovered DNA evidence conclusively shows that Mr. Hildwin did not rape the victim. Logically, it follows that under the state=s theory of the case, Mr. Hildwin was not the perpetrator of this crime.

After Mr. Lewan informed the trial court that he had in fact observed the brassiere with the investigator, the brassiere was admitted into evidence without objection (as state=s exhibit 48). The testimony of Detective Ralph Decker continued.

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[8]AWe note that this is the standard currently employed by the federal courts. United States v. Menard, 939 F. 2d 599 (8th Cir. 1991);[additional federal citations omitted](applying same standard for newly discovered evidence as a basis for habeas relief from state court conviction)@ Jones (1991), Id. at 915, 916.

The state continued to present their case theory that Mr. Hildwin raped and murdered the victim. After the admission of the brassiere, the state immediately began to question Detective Decker about the blood and saliva evidence in the case:

Q: Okay, sir. Thank you very much. This [the bra] was in Vronzettie Cox=s purse?
A: Yes, sir.
Q: Detective Decker, I show you what=s been marked for identification as State=s Exhibit TT and ask if you recognize that. Do you recognize that, sir?
A: Yes, sir.
Q: How do you recognize that?
A: It has my name on it.
Q: What did you do with that particular piece of evidence?
A: I took this to the FBI laboratory in Washington.
Q: What date did you take that to the FBI laboratory in Washington?
A: October Bthe last month B
Q: The 9th of July?
A: Right.
Q: When you delivered it to Washington, was it sealed?
A: Yes, it was.
Q: When you received it, it was sealed?
A: Yes.
Q: Where did you receive it from?
A: I received it from our nurse at the jail who withdrew the specimens from Mr. Hildwin.
Q: Were you present when they were withdrawn?
A: Yes, I was.
Q: And you saw these two Bwhat=s in these tubes?
A: The one is blood, and the other is saliva.
Q: And you personally witnessed this blood being drawn from the defendant?
A: Yes, sir.
Q: And where did you deliver this again, please?
A: I delivered it to the in-take counter at the FBI laboratory in Washington.
Q: In a sealed fashion?
A: Yes, sir.
(Dir. ROA Vol. III 555-7)

The juxtaposition of this evidence had the powerful effect of misleading the jury to believe that Paul Hildwin raped then murdered the victim. We now know that this theory is incorrect. Mr. Hildwin should be afforded a new trial where the state is barred from presenting a case based on misleading evidence. Had the jury been informed of the newly discovered DNA evidence by the defense, they would have acquitted Paul Hildwin.

Jones provides us with guidance and factors to consider in the analysis of newly discovered evidence. It is noted that the specific context of the Jones case involves newly discovered evidence of recanting witnesses. While recanting witnesses have been deemed inherently unreliable, DNA evidence is inherently and scientifically reliable.

The Jones requirements are as follows:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence Amust have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence.@ Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones, 591 So. 2d at 911, 915. To reach this conclusion the trial court is required to Aconsider all newly discovered evidence which would be admissible@ at trial and then evaluate the Aweight of both the newly discovered evidence

> and the evidence **which was introduced at trial**.@ *Id.* at 916. (Emphasis added)
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. [citations omitted]. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. [citation omitted]. The trial court should also determine whether the evidence is cumulative to other evidence in the case. [citations omitted]. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
> [Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)]

The first prong of Jones regarding the newly discovered DNA evidence is obviously satisfied and warrants no discussion. Using the above factors to evaluate the second prong of Jones, that is, whether the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial, the case at bar meets all criteria. The newly discovered DNA evidence would have been admissible at trial had it been available, and there existed no evidentiary bars to its admissibility. As far as the weight to be accorded to the DNA evidence, this extremely powerful evidence goes directly to the merits of the case, not merely to impeachment. At trial, the jury was persuaded beyond a reasonable doubt by the misleading secretor/non-secretor testimony which informed that there was an 89% or more chance that Paul Hildwin=s semen and saliva was found at the scene of the crime (FBI Agent Richard Reem

testified that non-secretors such as Paul Hildwin make up only 11% or less of the population; Dir. ROA Vol. IV 696). Now that modern science has evolved, provided a method and confirmed with virtually 100% certainty that the theory presented by the state at trial was incorrect, this analyzing Court should accord the newly discovered DNA evidence absolute and overwhelming weight.

Continuing to consider the Jones factors, the newly discovered DNA evidence in the case at bar is not at all cumulative in nature to anything presented at trial. To the contrary, it destroys and discredits all of the cumulative, prejudicial, and false evidence that was argued by the state at trial. As such, it is definitely material, relevant and indisputable. If there ever was a case that met the Jones standard on all points, this is the one.

With the foundation laid with the testimony from Detective Decker regarding his personally observing Paul Hildwin=s blood being drawn, and the blood being transported to the FBI laboratory for analysis, it was clear that the state was ready to forge ahead with their rape/murder theory. When the court recessed mid-trial on August 28, 1986, the defense conducted the depositions of three FBI agents from Washington D.C. regarding the serology issue. The three agents were previously scheduled for telephone depositions prior to trial, but Mr. Lewan failed to appear for whatever reason. During the depositions, Mr. Lewan was supplied with an FBI laboratory report detailing the incriminating secretor/non-secretor evidence. When the

court re-convened on August 29, 1986, the defense requested a Richardson hearing regarding the report. A lengthy discussion and Richardson hearing was conducted regarding this issue. (Dir. ROA Vol. IV 585-608).

Apparently, the FBI had conducted testing on the blood, saliva and semen samples and had generated a report on the Friday before the trial commenced. Mr. Lewan was concerned because he had not received a copy of the report until four days into the trial. Ultimately, the court found that a discovery violation had not occurred because of the recency of the report and the defense failure to previously take the depositions of the FBI agents:

THE COURT: All right. The Court finds there was no discovery violation of an intentional sort. I don=t think there was any. If it was, it was inadvertent. The timeframe as explained by the witnesses from the FBI was such a critical nature without any confirmation as to when it [the FBI report] was actually received.

It may very well not have come into the possession of the State until the day of trial. And if that were the case, of course, counsel was surprised in opening statement by the State of some indication of some additional information.

I feel that there are some responsibilities on counsel for the Defense, and since the Defendant never took the deposition of the FBI agents prior to yesterday, that if there=s any responsibility for whatever breakdown in communications or whatever you=d like to call it, it must be borne equally by both the Defense and the State.[9]

[9]The 23 pages of transcript involving the above Richardson issue illustrate the importance of the blood evidence in this case. Prior to the state receiving this last minute information from the FBI on a re-test of the blood evidence, the state=s case consisted of non-scientific, strained circumstantial evidence.

[Dir. ROA Vol. IV 607]

The state=s Adiscovery@ of the faulty secretor/non-secretor evidence just prior to trial was perhaps the Asmoking gun@ in their circumstantial case against Paul Hildwin. Without this evidence, the state=s strongest piece of evidence was the jailhouse snitch, Robert Worgess. Without the faulty secretor/non-secretor evidence and powerful, misleading corroborating testimony from respected agents from the Washington D.C. FBI crime laboratory, questions remain unanswered, reasonable doubt resonates, and Paul Hildwin is acquitted. At the original trial, if the defense has time and technology on their side, and is able to present the newly discovered DNA evidence from Orchid Cellmark Laboratories to the jury in rebuttal to the testimony from the FBI agents and other law enforcement agents in this case, Paul Hildwin is acquitted. The newly discovered DNA evidence standing alone in this case warrants a new trial.

The trial of Paul Hildwin continued on September 6, 1986. The discussion continued regarding the laboratory reports and admissibility of the blood evidence:

THE COURT: The basis specifically was if there was any surprise involved in the sort of delay in your receiving the lab reports to give you an opportunity to make whatever research or inquiry into the effect that that might have as far as your client=s position is concerned.

MR. LEWAN: All right. Judge, then addressing that, I would like to state to the Court that I did research this area this weekend, and this is a whole new area this has opened up for me, a very technical area, the blood test results. I found over 80 cases dealing with secretor or non-secretor evidence. The time constraints of it being over the holiday weekend, that being the Labor Day weekend, the number of cases, as well as several ALR articles and forensic journals, have put me in a position where I cannot

state to this Court that I feel the prejudice has been removed. I think it goes directly to my ability to cross-examine the witnesses which the state intends to call and, therefore, my ability to render effective assistance of counsel to my client. I would request that the Court entertain my motion from using this evidence at this point in time because I don=t think the prejudicial affect (sic) has been removed.
(Dir. ROA Vol. IV 669-70)

Pursuant to the defense motion, the Court ultimately ruled, AI will not suppress or restrain the State from producing whatever testimony they have based on this scientific evidence.@ (Dir. ROA Vol. IV 672). It has now been confirmed that the Ascientific evidence@ presented at trial was misleading. The above trial excerpts demonstrate that the error and prejudicial effect of admitting the misleading blood evidence at trial was compounded exponentially by an ill-prepared defense attorney who candidly admitted to the Court that he was not equipped to rebut the state=s scientific evidence.

Interestingly, the State=s current position is that the newly discovered DNA evidence is irrelevant. At this stage of the proceedings, in the postconviction context of Jones, the new DNA evidence is absolutely relevant in this case. If the jury would have been privy to the newly discovered DNA evidence at the original trial, the state=s theory of the case would be scientifically and absolutely refuted, leading the jury to acquit Mr. Hildwin. Additionally, alternatively, and hypothetically, if the recent DNA tests would have confirmed that Mr. Hildwin was the source of the DNA on the panties and wash rag, the state would be arguing that the DNA tests conclusively

confirm that Mr. Hildwin did in fact rape and murder the victim.

This is illustrated by the following: at a Huff hearing conducted August 1, 2001, the issue of proposed DNA testing was discussed. Interestingly, one of the state=s main concerns was that they wanted FDLE rather than an outside laboratory to perform the testing. The state=s position was that if the proposed DNA testing produced a match on Paul Hildwin, they wanted to have the ability and convenient accessibility to utilize those anticipated incriminating results against Mr. Hildwin in further proceedings. The following is an excerpt from the Huff hearing:

Assistant Attorney General Kenneth Nunnelley: Secondly, I have the very serious problem of what is going to happen if this comes back with a hit on Mr. Hildwin. I=m entitled to have that evidence or information. I=m entitled to know the results of it. I=ve got to worry about getting an expert who is 3,000 miles away, been retained by CCR, back to Hernando County, Florida to testify that he got a match between the biological evidence from the crime scene and Mr. Hildwin.
I don=t want to get in the position of having to do that. And that=s why the rule requires FDLE or its designee, to do that. And I would suggest to the Court that if we tell**B**if we get to the point of doing DNA typing in this case, if you tell FDLE to do it, they will do it.
[Huff hearing, August 1, 2001, page 93]

Mr. Nunnelley continues: **A**...at some point in time I think it might be prudent, I suppose, for the Court to inform Mr Hildwin of the risks that he is taking in pursuing this sort of DNA typing...the only reason I bring this up is all the talk we have had about ineffectiveness of postconviction counsel. I didn=t want Mr. Gruber to wind up as my putative client in a later 3.850 proceeding.@
[Huff hearing, August 1, 2001, pp. 101-02, 103]

Before the DNA was tested, the state was prepared to use an anticipated match against Paul Hildwin to prove his guilt. Now that the DNA testing has shown

otherwise, they claim that the DNA results are insignificant and irrelevant. The state cannot take the position at trial and in postconviction pre-testing that, Athe blood evidence and anticipated DNA evidence from the crime scene confirms guilt of the defendant,@ then turn around when they do not receive the desired testing results and say, Athe newly discovered DNA evidence is irrelevant and insignificant.@ Paul Hildwin should be afforded a new trial based on the fact that there exists at least a probability that a jury would reject the state=s theory of the case and acquit Paul Hildwin in light of the newly discovered DNA evidence. A defendant need not show that an acquittal be absolutely certain in light of newly discovered evidence, only that an acquittal be probable in light of newly discovered evidence. Clearly Mr. Hildwin meets the current Jones standard, and due process dictates that he be afforded a new trial.

When the lower court was evaluating whether DNA testing should be performed, the court in part was conducting an analysis of Fla. R. Crim. Proc. 3.853(c)(5)(C). That section includes the following language and prerequisite finding prior to authorizing DNA testing:

> Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

The following was discussed at a hearing on January 23, 2002:

THE COURT: What about the AC@ part of that rule, 5-C?

MR. HOOKER: That=s represented in the motion, it=s a fact, Mr. Hildwin did testify and say that he was not the perpetrator. I mean**B**and this [favorable DNA typing] would be evidence which is intended to support him the state would have to admit.
THE COURT: Well, based on that then I would find that not necessarily that he would have been acquitted, but he certainly would have been**B**had some strong supporting evidence that may tend to acquit him or at least possibly something that would cause a jury or a judge to perhaps, and, again, we=re speculating at this point, but perhaps consider a life sentence as opposed to**B**
(Hearing on Defendant=s Motion for DNA Testing, held January 23, 2002, pg.17)
(PC current ROA Vol. IV 00658)

Virtually, the above passage illustrates that the state stipulated that favorable DNA typing would support Paul Hildwin=s testimony at trial that he was not the perpetrator, therefore exculpatory DNA typing would meet the Jones standard for a new trial. Additionally, when evaluating whether Paul Hildwin would have been acquitted or received a lesser sentence in light of exculpatory DNA evidence, pre-testing, the lower court used language such as Acertainly,@ Astrong supporting evidence,@ Amay tend to acquit,@ and Aat least possibly something that would [lead a jury or judge to consider a life sentence].@ When one carefully reviews the extent to which the state developed and presented the false rape/murder theory in the record, it is undeniable that such powerful rebuttal DNA evidence would at least Aprobably@ produce an acquittal on retrial.

As far as the question of a lesser sentence, at resentencing in 1996, the very first question the jury asked was: AWas the victim raped?@ On the face of that record alone containing this jury question, it is obvious that the newly discovered DNA

evidence rebutting the rape/murder theory would have caused the jury to recommend life over death, or at the very least, result in the probability of a recommendation of a sentence of life. One thing is absolutely certain. Mr. Hildwin did not receive a fair trial. The state utilized misleading scientific evidence to obtain a conviction and death sentence against Mr. Hildwin. To deny Mr. Hildwin a new trial is to abandon fundamental notions of fairness. This Court should accept the proposition that there is indeed a Aprobability@ that the newly discovered DNA evidence would result in an acquittal on retrial, and grant Mr. Hildwin a new trial.[10]

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[10]The outcome of this case has been gravely undermined by the new evidence. The materiality of the newly discovered DNA evidence can be appreciated through a Brady-type or Strickland-type analysis. The Jones standard regarding materiality is comparable to the Brady standard and Strickland standard. Materiality is established, and post-conviction relief is required, once the reviewing court concludes that there exists a Areasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different.@ United States v. Bagley, 473 U.S. 667 at 680 (1985). By analogy and tracking the same materiality standard that is found in Jones, if there exists a Areasonable probability that had the [newly discovered DNA evidence] been [available] to the defense, the result of the proceeding would have been different,@ materiality is established. Materiality of the newly discovered DNA evidence in the case at hand therefore has been established by virtue of the misleading rape/murder evidence having been such a focus at the 1986 trial.

Continuing with the analogy, it is crucial to be aware that it is not the defendant=s burden to show the nondisclosure [or newly discovered evidence] A[m]ore likely than not altered [or would alter] the outcome of the case.@ Strickland v. Washington, 466 U.S. 674 at 693 (1984). See Barkauskas v. Lane, 878 F. 2d 1031, 1034 (7th Cir. 1989) (evidence is material where it could Ahave pushed the jury over the edge in the region of reasonable doubt.@) The Supreme Court specifically rejected the Amore likely than not@ standard in favor of a showing of reasonable probability. A reasonably probability is one that undermines the confidence in the outcome. Jean v.

After the trial court denied the defense motion to prevent the state from presenting the blood evidence, the state immediately called Betty Snyder to the stand, a nurse from the Hernando County Sheriff=s Department. Ms. Snyder=s testimony focused on the blood evidence in the case and was very crucial in the state=s case against Paul Hildwin. She testified that Detective Ralph Decker directed her to draw blood from the defendant. And in dramatic Perry Mason-like fashion, Ms. Snyder pointed at Mr. Hildwin, making an in-court identification of him in front of the jury. (Dir. ROA Vol. IV 674). Great emphasis was placed on the fact that she drew blood from the defendant sitting at counsel table. Although there were no eyewitnesses to this alleged crime, Ms. Snyder had the effect of a powerful eyewitness. Although eyewitness testimony can be effectively cross-examined in most instances, there was no way for Mr. Lewan to cast doubt on Ms. Snyder=s in-court identification. Without the misleading secretor evidence, the Nurse Betty Snyder in-court identification loses its effect the jury. The following exchange took place during Ms. Snyder=s direct examination:

Rice, 945 F. 2d 82 (4th Cir. 1991). Such a probability exists in the case at bar where the newly discovered DNA evidence proves absolutely and scientifically that Paul Hildwin did not rape and murder the victim as the state argued at trial. Mr. Hildwin need *not* show that Amore likely than not@ the jury would acquit on retrial. Mr. Hildwin need only show that the confidence in the outcome of his trial has been undermined by the new DNA evidence, and this is apparent in light of the very damaging and convincing misleading evidence presented at trial.

Q: Miss Snyder, did you have an occasion to draw blood from an individual known to you as Paul Hildwin?
A: Yes, sir.
Q: Was that done at the direction of Detective Ralph Decker?
A: Yes, sir.
Q: I ask you to look around the courtroom here today and tell me if you see the individual known to you as Paul Hildwin.
A: Yes, sir.
Q: Please point to him and describe what he is wearing.
A: A white shirt.
MR. HOGAN: May the record reflect the witness has identified the defendant, Paul Hildwin.
THE COURT: Yes.[11]
(Dir. ROA Vol. IV 674)

After Ms. Snyder, the state called Rick Copenhaver to the stand. Mr. Copenhaver was the laboratory manager at Lykes Memorial Hospital in Brooksville. Mr. Copenhaver testified regarding the blood draw of William Haverty he conducted in August of 1986. (Dir. ROA Vol. IV 678). The defense strategy was to offer William Haverty as the alternative suspect in the murder. With Mr. Coperhaver=s testimony, the state was laying a foundation to rule out the possibility that the

[11]This witness=s testimony further bolstered the purported reliability of the blood evidence presented to the jury in this case. Now we have learned that the blood evidence presented at trial was completely unreliable. As such, the verdict was unreliable, Mr. Hildwin did not receive a fair trial, and there is a definite probability that he would have been acquitted had the newly-discovered DNA evidence been presented to the jury.

The attempted cross-examination of Ms. Snyder acted only to further bolster the perceived reliability and credibility of the blood draw. The areas covered on cross-examination confirmed that Ms. Snyder was a licensed nurse and that the blood vial was sealed and obviously free from contamination.

characteristics of the panties and wash rag located at the scene of the crime matched that of William Haverty, thus negating any reasonable doubt. The only cross-examination explored with this witness involved casting doubt on Mr. Coperhaver=s knowledge of the identity of Mr. Haverty. The defense simply pointed out that Mr. Coperhaver was aware of the identity of Mr. Haverty only because Mr. Haverty informed him that his name was William Haverty. Now that newly discovered DNA evidence has ruled out the possibility that Paul Hildwin=s DNA was located at the crime scene, the possibility that Mr. Haverty was involved in the murder becomes that much greater. Consequently, the DNA evidence reinforces the theory of defense and the reasonable doubt in this case.

After the testimony of Rick Copenhaver, the state recalled Detective Ralph Decker to confirm that the detective was personally present when the blood draws were conducted on both William Haverty and Paul Hildwin. Decker also confirmed that he personally transported the blood samples of Hildwin and Haverty to the FBI laboratory in Washington D.C. The final point covered on recall was that Detective Decker interviewed the defendant on September 21, 1985. During that interview, Paul Hildwin allegedly informed Detective Decker that Vronzettie Cox was wearing blue shorts on the night in question. (Dir. ROA Vol. IV 682). No cross-examination was attempted after this recall of Detective Decker on these three points.

The state continued to present their misleading rape/murder theory to the jury.

The next witness called was Sergeant Robert Haygood. Sergeant Haygood testified that he searched and preserved articles of clothing found at the crime scene. The following testimony was elicited:

Q: I show you what=s been marked for identification State=s exhibit VV and ask if you recognize that.
A: Yes, sir, I do.
Q: Okay. How many articles of clothing does that exhibit consist of?
A: Two articles of clothing.
Q: Where did you find those articles of clothing?
A: These were also in the green plastic trash bag.
Q: Okay. Where were they in the bag?
A: They were at the very top, also.
Q: Very top of the bag?
A: Yes, sir.
Q: Would you describe those for me, please?
A: This is a pair of cut off blue jeans.
Q: Blue shorts?
A: Blue shorts. Jeans that are apparently cut off, and a pair of panties, ladies.
Q: Ladies panties?
A: Yes, sir.
Q: Now, those markings on there, were those there when you found them?
A: No, sir. They were placed on there after the fact.
Q: Okay. Where did those articles of clothing go after you got them?
A: I secured these and placed them in property in evidence.
Q: Okay. And after that?
A: And after that they were sent to the FBI laboratory for examination.[12]

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[12]After Detective Ralph Decker testified about Paul Hildwin=s statement concerning the blue shorts that the victim was wearing, the jury heard the above testimony from Sergeant Haygood regarding the cut off blue shorts with panties inside. The cross-examination of Sergeant Haygood included only one question. On cross, Haygood confirmed that the articles of clothing were found in the laundry bag. The prejudicial effect of this misleading evidence denied Paul Hildwin a fair trial. The state introduced Paul Hildwin=s statement regarding his knowledge that the victim was wearing blue shorts on the date of the murder, they referenced that blue panties were found inside the shorts, then they presented testimony from FBI agents claiming that

(Dir. ROA Vol. IV 685-6)

After the recall of Detective Decker, the state called FBI Agent Richard Reem. Before the testimony of Agent Reem, the defense once again raised an objection to the blood evidence because they had not had an adequate time to research the secretor issue and the evidence was unfairly prejudicial. The trial court again overruled this objection. Agent Reem testified that he had been employed with the FBI for 16 years, with 15 years of experience in the FBI laboratory. The defense then stipulated to his expertise. Nonetheless, the state reviewed Agent Reem=s extensive experience and education. Agent Reem informed the jury that he held a Master=s Degree of Science in forensic science from George Washington University in Washington D.C., and that he had done post-graduate study in the field of forensic serology at the University of Virginia. Agent Reem then testified as follows:

Q: Okay, sir. What is serology?
A: Serology is the identification and classification of blood and other bodily fluids usually found in stain form.
Q: Okay, sir. Did you have occasion to receive several pieces of evidence or blood from the Hernando County Sheriff=s office involved in the case of State of Florida versus Paul Hildwin?
A: Yes, sir, I did.
Q: I show you what=s been marked State=s Exhibit TT and State=s Exhibit CCCC for

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blood typing tests showed that semen on the panties matched that of Paul Hildwin. Had the newly discovered DNA evidence been available at the time of trial, the defense could have completely discredited the state=s theory of the case and the testimony of approximately 10 well-respected and credentialed state witnesses.

identification and ask if you recognize those two articles.
A: Yes, sir, I do.
Q: And how did you receive those? What condition were they in when you received them?
A: They were in the condition**B**they were sealed and in this particular condition when I received them. This particular sample I received in the mail from the police department in Hernando County.
Q: Okay. Was it also sealed?
A: Yes, sir, it was.
Q: Okay, sir. Have you conducted certain tests on these two blood samples?
A: Yes, sir, I did.
Q: Now, item CCC is identified as coming from what subject?
A: This sample which I=ve marked as K-26, which has been marked as four C=s, came from Mr. Haverty.
Q: Okay, sir. And the other exhibit?
A: This I=ve marked as K-24, which is marked as double T, came from Mr. Hildwin.
Q: And have you analyzed these two substances?
A: Yes, sir, I did.
Q: Would it aid you in explaining to the jury the work you did on these two samples to use the easel?
A: Yes, it would, I believe.
MR. HOGAN: With the Court=s permission.
Q: When you say that if a person is a secretor that you can find these characteristics in other body fluids, what other body fluids are you talking about?
A: We=re talking about saliva, semen, vaginal secretions, perspiration, et cetera.
Q: So if a person is a secretor, you would be able to tell they were a type A or type B from their other body fluids.
A: That=s correct.
Q: Okay, would you please write **A**non-secretor@ here and **A**secretor@ here.
A: (Complying.)
Q: Okay, sir. If you could just remain standing there, it might be easier. I show you what=s been marked for identification as State=s exhibit UU and ask if you recognize that article.
A: Yes, sir, I do.
Q: And how do you recognize that?
A: By the initials that I placed thereon.
Q: And who did you receive that from?
A: I received this initially from Agent Quill and then I received it on a second time again from Agent Quill.

Q: Okay. Coming from the Hernando County Sheriff=s office?
A: That=s correct. Yes, sir.
Q: Okay. What type of test did you run on that article?
A: The first time I checked this item for blood and semen.
Q: With what results?
A: And I found none. The second time I received it, I examined it for saliva. On examining it for saliva, I found saliva present. I found the enzyme amylase present, when (sic) is indicative of saliva.
Q: Okay. Were you able to do any further testing on the saliva that you found on that cloth?
A: Yes. Group testing on this particular stain is consistent with that coming from a non-secretor.
Q: Okay. So would that be consistent with Mr. Hildwin or Mr. Haverty?
A: It would be consistent with the non-secretor status of Mr. Hildwin.
Q: Would it be consistent at all with Mr. Haverty?
A: No, sir, it would not.
Q: Okay. I show you what=s been marked for identification State=s Exhibit BB and ask if you recognize the two articles in that bag there.
A: Yes, sir, I recognize these items.
Q: Okay, sir. How do you recognize them?
A: By my initials that I placed thereon.
Q: Have you done testing on those items?
A: Yes, sir, I did.
Q: Those items likewise come from the Hernando County Sheriff=s office?
A: Yes, sir.
Q: What type of test did you do on those items, sir?
A: On these two items, again I checked for blood and semen.
Q: Did you find any blood on those items?
A: On the item which is a pair of shorts, cut off jeans, I found no blood or semen on this item.
Q: Okay, sir.
A: On this item, which are a pair of panties, I found no blood, however, I did find semen.
Q: Did you do any testing on that semen?
A: Yes, sir. Group test conducted on the seminal stains left on the pair of panties, I found that came from a non-secretor, which is again consistent with that of Paul Hildwin.
Q: Is that consistent with Mr. Haverty=s blood?
A: No, sir, it is not.

Q: And just to make sure there=s no misunderstanding, what are you talking about when you say semen or seminal stain?
A: A seminal stain is identified by the enzyme phosphatase and also by the identification of spermatazoa, which is the male reproductive cell.
Q: Now, are you aware of the percentage of people in the population of white males who are secretors and non-secretors?
A: In the white population the secretor status indicated by the A negative-B positive is approximately 72 percent of the population, and that represented by A positive-B negative is approximately 22 percent. Now, if you go by the male population, you have to divide that in half hypothetically and you=d probably come up with 11 percent or less.
Q: So 11 percent or less of the male population, white male population, are non-secretors?
A: Would be non-secretors, yes, sir.
Q: If you would write 11 percent here, please.
A: (Complying.)
Q: Did you receive those articles of clothing in a sealed fashion?
A: Yes, sir, I did.[13]
(Dir. ROA Vol. IV 690-96)

After Agent Reem=s testimony, the court asked the state to present their next witness.

The state asked the judge for a recess to Areview some evidence make sure everything

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[13]The aforementioned items were then introduced into evidence as State=s Exhibits 57, 58, 59 and 60 over defense objection. As anticipated by Mr. Lewan, he was unable to do an effective cross-examination of Agent Reem. Mr. Lewan was unable to discredit the results of the blood testing on cross-examination. Furthermore, the questions asked on redirect bolstered the perceived credibility and reliability of the testing and analysis. The following questions were asked and answered during redirect:
Q: So are you saying this [saliva stain] is a very good sample?
A: It=s a good sample. Yes, sir.
. . .
Q: And you feel confident that this semen stain came from a non-secretor?
A: That is correct. Yes, sir.
(Dir. ROA Vol. IV 704)

is in place.@ (Dir. ROA Vol. IV 704-5). In reality, the state was keenly aware that they had already convinced the jury of Paul Hildwin=s guilt through the extensive presentation of the misleading scientific evidence, and perhaps they were considering resting their case. Before the recess, the state asked to enter Agent Reem=s chart into evidence:

MR. HOGAN: Judge, while we=re still on the record, before court is adjourned I would move this chart into evidence that Agent Reem used in his demonstration for the jury.
THE COURT: Any objection from the defense?
MR. LEWAN: Excuse me, Judge.
THE COURT: Any objection other than that made earlier on this witness=s testimony?
MR. LEWAN: No, sir. Continuing on that objection.
THE COURT: All right. It=s in evidence [State=s Exhibit #61].[14]
(Dir. ROA Vol. IV 705)

The state must have been considering resting their case after the powerful testimony of Agent Reem. But in efforts to seal a certain wrongful conviction, they summoned jailhouse snitch Robert Worgess.

Robert Worgess was called as a witness from the Hernando County Jail. (Dir.

[14]Agent Reem=s chart detailing the misleading blood evidence would be the state=s final exhibit submitted in the guilt phase of the trial. The fact that a chart detailing the misleading blood evidence accompanied the jury into the deliberation room indicates that in all likelihood, the misleading evidence played a very significant part in the jury=s consideration of the limited and circumstantial evidence against Paul Hildwin. If in all likelihood the chart and the information contained on the chart led to Mr. Hildwin=s conviction, it is reasonable to presume that if the defense was able to present the newly discovered DNA evidence to the jury in rebuttal, the jury would have rejected the state=s theory and acquitted Paul Hildwin.

ROA Vol. IV 706). He was serving time for violation of probation on a Grand Theft charge. He was previously convicted of a separate Grand Theft charge. Although he admittedly testified that Mr. Hildwin informed him in the jail cell that Hildwin Akilled her,@ he interestingly testified that Hildwin informed him that he had stabbed her. In this case, there was no evidence whatsoever that the victim was stabbed. The medical examiner testified that the cause of death was strangulation, and provided no testimony regarding stab wounds found on the victim.[15]

The defense had reserved their opening statement until the presentation of the state=s case. After being confronted with the misleading scientific evidence, it seemed as if the defense was throwing in the towel. The defense opening statement began: ALadies and gentlemen, what we=re going to show you is yes, my client met the victim that day and he may have been in her car and that he ripped her off, but, ladies and

[15]Worgess testified that he had only known Hildwin for three weeks before the alleged confession was made, and that he met him in the jail. Worgess admitted that he had been in fights with Hildwin, and that he felt threatened by him. It was brought out through impeachment that the witness testified previously that he asked Hildwin if he killed the woman, and Hildwin merely said Ayeah.@ This was in contrast to the trial testimony where the Worgess said he allegedly heard Paul Hildwin say, AYes, I killed her.@ It was also brought out that Worgess did indeed harbor ill feelings towards Paul Hildwin. From an evidentiary value standpoint, the misleading scientific evidence presented in this case far outweighs the value of Worgess=s testimony given the scant details and inconsistencies in Worgess=s story. As such, the newly-discovered DNA evidence in rebuttal to the blood evidence presented at trial would probably produce an acquittal on retrial.

gentlemen, there is no proof and no way that the state can refute the theory that he did not commit the murder and it was not done with premeditation.@ (Dir. ROA Vol. IV 730). The opening statement concluded: ANow, we=re not going to present all the evidence, the volume of evidence the state has presented. We don=t have that []...We=re going to show that the victim was a 42 year old female. She was living with a 23 year old man. We=re going to show that he [Haverty] had just as equal an opportunity as my client to have committed this crime. I ask you to use your common sense. Look at these facts. If you do, I think you will find reasonable doubt in your mind. Thank you, ladies and gentlemen.@[16] (Dir. ROA Vol. IV 731-2).

The defense made several attempts to elicit testimony from patrons and bartenders at the Lone Star Bar regarding the victim=s propensity to pick up men and take them home from the bar. When the state objected, the defense responded:

> MR. LEWAN: Your Honor, my basis for the admission of this evidence would be that the State=s already put on evidence of the semen stains and, therefore, evidence of the possible sexual assault. I would submit to the Court under Section 794.022 of the Florida Statutes that the evidence of past sexual behavior between a victim and a person other than the defendant are admissible when this type of evidence is introduced by the State.
> (Dir. ROA Vol. IV 744)

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[16]Mr. Lewan stated that he Athink[s]@ the jury would find reasonable doubt. Had the defense been able to produce the newly discovered exculpatory DNA evidence, he need not concede guilt in his opening statement, he need not put Paul Hildwin on the stand, and he could have been able to state with scientific certainty that the jury *would find reasonable doubt*.

....
MR. LEWAN: It=s not really reputation that I=m trying to get to, Judge. It=s the fact that she would take other people home from the bar. I think this goes to whether or not someone other than the defendant left that seminal stain and this is what I=m really trying to do.
(Dir. ROA Vol. IV 746)

Ultimately, the court ruled that past sexual behavior of the victim was an improper evidentiary area, and prevented the defense from exploring this area. Consequently, the defense could only present this evidence as a proffer outside of the presence of the jury. When the defense proffer was complete, the court stated:

THE COURT: The Court believes the testimony is irrelevant and immaterial as it is asked and answered in the proffer. It doesn=t tend to prove or disprove anything. I would continue to sustain the objection to the line of questioning.
(Dir. ROA Vol. IV 751)

If the defense could have presented the newly discovered DNA evidence to the jury, that compelling evidence would have proved that the defendant did not sexually assault the victim, thus completely disproving the state=s theory of the case. As such, the newly discovered DNA evidence clearly exceeds the Jones standard as the evidence would have led to an acquittal.

In the state=s closing argument, they admitted that their case against Paul Hildwin was circumstantial. They argued, A...you all agreed that circumstantial evidence is good evidence...Circumstantial evidence is good evidence. Circumstantial evidence can prove a case beyond a reasonable doubt, and in this case we have a lot of circumstantial evidence and it is good evidence...that circumstantial evidence buries

him.@ (Dir ROA Vol. V 933). The state continued:

The only issue that=s come up in this case was one that came up in the opening statement in the case the defense made. Mr. Lewan stood at this podium and told you ladies and gentlemen, he said, >Bill Haverty had an equal opportunity to kill Vronzettie Cox.=
...Now, when he gets up here to do his closing argument, ask him, >Did you prove Bill Haverty did this?= And if you folks think that Bill Haverty did this first degree murder, strangled this woman, then you come back with not guilty. You come back and tell me and Mr. Cole and you tell the judge that he=s not guilty, and he=ll get up and walk out that back door of the courtroom with all of us.
(Dir. ROA Vol. V 937)

Not only were these un-objected arguments improper burden shifting[17] thus clear evidence of ineffective assistance of counsel for failure to object, they reflect the egregious violation of Paul Hildwin=s due process rights in this case. The jury was misled by the erroneous blood evidence, then that misleading evidence was compounded by the above improper arguments. The jury was presented with blood evidence during the state=s case which purportedly ruled out the possibility that Haverty deposited the semen and saliva at the crime scene, and narrowed the odds to 89% that Hildwin raped and murdered the victim. Then the jury was essentially informed that if the defense could not prove to them that Haverty committed the crime, they would have to find Mr. Hildwin guilty. This unconstitutionally shifted the burden to the defense to prove the defendant=s innocence. In light of the misleading scientific evidence, this was impossible. In light of the newly discovered DNA

[17]Gore v. State, 719 So. 2d 1197 (Fla. 1998).

evidence, Paul Hildwin must be afforded new trial, a fair trial.

The misleading blood evidence caused the defense to suggest the following to the jury in their closing argument:

> We don=t know what happened there. They could have been**B**there could have been**B**Vronzettie Cox could have engaged in a sexual act, as I put it 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 it 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.
> (Dir. ROA Vol. V 946-7)

The above passage shows the desperation of the defense after the testimony concerning the misleading blood evidence. Had the newly discovered DNA evidence been available, the defense would not have resorted to this level of desperation. If available, the defense could have argued that through DNA testing it had been scientifically proven beyond all doubt that the defendant was not involved in a sexual assault, therefore was not guilty under the state=s theory of the case. Instead, the defense continued with the desperation theory:

> A final lesser included offense that you will be instructed on by the Judge is manslaughter. I suggest to you that even if you find that Mr. Hildwin was responsible for the death of Vronzettie Cox, this is at most what the evidence shows resolving those reasonable doubts in favor of my client. And that is that there was culpable negligence involved here. There is a reasonable theory here that there was some consensual sex going on and it got out of hand. This is at best what=s been proven.
> (Dir. ROA Vol. V 949-50)

The above argument illustrates that in 1986, trial counsel accepted the state=s theory that Paul Hildwin=s DNA was found on the victim=s panties and washcloth. If defense counsel would have had the benefit of the newly discovered DNA evidence at trial, trial counsel=s argument would have been stronger, the state=s case would have been much weaker (if not completely destroyed), and the verdict would have been Anot guilty.@

This motion will not address the 1986 penalty phase in much detail because the defendant was already granted a new penalty phase. But the Appellant points out that the jury=s first question at the 1996 resentencing proceeding (AWas the victim raped?@) indicates that had newly discovered DNA evidence been available to rebut the state=s original rape/murder theory, the jury would have recommended a life sentence. The defendant notes that the jury=s recommendation in 1986 was 12-0. When the state retried the penalty phase in 1996, the jury=s recommendation was only 8-4. It is noted that the state completely stayed away from the rape/murder theory during the 1996 penalty phase.

Nonetheless, the resentencing in 1996 was not without undertones suggesting that the case involved a rape/murder. During the 1996 resentencing, the state attempted to introduce a photograph of the victim, showing the victim=s body in the trunk with her legs folded over her head and the genital area exposed. (Resentencing, Vol. III, 446). The defense objected. The Court agreed to the exclusion of the

photograph from evidence, but allowed the state to show the jury the photograph during Dr. Techman=s direct examination. The defense argued and this Court agreed that although the trial court in 1986 allowed the subject photographs into evidence, the photograph was inflammatory, prejudicial, and improper. As such, the photograph was shown to the 1996 resentencing jury, but not introduced into evidence. Therefore, the image was impressed and the seeds of speculation were planted that the victim was raped and murdered by Paul Hildwin. The following discussion regarding this photograph is on record in the 1996 resentencing proceeding:

THE COURT: If Dr. Techman needs to refer to this or if he does refer to it**B**I mean, he refers to it, **but I don=t think this needs to go back to the jury. It=s really inappropriate in my opinion.**
Unless if this was a rape case or something like that, then, you know,B and if that=s an issue, we=ve got to talk about it. My understandingB and I could be wrong, but my understanding is that is not the State=s case.
MR. SCAGLIONE: There=s no inference as to rape or sexual battery. That is, in fact, the condition of what the body was found in when this individual found Item Number 15 wrapped around her neck on that morning of September 13th.
THE COURT: Well, I have no problem with you showing this to witnesses and having them look at it. I do have a problem with this going to the jury.
MR. HOWARD: Thank you.
THE COURT: That=s the Court=s humble opinion and I=m no expert, but it definitely is evidence of rape.[18]

[18]It is important to note that many sexually-assaultive-suggestive photographs were introduced at the 1986 trial (State=s Exhibit=s Numbers 11-14). In conjunction with the false and/or misleading secretor evidence, the suggestive images in the photographs led to Mr. Hildwin=s wrongful conviction. Had the newly discovered DNA evidence been presented to the 1986 jury, the jury would have been led to the conclusion that some other perpetrator was responsible for the rape and murder of Vronzettie Cox. Had the 1996 resentencing jury had the benefit of the newly discovered DNA evidence, the jury would have split even further and recommended

(Resentencing Vol. III 448-9)

In the penalty phase of the 1986 trial, it was clear that the trial court felt reasonably convinced that Paul Hildwin had raped and murdered the victim. During the discussion of which jury instructions regarding aggravators should be provided the jury, the court inquired of the attorneys, A**How about as to the capital felony was committed while the defendant was engaged in the commission of a robbery and most likely a sexual battery?@ (**Dir. ROA Vol. VI 1066). In this instance, the state actually chimed in and requested that the sexual battery aggravator not be given to the jury for fear of unconstitutional doubling concerns. After the close of the state=s case, it appeared as if the state, the judge, and even the defense attorney were convinced that Paul Hildwin raped and murdered the victim. Ultimately, the jury reached this same conclusion. **On direct appeal to the Florida Supreme Court, this Court opined that the evidence Aconvincingly@ led to the conclusion that Paul Hildwin raped and murdered the victim.**[19] Now that DNA results have shown otherwise, the defendant should be afforded a new trial.

As the discussions of the jury instructions continued, the state in support of the

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life in prison rather than death.

[19] See Hildwin, Id. at 128 (**The Florida Supreme Court opined on direct appeal: A[the victim] was brutally attacked, as evidenced by the torn bra found with the body... the evidence points convincingly to a conclusion that the**

HAC instruction argued that the victim was conscious that she was going to be killed. And again the prosecutor made reference to the fact that the victim=s bra had been ripped off during the attack in support of the terror and the HAC instruction. (Dir. ROA Vol. VI 1071-2). This same bra was paraded in front of the jury as the state persuasively and erroneously argued that Paul Hildwin raped and murdered the victim.

All of the foregoing leads to only one conclusion: the jury was misled by unreliable scientific evidence, and Paul Hildwin=s conviction and sentence are constitutionally flawed. As such, the conviction and sentence must be vacated in light of the newly discovered DNA evidence.

The Circuit Court.

In denying relief on the newly discovered DNA evidence claim, the circuit court clearly erred. On page four of the lower court=s Order, the Court states the following, ADefendant goes into extensive discussion regarding cases where DNA testing was denied, but that is inapplicable here.@ (PC current ROA Vol. III 0425). This is incorrect. The Appellant cited two Florida cases involving DNA testing, but did not engage in an extensive discussion regarding those cases.

The Appellant=s extensive discussion in his Motion actually focused on persuasive precedent from sister jurisdictions which involved *not just* DNA testing, but a *full analysis* of the significance of the exculpatory results received after DNA

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appellant abducted, raped, and slowly killed his victim@).

testing. The lower court failed to acknowledge, address or distinguish cases cited by the Defendant on the issues facing the court, specifically, Commonwealth v. Reese, 633 A. 2d 206 (Pa. Super. 1995), People v. Waters, 764 N.E. 2d 1194 (Illinois 2002), and State v. Hicks, 549 N.W. 2d 435 (Wisconsin Sup. Ct. 1996). These cases came from three states with standards of review for newly discovered evidence similar to Florida: Illinois, Pennsylvania and Wisconsin. As previously discussed, of those cases, the Reese case from Pennsylvania, is most similar to the case at bar (Reese is discussed in detail beginning at page 13 of this Brief). All three sister jurisdictions awarded or affirmed new trials for the defendants based on the results of the DNA testing. In the lower court=s order in the case at bar, there was absolutely no mention of Reese, Waters or Hicks. The lower court failed to even place a value on this important persuasive precedent. The Defendant respectfully asks this Court to utilize the reasoning of the aforementioned sister courts and grant a new trial.

Because Florida has little to no case law on the issue of whether newly discovered DNA evidence is such that a new trial should be granted, we must look to sister jurisdictions for guidance. At present, most all of the case law in Florida discusses scenarios where requests for DNA should have been granted or denied.

The Appellant cited two cases from Florida where DNA testing was originally denied in lower courts but granted on appeal, and although the lower court in the case at bar dismissed the cited cases as Ainapplicable@ in its Order, the Appellant urges that

these cases are applicable to the instant case. *See* Manual v. State, 855 So. 2d 97 (Fla. 2d DCA 2003) and Huffman v. State, 837 So. 2d 1147 (Fla. 2d DCA 2003), Id. Interestingly, the Manual case dealt with the testing of a washcloth just as in the case at bar. In Manual, the evidence of guilt at trial included serology testing of semen found on a washcloth that matched the defendant, and actual identification by the victim of the defendant. Dated serology tests performed prior to trial indicated that the sperm extracted from the washcloth could have come from Mr. Manual or 37% of the general population. In the case at bar, the odds against Mr. Hildwin were even greater : Mr. Hildwin or 11% of the general male population. In addition, Manual included identification of the defendant by the victim, which is absent in the case at bar. As such, identification of the perpetrator in the case at bar is a major issue.

Identification of the perpetrator in the Hildwin trial *as the murderer* was established merely by circumstantial evidence *of theft* coupled with misleading scientific serological evidence *of rape and murder*. Evidence of possession of stolen items is circumstantial evidence *of theft*, and *theft alone*. Evidence of scientific serological evidence (sperm and saliva found at the crime scene matching the perpetrator) is strong additional evidence that may lead one to believe that the perpetrator *raped and murdered* the victim. The photos of the victim indicate *rape*

and murder, as affirmed by Judge Tombrink in the 1996 resentencing.[20] This is all evidence that led the jury to believe that Mr. Hildwin raped, murdered, then stole from the victim. Now that newly discovered DNA evidence excludes Mr. Hildwin as the donor of the sperm and saliva found at the crime scene, we know that he did not rape and murder the victim; at this point, we can only suspect that Mr. Hildwin is guilty of theft. The DNA evidence creates a reasonable doubt as to who the rapist and who the murderer is. As such, this case meets the Jones standard and Mr. Hildwin should be afforded a new trial.

At pages four and five of the Order, the lower court cites to Aconsiderable testimony@ and Anumerous factors@ Awhich resulted in [the Defendant=s] conviction.@ (PC current ROA Vol. III 00425-00426). Besides the Ajailhouse snitch,@ the only evidence cited in the Order as to the Defendant=s guilt includes evidence of theft and forgery, *not murder*. It must be stated again that the alleged confession in this case was relayed through a Ajailhouse snitch@ , Robert Worgess, who testified that Paul

[20]At the resentencing in 1996, Judge Tombrink stated that the photograph depicting the victim=s body nude with legs folded over the head was Ainappropriate@ because it was Aevidence of rape.@ Nonetheless, he allowed the jury to be shown the photograph. In his recent Order, Judge Tombrink stated, AThe 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 her neck, which caused her death. Although graphic, this photo was not misleading.@ (PC current ROA Vol. III 00424).

Hildwin informed him in jail that he had stabbed the victim in this case. The Defendant asks this Court to review the list of Aother evidence@ of guilt cited by the lower court and rule that although the evidence may indicate that the Defendant is guilty of theft and forgery, the other evidence does not support a murder conviction. The lower court=s rulings are not supported by competent and substantial evidence, and accordingly, the Appellant urges that the Court reverse the lower court=s ruling and grant a new trial. In the alternative, the Appellant urges that the Court remand this case back to the circuit court for an evidentiary hearing, and instruct the circuit court to consider the Appellant=s evidence from Trial Practices, Inc., as it meets the Frye test for admissibility of scientific evidence and supports the Appellant=s argument that he in fact meets the Jones standard (see Argument II for discussion of the mock trial evidence).

The same evidence of guilt cited by the lower court in its Order was considered by focus groups or mock juries in Dr. Harvey Moore=s recent studies. This leads to Argument II of this Initial Brief. The focus groups or mock juries concluded that, although the state may have proven a case of theft and forgery against Paul Hildwin, they did not prove the murder charge.[21] The Defendant urges the Court to view and

[21]Dr. Moore analyzed the mock juror's responses regarding the significance of the newly discovered DNA evidence and estimated that the likelihood of acquittal on retrial would be high, approximately 90%. [PC current ROA Vol. II, 00120]. In a replication of the original trial which did not include the newly discovered DNA

consider the mock trial and related evidence which supports the Defendant=s argument that he meets the Jones standard in the instant case.

ARGUMENT II

THE DEFENDANT WAS DEPRIVED OF A FAIR EVIDENTIARY HEARING WHEN THE CIRCUIT COURT EXCLUDED AND REFUSED TO CONSIDER THE APPELLANT=S MOCK TRIAL AND RELATED EVIDENCE, INCLUDING THE REPORTS AND OPINIONS OF DR. HARVEY MOORE AND TRIAL PRACTICES, INC., IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THIS EVIDENCE MEETS THE FRYE STANDARD AND SHOULD HAVE BEEN CONSIDERED BY THE LOWER COURT.

Standard of Review.

A trial court=s ruling on a Frye issue is subject to de novo review on appeal. Murray v. State, 838 So. 2d 1073 (Fla. 2002), Brim v. State, 695 So. 2d 268 (Fla. 1997). Therefore, this issue is a matter of law rather than a review of the trial court=s abuse of discretion.

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evidence, 70% of the mock jurors specifically cited the secretor/non-secretor evidence as a contributing reason for their verdict. "In fact, of the seven jurors who actually gave a specific reason, **all** mentioned some aspect of the secretor/non-secretor evidence although one (David Hall) voted for third degree murder because it was not 100% sure like DNA evidence." [PC current ROA Vol. II, 00115]. In a separate study involving telephone surveys with other individuals, 77% who voted to convict cited the [misleading] serology evidence as either the most important or very important piece of evidence in their decision. Of that sample, 67% believed the newly discovered DNA evidence would either definitely or probably change their verdict. [PC current ROA Vol. III, 00446].

In the case of Ramirez v. State, 810 So. 2d 836 (Fla. 2001), this Court reviewed the criteria for admissibility of expert evidence under Frye. The Court stated,

> AWhen applying the Frye test, a court is not required to accept a >nose count= of experts in the field. Rather, the court may peruse disparate sourceBe.g., expert testimony, scientific and legal publications, and judicial opinionsBand decide for itself whether the theory in issue has been >sufficiently tested and accepted by the relevant scientific community.= In gauging acceptance, the court must look to properties that traditionally inhere in scientific acceptance for the type of methodology or procedure under reviewBi.e., >indicia= or >hallmarks= of acceptability.@
> [Ramirez at 844].

Mock jury simulations and their results have been Asufficiently tested and accepted by the relevant scientific community.@ At the lower court, the Appellant provided approximate 300 pages of expert testimony, scientific and legal publications, and judicial opinions on the acceptance and reliability of mock trial results. The lower court dismissed the evidence without even viewing the evidence, and dismissed it simply as Aunscientific.@

Under the Jones standard, the Appellant is required to prove that in light of the newly discovered evidence, an acquittal is probable on retrial. To achieve that purpose, the Appellant consulted with jury trial consultant Harvey Moore of Trial Practices, Inc. Dr. Moore=s CV is part of this Record on Appeal (PC current Vol. III 00367-00373). Dr. Moore is a well-known and respected retired professor,

sociologist, and jury trial consultant whose specialties include conducting mock trials and gathering focus groups to analyze the strengths and weaknesses of court cases and related evidence for professionals and organizations throughout the country. Such exercises generally assist attorneys in evaluating their chances of success in court cases. Articles have been written which state that mock trials are very accurate indicators of actual trial results. It was the Appellant=s hope that neutral mock juries would acquit him in light of his newly discovered evidence. Two mock juries did acquit Mr. Hildwin in light of newly discovered evidence (See Dr. Moore=s September 6, 2003 report on the mock jury studies, PC current Vol. II 00106-00232). This is concrete evidence that the Defendant meets the Jones standard, evidence that should have been considered by the lower court as a matter of law.

Dr. Moore=s report was introduced at the Case Management Conference on December 2, 2003, but it appears the lower court did not read or consider the evidence. At the December 2, 2003 Case Management Conference, when the Appellant tendered the reports and videotapes, the state informed that their belief was that such evidence did not meet the Frye standard. The lower court ordered that the parties submit memorandums on the admissibility of such evidence under Frye (PC current Vol. II 00236-00237). The lower court stated at the Case Management Conference when presented with the evidence: A[I want to know] what supporting authority is there for the Court to consider such items in trying to see if the Jones

standard has been met....[W]hat I would like for you to do is to present legal authority for me to even look at the material and then I would Bbecause the state has objected, and I would like the state to respond. And what I=m going to do is not review any of the material until I rule on the issue.@ (PC current Vol. II 00277, 00279-00280). The court ultimately ruled that the evidence was inadmissible.

In its Order, the lower court refused to consider the reports and videotapes of the mock trials for the following reasons (PC current Vol. III 00429):

1) [Mock trials] are pretrial functions, not post-trial functions
2) The lower court knew of no other cases where such evidence had been introduced as substantive evidence
3) The results are not accurate or reliable
4) The results do not meet Frye
5) The results are unscientific
6) The results attempt to offer opinion as to a question of law and invade the province of the court on an issue of law[22]

It appears that these rulings were made by the lower court without even reading the reports or viewing the videotapes. The Appellant suggests that these rulings cannot be made without reading the reports and viewing the tapes. The Appellant suggests that if the reports are read and the videotapes viewed, it becomes clear that the exercises can serve post-trial functions. The reports make clear that the state=s most important piece of incriminating evidence at the 1986 trial was the misleading and outdated

[22]This is a summarized list of reasons, not a direct quote from the lower court=s Order.

serology evidence. The reports make clear that the most significant piece of exculpatory evidence is the newly discovered DNA evidence, which caused two mock juries to acquit Paul Hildwin. A separate mock trial was conducted with a separate mock jury without mention of the newly discovered DNA evidence, and the Appellant was not-surprisingly convicted (it was noted by these jurors that the serology evidence was the most significant piece of evidence in their decision to find the defendant guilty). This is extremely important evidence in the context of a Jones analysis, evidence which the lower court refused to consider. Just because there are no cases directly on point authorizing the admittance of such evidence in postconviction does not absolutely bar the use of such evidence. The Appellant argues that this should be a question of weight to be afforded the evidence rather than admissibility.

Our own United States Supreme Court has used similar sociological research in their authored opinions (see discussion below from the Appellant=s AMemorandum of Facts and Law in Support of the Use of Mock Trial Evidence@ PC current ROA Vol. III 00287-00409).

The lower court states that the results are not accurate or reliable. Again, this decision cannot be made without viewing the evidence, and the court gives no specific reasons in its Order why this conclusion was made. The results of the mock trials are accurate. Two mock juries voted to acquit Paul Hildwin based on newly discovered DNA evidence. The proceedings including case presentations and jury deliberations

are on videotape, and if the lower court would have taken the time to watch the tapes or read the reports, perhaps the court would have seen that the results of the mock trials are accurate and reliable.[23] The lower court ruled that the mock trial results do not meet Frye. Support for the results of the exercises meeting Frye can be found at PC current ROA Vol. III 00287-00409, 00432-462, and PC current ROA Vol. IV 00465-626). Although there was no actual Frye hearing conducted in this case, the above record citations contain numerous cases, articles, studies, and other support for the reliability of mock trial results. Although the approximately 300 pages of the above-listed support for the mock trial results were cited to the lower court, the lower court simply dismissed the results as Aunscientific@ and Awithout scientific controls@ without referencing any of the Appellant=s cited and filed material in support of the admissibility of mock trial results under Frye. The lower court criticized the mock trials for being Acondensed,@ but that is generally how mock trials are conducted in the sociological scientific community.

In support of the admissibility of the mock trial evidence, the Appellant stated in

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[23]A completely separate telephone survey was conducted regarding the newly discovered evidence. The results were again in favor of the participants acquitting Paul Hildwin (*see* Appellant=s AMotion for Rehearing and attached Trial Practices, Inc. Report at PC current ROA Vol. III 00432-00462). In its AOrder Denying Defendant=s Motion for Rehearing,@ at PC current ROA Vol. III, 00462, the lower court denied the Motion for Rehearing and stated that there were no new issues. In actuality, a completely different telephone survey was conducted, was attached to the Motion for Rehearing, and was not acknowledged by the trial court.

part the following in his AMemorandum of Facts and Law in Support of the Use of Mock Trial Evidence, Accompanying Report from Trial Practices, Inc, and Expert Testimony of Harvey A. Moore, Ph.D@ (PC current Vol. III 00295-00305):

AIn support of the general acceptance of mock trial simulations in the scientific and legal community, the following are excerpts from the aforementioned 1988 article from the ABA Journal, AThe Verdict on Surrogate Jury Research@:

[Q]: How recent is the use of surrogate jury research?
[A] Meyer: **It=s really come of age in the past five years.** The whole concept is really an outgrowth of the focus group concept in marketing. It=s no different than what Pepsi-Cola does when it introduces a new product on the market. It gathers together a group of people to see how that product is going to play in the broader atmosphere in the public. That=s the same thing that we, as up-to-date law firms, are doing-B**gathering together simulated juries, who are just members of the public, to listen and give us an indication of what 12 people would find in a case.**
[Q]: For what sorts of cases are jury studies most useful?
[A] Lunsford: Both civil and criminal. **We=ve done them in criminal cases where the stakes are high, such as a death penalty case,** and we=ve done them in complex civil cases.
[A]: Meyer: **I think they are useful in all sorts of cases. Whenever you are going to be appealing to a jury you ought to get an impression of how 12 people, or six people in federal court, are going to react to your set of facts. How are they going to deliberate? Which facts stand out? Those are questions that you want to get answered.**
[Q]: In pre-trial jury studies, what formats are possible?
[A]: Lunsford: A series of things is possible. **We do brief half-day simulations where either consultants** or the attorneys themselves **present abbreviated statements of facts and arguments for each side and the mock jurors deliberate for an hour or two. Then we debrief them.**
We occasionally do simple discussions of issues with mock jurors without getting into the facts of the trial, but it=s much better to talk about the facts in a particular case. **We do a lot of full-day mock trials. They include abbreviated jury instructions from a person who acts as a judge**.
Then usually the jurors deliberate for several hours while we videotape and we

debrief them again. Sometimes they want to talk to the lawyers and the lawyers want to talk with them and explore their own private concerns. In the longer ones we do, there is a presentation of people as witnesses on the side we're working for. Sometimes we even use actors to take the role as opposing witnesses. **Typically the jurors don't know which side you're on. They are told it's part of lawyer training on how to communicate clearly.**

. . . .

[Q]: Is it important for the mock trial to be realistic?

[A]: Lee:... **You should be able to get your information to the panel within a two-and-a-half hour period.**

[A]: Meyer: **It should be realistic to the extent that you accurately assess the strong points and weak points of your claim. You have to be able to see how the opposing party sees its case and accurately present that case to your mock jury. If you don't, then you've really wasted your time. If you can identify your presentation and the opposing presentation as they will appear in court, you'll find that if you do that three or four times, the outcome of the mock juries will be consistent with the verdict that comes down at trial**.

[Q]: What is the ideal length for a mock trial?

[A]: Meyer: **Practicality comes into it. I would like to make sure that the facts get out there at one sitting...**

[Q]: Should a mock trial be videotaped or viewed through a one-way mirror?

[A]: Lunsford: We both view it through a one-way mirror and **videotape it.** Occasionally when the facilities are not available to do it that way, we do it with a camera in the room, but **it doesn't stop the jurors from having spirited discussions. It's very useful for the later analysis when you and the attorneys have a chance to go over the tapes, each person will see different things. We do a detailed analysis of the tapes, the relationship between the way people reason to their conclusions, the conclusions they reached, and the jurors' backgrounds.**

[Q]: How important is it to match mock jurors demographically with people likely to be impaneled for the real trial?

...

[A]: Meyer: **I don't think it does you any good to get a juror from one part of the state when in fact your jurors will not come from that part of the state. There are different dynamics in a state court case, where everybody is from one county,** and a federal court trial, where they may be drawn from all different corners of the state. **The ways they act and will decide together and feel comfortable with one another are very different and ought to be assessed.**

. . . .

[Q]: Should multiple surrogate jury tests be done?

[A]: Lunsford: **There are times when it's very useful. It's kind of expensive and you only find people doing that in a case where the stakes, either personal or monetary, are pretty high. Where you do that you have the advantage of trying out more than one version of the argument and you always learn a lot of things from the reaction of the jurors.**
[A]: Vinson: It depends on the complexity of the case. You may not be able to capture the entire case with one trial simulation. You may need a variety of them.
[A]: Lee: **I think it's important to do multiple tests. I've done just one assessment, but a lot of times I've done two and three.**
[A]: Meyer: There are certainly going to be cases where there are aberrations and you want to account for those. Doing one trial, you may end up with the aberrant jury. **What you want to do is make a number of presentations and allow the mock jury to account for that aberration, because if you are going to court you will find that, absent another aberration, your jury in the actual court will find very similarly to your mock juries.**
. . . .
[Q]: What has been your experience with mock trials in terms of their predictiveness?
[A]: Meyer: I would say that if you do more than one mock trial, if you were doing three or four, you can predict with uncanny accuracy the result within given parameters. I mean even down to dollars and cents.
. . . .
[A]: Lee: In one case I tried in Tennessee involving a local doctor, there were substantial injuries ending in the death of the plaintiff. The verdict came out not only against the doctor, but I was able to get a substantial verdict at the actual trial that was the average of the two mock jury studies. It was uncanny. In another case, the mock jury returned a defense verdict. That was predictive and I could not settle it.
Another time the mock jury ended up with a defense verdict and I was able to settle for a very substantial amount, knowing the problems that had been confronted with a mock jury defense verdict.
A case that I tried two years ago was probably the most important of my career. This was Roydson v. R.J. Reynolds, in which the plaintiff, a smoker who suffered from pulmonary disease, contended that tobacco products are unreasonably dangerous under Tennessee law. I had heard through the grapevine that R.J. Reynolds had done some mock jury studies in different parts of the country.
Even though there had been litigation in this field [tobacco company liability] for more than 30 years, it's still in the pioneer stage because there has not been a

jury verdict for the plaintiff. I did three mock juries and maybe because of my inability to get across to the jury the arguments the best I could, I ended up with three defense verdicts.
Now that sounds bad for me, but I don=t think my time and efforts were wasted because it has given me a chance to totally reevaluate my handling of that case, so that if I do get a new trial, I=ll come back and do a different approach than I did both with the mock jury and in the actual trial itself.
[Q]: Should the size of the surrogate jury be the same size as the actual trial jury?
[A]: Lunsford: **Ideally, but it=s not vital that it be exactly the same. The research suggests that the number of people on a jury has some effect on the dynamics of a jury...So you want them to be about the same size. But what you want above all in a simulation is to have a good examination of the issues, so that you understand how they think about these things.**

-Excerpts from A The Verdict on Surrogate Jury Research@, ABA Journal, March 1988, Litigation section, see Appendix A. Emphasis added in text as it applies to the procedures followed by Dr. Harvey Moore and Trial Practices, Inc. in their mock trial simulations.

The article referenced above is important for Frye purposes because the article is documented proof that even back in 1988, 16 years ago, the science and utilization of mock trials in the practice of law was firmly established. The fact that the article and the subject of the utilization of mock trial simulations in the practice of law was published in the very mainstream and well-known American Bar Association periodical shows that the science of mock trials and utilization of professional jury trial consultants are generally recognized and nationally accepted. Additionally, the article speaks to the reliability of mock trials. Respected law practitioners in the article describe the accuracy in predicting future actual trial results by way of mock trials as Auncanny.@ The evidence that Paul Hildwin wished to present at an evidentiary

hearing by way of the testimony of Dr. Harvey Moore meets the current Frye standard in the State of Florida.

Before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the Court: first, the Court must decide whether the subject matter is proper for expert testimony, i.e., that it will assist the trier of fact in understanding the evidence or in determining a fact in issue; second, the Court must determine whether the witness is adequately qualified to express an opinion on the matter. Terry v. State, 668 So. 2d 954 (1996), rehearing denied. In the case at bar, the subject matter is proper and the issues can be assisted with expert testimony regarding the results of mock trial studies involving the newly discovered DNA evidence. As the state and defense have pointed out in their prior pleadings, the Court is required to engage in speculation in deciding whether the defense has met the Jones standard and is entitled to a new trial. This speculative standard is a difficult standard and one which can be assisted by the results of mock trial studies conducted in this case. This case involves the most serious of penalties, the death penalty. As pointed out in the 1988 ABA Journal article, mock trial studies are utilized in cases where the stakes are high. If the defendant is not allowed to have the Court consider the evidence from the mock trial studies, he will be denied due process of law in this high-stakes case. Post-conviction litigation is governed by principles of due process. See Holland v. State, 503 So.2d 1250 (Fla. 1987). Accordingly, the Defendant should be

allowed an opportunity to present his evidence at an evidentiary hearing. Although whether or not the newly discovered DNA evidence is such that it meets the Jones standard in this case is a decision ultimately for the Court to make, the Court=s decision can be assisted by the mock jury studies and the expert testimony of Dr. Harvey Moore. Again, this is more of a question of the evidentiary weight to be afforded to the mock trial studies rather than the admissibility of the evidence. Any possible flaws in the design or procedure of the mock trial studies can be revealed on cross-examination by the state and will go to possibly discrediting the value the Court should place on the evidence.

The evidence the Defendant wishes to present in the case at bar will likewise assist the trier of fact, the Court, in determining if the newly discovered DNA evidence is such that an acquittal would be probable on retrial. The Jones standard in the case at bar is met not by an unsupported opinion of an expert jury trial consultant and sociologist, but such expert opinions are supported and evidenced by mock jury trial simulations and accompanying deliberations.

At the very least, the Defendant requests that the Court view the previously submitted evidence and presently defer ruling as to whether the Court will admit the evidence and hear the expert testimony of Dr. Harvey Moore. If the Court views the four videotapes and Trial Practices, Inc. report and determines that they are not helpful to the Court=s decision, and that the expert=s testimony regarding the exercises

will not be helpful to the Court=s decision, then the decision can be made at that time to exclude the evidence. The Defendant respectfully submits that there is no way for the Court to decide if the evidence at issue may be helpful to the Court unless the Court at least views the evidence to determine if it may be helpful, and if the expert and his methods are generally scientifically accepted and reliable. Furthermore, under Frye, when an expert=s opinion is well-founded and based upon generally accepted scientific principles and methodology, it is not necessary that the expert=s opinion be generally accepted as well, for the opinion to be admissible. See Berry v. CSX Transportation, Inc., 709 So. 2d 552 (Fla. 1st DCA 1998).

Support for the use of mock trial simulations in this context can be found in a recent study supported by the National Center for State Courts (the NCSC), with headquarters in Arlington, Virginia (see Appendix B, information on the NCSC including a Fall 2003 article entitled AProject Examines Jurors= Understanding of DNA Evidence@). The project, designed to test jurors understanding of DNA and test proposed jury trial innovations is funded by a grant from the National Institute of Justice and supported by the NCSC. The project will last one year and will utilize 60 mock jury simulations to analyze jurors= understanding of DNA and the effect of certain trial innovations on jurors= understanding of DNA evidence. Innovations considered will include 1) Allowing jurors to take notes 2) Allowing jurors to ask questions of DNA experts and 3) Providing Jurors with a checklist for following and

evaluating DNA evidence. Heading the study and utilizing mock trial simulations will be Judge Michael B. Dann, retired Arizona Superior Court Judge and former scholar-in-residence at the National Center for State Courts. Just as the NCSC is utilizing large scale mock trial simulations to test jurors= understanding of DNA evidence, the Defendant wishes to present the results of mock trial simulations, concrete scientific and empirical data, to illustrate the effect of newly discovered DNA evidence on a jury that convicted him in 1986 based on seemingly-powerful, misleading and outdated scientific evidence. The NCSC was founded in 1971 with a goal to improve the development of court systems and court administration nationwide and worldwide. Supported national associations of the NCSC include the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, the American Judges Association, and the National Conference of Appellate Court Clerks. The fact that the National Institute of Justice and the NCSC is supporting the study utilizing 60 mock trial simulations is support for the utilization of mock trial simulations and their reliability in the case at bar. It is clear that mock trial simulations and survey research are widely utilized and accepted in the scientific and legal community, and have been for at least two decades.

In a March, 1986 article printed in the University of Pennsylvania Law Review, entitled ASocial Authority: Obtaining, Evaluating, and Establishing Social Science in Law,@ (134 Univ. Pennsylvania Law Review 477, March 1986) (Appendix C) [PC

Current ROA Vol. III 00335-00365] authors John Monahan and Laurens Walker point out at page 517 that AAll nine current justices of the United States Supreme Court have either authored or joined opinions using social science to establish or criticize a rule of law. See, e.g., United States v. Leon, 104 S. Ct. 3405 (1984) (opinion of Justice White citing sociological field research to support a ›good faith› exception to the fourth amendment exclusionary rule); Barefoot v. Estelle, 463 U.S. 880, 916 (1983), (dissenting opinion of Justice Blackmun, joined by Justices Brennan and Marshall, using psychological and psychiatric research to support the proposition that a state statute predicating capital punishment on a prediction of continuing violence is unconstitutional); Florida v. Royer, 460 U.S. 491, 519 (1983) (dissenting opinion of Justice Rehnquist, joined by Chief Justice Burger and Justice O=Connor, in which sociological surveys were cited to support the use of a Adrug courier profile@ in establishing reasonable suspicion for a search); Mississippi Univ. For Women v. Hogan, 458 U.S. 718 (1982) (opinion of Justice O=Connor citing sociological surveys to establish the unconstitutionality of a state statute that excluded males from enrolling in state-supported nursing school); Ballew v. Georgia, 435 U.S. 223 (1978) (opinion of Justice Blackmun, joined by Justice Stevens, citing psychological laboratory studies to establish the unconstitutionality of five-member juries in state criminal trials); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (opinion by Justice Powell citing epidemiological and demographic research to support the constitutionality of

fixed checkpoint stops of vehicles at borders); Paris Adult Theatre v. Slanton, 413 U.S. 49 (1973)(opinion of Chief Justice Burger using behavioral studies to support the constitutionality of a state obscenity statute).@ Sociology involves the study of human social behavior. Dr. Harvey Moore has dedicated his life to this field of study, and is qualified to testify in the Hildwin case regarding the newly discovered DNA evidence as it relates to the Jones standard. Mock trial jury simulations have evolved out of the fields of sociology and the law and are designed to predict how actual jurors might react to certain evidence and what a verdict may be in an actual trial. People familiar with mock jury simulations have described their reliability and accuracy as Auncanny.@ Simply stated, the evidence the Defendant wishes to present at the evidentiary hearing meets the requirements of Frye because it is widely accepted in the scientific and legal community, and it is tested and reliable.@

The Appellant urges that this Court consider the mock trial and related evidence, and grant him a new trial under Jones. In the alternative, the Appellant urges that the Court remand this case for an evidentiary hearing, instruct the lower court to consider the Trial Practices, Inc. evidence in full, and allow Dr. Harvey Moore to present his opinions at an evidentiary hearing.

ARGUMENT III

THE CIRCUIT COURT ERRED IN FINDING THE CONSTRUCTIVE AMENDMENT/FATAL VARIANCE CLAIM PROCEDURALLY BARRED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION .

Standard of Review.

In deciding this type of claim, which is jurisdictional, this Court should review this legal question de novo.

The circuit court stated (at PC current ROA Vol. III 00426) that this claim should have been raised in earlier pleadings and therefore is procedurally barred. The lower court also stated that the claim is not clear and identifiable, and states that there were no fatal variances in the indictment because the defendant was only charged with first degree murder. That is the basis of the claim. The defendant was only indicted on a charge of first degree murder, but essentially was tried for a charge of sexual battery not alleged in the indictment. The record is clear that trial counsel was not prepared to defend allegations of sexual battery, and those allegations and arguments accompanied the secretor/non-secretor evidence. As such, the Appellant was not adequately noticed of the charges which were prosecuted at trial.

To state this issue, the Appellant will simply stand by arguments previously made in the 3.850 Motion, which are as follows:

APaul Hildwin asserts that he was embarrassed in his defense due to fatal variances and constructive amendments of the indictment at trial. Attached to this pleading is a copy of the indictment for first degree murder presented and filed on November 22, 1985. (see Attachment AB@) [Note: this is at PC current ROA Vol. I 00070) The indictment does *not* include an accompanying charge of sexual battery. The indictment simply states that Paul Hildwin murdered Vronzettie Cox by strangulation and/or asphyxiation. As such, Paul Hildwin was on notice that he was to defend against those charges and those charges alone. But when the state presented their opening statement to the jury, the defense learned for the first time that the state=s theory of the case included allegations of sexual battery based on false and/or misleading scientific evidence.

While the indictment was limited to alleging a simple murder charge, the state=s evidence and arguments unconstitutionally opened the door to include an otherwise purported rape. The state presented evidence and a theory to the jury that Ms. Cox was murdered after she was raped by Paul Hildwin.[24]

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[24]Because the state was able to expand its theory at trial from that alleged in the indictment, fundamental notions of fairness and the Fifth Amendment were violated in the case at bar. Due process requires that the state adequately inform a defendant of the nature of the charges. Because the indictment did not include the charge of sexual assault, Paul Hildwin lacked adequate notice of the allegations he was to defend himself against. The prejudice that ensued is evidenced by the portions of the trial record cited in Claim II of this motion [Note: this would be Argument I of the instant brief]. Throughout the trial, starting with the defense objections in the opening

Fla. R. Crim. Pro. 3.140(o) reads as follows:

> **Defects and Variances**. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses for any cause whatsoever, *unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense* or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense. (emphasis added)

A trial modification that broadens the charge contained in the indictment is reversible error. See Lucas v. O=Dea, 179 F. 3d 412, 416 (6th Cir. 1999) citing Stirone v. United States, 361 U.S. 212, 217-219 (1960). In the case at bar, the state modified and broadened the charge of murder to include a separate unindicted charge of sexual battery. Amendments occur when the charging terms of the indictment are altered, literally or in effect, by the court or the prosecutor after the grand jury has passed upon them. Id. Variances occur when the charging terms of an indictment are not altered, but the evidence at trial proves facts different from those alleged in the

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statements, it was clear that the State was practicing trial by ambush. It was an ambush because the state failed to allege a sexual battery as a charge in the indictment and the defense was unprepared to defend against those allegations. We have now learned that the Defendant was convicted by faulty and/or misleading scientific evidence. In light of the evidence and allegations presented at trial, the indictment was so unlawfully vague, indistinct and indefinite that it misled Paul Hildwin, failed to inform him of the nature of the charges, and consequently embarrassed him in the preparation of his defense.

indictment. Id. (Internal citations omitted). Jury instructions that alter the circumstances upon which a conviction can be based from those alleged in the indictment are constructive amendments. Id. In the case at bar, the evidence presented at trial purported to prove allegations not contained within the four corners indictment. While the defense in the case at bar may or may not have been prepared to defend a murder charge at trial, they were completely caught off guard when the State presented a virtual joinder of a sexual battery charge. And to further the injustice and prejudice, we have recently learned that the allegations of sexual battery were based completely on false and/or misleading scientific evidence.

In the case of United States v. Ford, 872 F. 2d 1231 (6th Cir. 1989), the defendant was charged with possessing a firearm on or around a certain date. The jury was instructed that they could convict the defendant if they found that the defendant possessed a firearm at anytime during a one year period. The Sixth Circuit held that this constructive amendment was a Afatal variance@ and was per se prejudicial error. Id.

In the case of United States v. Tran, 234 F. 3d 798 (2d Cir. 2000), after pleas of guilty and failure to object at the trial level, the sentences of the defendants for enhanced firearm charges in Tran were reversed on appeal and the cases were remanded for sentencing on the simple firearm offenses. The basis for the reversals was that the indictments failed to allege that a sawed-off shotgun was used in the bank

robbery. The indictments simply alleged that generic firearms were used, and as a result of this flaw in the indictment, the appellate court ruled that the district court lacked subject matter jurisdiction to sentence the defendants to the enhanced charge not listed in the indictment. Similarly, the indictment in the Hildwin case failed to allege that the charges included sexual battery. When the state presented the secretor/non-secretor evidence and argued to the jury that Paul Hildwin raped and murdered the victim, the Defendant was effectively forced to stand trial blind, unaware of the variety and nature of the accusations against him. This issue is one of the types of issues found in Apprendi v. New Jersey, 530 U.S. 466 (2000) (held, Judge=s role in sentencing is constrained at its outer limits by facts alleged in the indictment and found by jury). In the case at bar, the allegations of a sexual assault were not contained in the indictment. As such, the court lacked jurisdiction to sentence Paul Hildwin to an unindicted crime. In Tran, the government first argued that the defendants waived their right to challenge the flaws in the indictment because they pled guilty. The Court rejected this argument stating that pleading guilty does not waive a defendant=s right to indictment by a grand jury. Tran at 806. Second, the government argued that because the defendants had failed to challenge the indictment at the lower level requires that the defendants show plain error, and no plain error was demonstrated. The Court rejected this argument, stating:

[P]lain error review is inappropriate where the defect in the

> indictment is jurisdictional. Where an indictment fails to allege each material element of the offense, it fails to charge that offense. See Cabrera-Teran, 168 F. 3d at 143. AA >failure of the indictment to charge an offense may be treated as [a] jurisdictional= defect, ... and an appellate court must notice such a flaw even if the issue was never raised in the district court nor on appeal.@ United States v. Foley, 73 F. 3d 484, 488 (2d Cir. 1996) (quoting United States v. Doyle, 348 F. 2d 715, 718(2d Cir. 1965)), abrogated on other grounds by Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); see also Fed.R.Crim.P. 12(b)(2) (objection that an indictment Afails to show jurisdiction in the court or to charge an offense ... *shall* be noticed by the court at any time during the pendency of the proceedings@ (emphasis added).[25]
> [Tran at 806, 807]

At the evidentiary hearing for the original 3.850 proceedings in 1992, the assistant state attorney who prosecuted the original trial in 1986, Thomas Hogan, was

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[25]Just as the government in Tran was attempting to argue that the defendants= failure to object to the indictment at the trial level should act as a procedural bar to the claim, the government in the case at bar may attempt to argue that the failure to specifically allege the indictment-related fatal variances and constructive amendments in the direct appeal should procedurally bar this claim. The case law is clear that when a defendant objects to issues stemming from a faulty indictment, this becomes a jurisdictional claim that the court *must* notice. Therefore, any anticipated arguments regarding procedural bars must be disregarded. Justice requires that these issues be addressed in this Court.

The facts in the original indictment alleged that Paul Hildwin murdered Vronzettie Cox by strangulation and/or asphyxiation. This is the act that Paul Hildwin was accused of committing, and that act that he was indicted for by a grand jury. At trial, the State expanded and enlarged their theory and argued that Paul Hildwin was guilty of sexual assault by virtue of false and/or misleading scientific evidence. This constitutes fatal variances and/or constructive amendments according to case law.

called to the stand. Interestingly, when Mr. Hogan was answering questions about his response to Mr. Lewan=s Motion for Bill of Particulars, he stated:

A: I didn=t like filing Bills of Particulars because it gave youBit restricted any latitude you may have in the indictment and certainly in an indictment you=re restricted enough. You can=t go back and just amend it once the trial starts because you got a grand jury that handed it down, and I didn=t like being restricted in any way that I didn=t have to be.
It wasn=t that, you know, we weren=t willing to tell him what we thought or give him Dr. Techman=s report, which we certainly did and he certainly had the opportunity to depose Dr. Techman.
What I mean by the notation is, I was going to object to the filing of a Bill of Particulars, and then force myself to beBrestrict my window of opportunity as so it were to prove the case beyond a reasonable doubt.
Mr. McClain: May I have just a moment, Your Honor?
A: But I don=t think it has anything to do with discovery necessarily. In fact, the note indicates that we expected him to discover this and that certainly was no secret.[26]
[1992 Evidentiary Hearing, Vol. IV, 645-46]

Though the development of constructive amendment law comes from the Grand Jury Clause of the Fifth Amendment which applies only to federal courts, state criminal defendants have an equally fundamental right to be informed with the nature of the accusations against them. Lucas 179 F. 3d at 417. See also United States v. McAnderson, 914 F 2d 934, 944 (7th Cir. 1990) (constructive amendments are *per se*

[26]The above passage shows that the individuals responsible for prosecuting the Hildwin case were well aware that the presentation of evidence must be restricted to those factual and legal allegations specifically listed in the indictment. As Mr. Hogan notes above, the state is restricted by the specific terms of an indictment. Because the state opened the door to convictions for unindicted and uncharged offenses, specifically a charge of sexual battery, Paul Hildwin was denied his Fifth Amendment protections.

prejudicial because they Adeny the defendant his right to a grand jury and hamper the ability to prepare adequately for trial.@) The indictment in the case of Paul Hildwin did not include sexual battery charges. As such, the defense was completely unprepared to defend against the allegations that he raped and murdered the victim. The lack of preparedness was compounded by Mr. Lewan=s failure to attend the depositions of the FBI agents prior to trial, and failure to discover the purported secretor/non-secretor evidence. The actions of the state and the inactions of the defense attorney led to grave violations of the Defendant=s Constitutional rights. As such, the Defendant must be afforded a new trial which does not include false and/or misleading scientific evidence of an unindicted offense. Paul Hildwin=s unconstitutional conviction and sentence of death must be reversed.@

The Appellant prays that this Honorable Court give this claim due consideration and rule that the circuit court erred in finding it procedurally barred.

ARGUMENT IV

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. HILDWIN OF A FUNDAMENTALLY FAIR CAPITAL TRIAL, PENALTY PHASE PROCEEDINGS, AND POSTCONVICTION PROCEEDINGS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

In deciding ineffective assistance of counsel, newly discovered evidence and cumulative error claims, this Court reviews legal questions de novo and gives deference to the circuit court=s findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000)(internal citations omitted).

In it=s Order regarding the Appellant=s request for cumulative error analysis, the lower court states, A[The claim] contains numerous allegations that **were** or should have been brought in the original appeal or previous motions, and **cannot now be again reviewed**...[the Appellant] asks this Court to conduct a Acumulative@ Jones analysis in reconsidering and vacating his conviction and sentence.@ (PC current Vol. III 00427, **emphasis added**). The lower court, rather than conducting a cumulative analysis, discusses at length its feeling that Paul Hildwin is a liar. Emphasis was added

above because it is clear that the lower court is refusing to conduct a cumulative error analysis. The court basically states that anything that was brought up at the 1992 evidentiary hearing is somehow procedurally barred from being considered once again. Important evidence revealed at that 1992 evidentiary hearing must be reviewed again to give the reviewing court a total picture of this case. It was not revealed until the evidentiary hearing in 1992 that the alternate suspect, the victim=s boyfriend, William Haverty, was acting very suspicious at the time of the murder. In the Appellant=s 3.850 Motion filed in circuit court, regarding this cumulative error claim, the Appellant relayed the following:

AAll factual and legal allegations made in this claim, the instant Motion, and all prior motions are incorporated herein by reference. Paul Hildwin asks the Court to take judicial notice of all prior proceedings and evidence produced therein, including all evidence from the 1992 evidentiary hearing. In Jones v. State, 709 So.2d 512, 521-22 (Fla.), cert. denied, 523 U.S. 1040, 118 S.Ct. 1350, 140 L.Ed.2d 499 (1998), the Florida Supreme Court explained that when a prior evidentiary hearing has been conducted, "the 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' " in determining whether the evidence would probably produce a different result on retrial. This cumulative analysis must be conducted so that the trial court has a "total picture"

of the case. Lightbourne v. State, 742 So.2d 238, 247-48 (Fla.1999). Accordingly, Paul Hildwin asks this Court to conduct a new Jones analysis incorporating the newly discovered DNA results in the balance of all newly discovered evidence produced from 1992 to the present time as weighed against the evidence produced at trial.

As well as the newly discovered DNA evidence, the following newly discovered evidence was presented at the 1992 evidentiary hearing (note: this list is not exhaustive):

Haverty told police investigators that he worked all day on Wednesday, September 10. In fact, according to his employer, Michael Anthony Couch, Haverty did not work that day. He worked a partial day on the ninth and not at all on the tenth and eleventh. Thus, Haverty gave a false alibi to the police for a period of time in which the witnesses listed above say the victim was still alive.

Police reports reflect suspicious behavior by Haverty after the victim's disappearance (PC Exs. 16, 41, 20) [Note: these are exhibits introduced at the 1992 evidentiary hearing]. The evidence also reflected the discovery of a note in the victim's trailer. The note stated, "Fuck off and die" and that if the recipient of the note "didn't like it at the house they could leave" (PC Exs. 19; State PC Ex. 2) [1992 PC]. A sheriff's deputy testified that Haverty admitted writing the note (PC-R. 3728, 3746) [1992 PC]. Ms. Cox's family, based upon the interaction between Ms. Cox and Haverty, believed he committed the murder (PC-R. 4184)[1992 PC]. None of this

information was presented to Mr. Hildwin's trial jury.

Moreover, Bernice Moore, the victim=s sister, reported that on September 12 she noticed that the victim's watch was not on the sink in the trailer where the victim resided. On September 13, she noticed the victim's watch on the sink. She also noted that a knife that was in a sheath was there on September 13 but not on September 12. This knife was most likely used when the victim went fishing which was quite often.

The jailhouse snitch, Robert Worgess, who allegedly heard Paul Hildwin confess to the murder, was up for violation of probation for lying and was subsequently released by Hildwin=s prosecutor after his testimony against Paul Hildwin.

An evidentiary hearing should be conducted on the instant Motion in order for the Court to receive and evaluate the new evidence being offered. Jones, supra. The newly discovered DNA evidence cannot be simply analyzed in a vacuum. It must be analyzed in conjunction with all previously presented newly discovered evidence and weighed against the circumstantial evidence presented at trial.@

Although rulings were made post-1992 that the above-cited evidence was not material enough for relief due to the other indicia of guilt of the Appellant, the Appellant urges that this Court now reconsider the above-cited evidence in a new cumulative analysis, or in the alternative, remand this case back to the circuit court with instructions to do a proper cumulative analysis. The prior rulings were made

before newly discovered DNA evidence excludes Paul Hildwin as the source of the semen and saliva recovered from the crime scene. The materiality of the above-cited evidence grows exponentially when considered in conjunction with the newly discovered DNA evidence.

The DNA results not only contradict the FBI's expert scientific testimony, but eviscerate the only corroborating evidence for a series of "admissions" attributed to Appellant by State agents at trial. As such, the new DNA evidence raises the spectre that these "admissions" were deliberately fashioned to conform to the state of the crime scene evidence (as the officials then believed it to be), and violate the Due Process Clause of the 14th Amendment. The 14th Amendment prohibits the "deliberate deception of court and jury" in criminal Trials. Mooney v. Holohan, 294 U.S. 103, 112 (1935). There is a strong inference that state agents knowingly presented false and misleading evidence and perjured testimony from law enforcement at the 1986 trial in violation of Giglio v. United States, 405 U.S. 150 (1972). A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. U.S. v. Agurs, 427 U.S. 97, 103 (1976) (emphasis added); *see also* Napue v. Illinois, 360 U.S. 264, 269 (1959), Pyle v. Kansas, 317 U.S. 213, 216 (1942). It appears that state agents falsely and knowingly attributed the defendant's alleged statements or "confessions" to bootstrap the effect

of their misleading serological evidence: *see also* Kyles v. Whitley, 514 U.S. 419, 436-38, 447 (1995) (constitutional violations must be assessed for their cumulative effect on outcome of trial, including integrity of original police investigation).

The Appellant suggests that the lower court placed an unreasonable and unlawful standard upon him. This is evidenced by the lower court=s following statement in its Order: APursuant to the standards set forth in *Jones*, this 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.@ (PC current ROA Vol. III 00425). First of all, Jones does not require that the Defendant show that he is innocent of the crime charged. Secondly, the lower court says nothing in the above statement about reviewing all of the newly discovered evidence presented at the 1992 evidentiary hearing on a cumulative analysis basis. The DNA evidence must be analyzed not just with the evidence presented at trial, but in conjunction with evidence presented at the 1992 evidentiary hearing suggesting the guilt of the victim=s boyfriend, William Haverty.

If this Honorable Court does not reach a decision to grant relief on Argument I of this Brief, the Appellant asks the Court to conduct a cumulative analysis and grant relief based on cumulative error, or in the alternative, remand this case to the lower

court for a cumulative analysis to be performed based on all newly discovered evidence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Hildwin respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail to all counsel of record on this ____ day of January, 2005.

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