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**

REPLY BRIEF OF THE APPELLANT AND REQUEST FOR ORAL ARGUMENT

DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCC

MARK S. GRUBER
FLORIDA BAR NO. 0330541
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

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). References to the 1986 Trial Transcript are of the form (TT pg. xx). 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.@

Preliminary Statements, Comment on Timeliness, and Request for Oral Argument

The State=s stubborn refusal to concede constitutional and reversible error in this case, or simply submit the DNA profile into the CODIS system to determine if it matches a known serial rapist/murderer, is frankly disturbing. The State seems more concerned with protecting the wrongful conviction and death sentence of an innocent man on death row rather than identifying the true perpetrator of this crime.

In light of the current record of this case, the State cannot, and should not be permitted to, deny the obviously critical role that the now-discredited serology evidence and testimony played in securing the Appellant=s original conviction and sentence of death. In a discussion of the facts of this case on direct appeal, this Court found:

> Death was due to strangulation; **she had also been raped**. . . .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.

Hildwin v. State, 531 So. 2d 124, 125 (Fla. 1988) (**emphasis added**)

This case was obviously portrayed by the State as a sexual assault. The above factual findings made by this Court are of no strange coincidence. This Court would

never have made the above factual findings without the State presenting evidence and arguments in support of those facts. The State argued rape/murder at trial. Now the State is claiming they never argued rape/murder. The State argued at trial that the panties and washcloth were found on top of the laundry bag. Now the State is claiming that the panties and washcloth were found inside of the laundry bag. The State, try as it now might in an untimely-served Answer Brief, cannot change or in good faith deny the testimony presented and the arguments advanced at trial.[1]

Furthermore, in addition to the untimeliness of the State=s Answer Brief, the Appellant notes and takes exception to the Appellee=s unprofessional characterizations of his briefs and arguments Ahistrionics@, Ahysterical attacks on the integrity of the state@, Ahyperbole@, Atrendy@, Apage-limit evading@, Aremarkably misleading@, Aopen invitation to fraud@, Abordering on bad faith and sharp practice@, A*ad hominem* abuse directed toward the state@, and Ablatantly false.@ Appellant concedes that his arguments, and those of amici, are impassioned ones, but submits that a vigorous challenge to the State=s position is not inappropriate here. For it is hardly a run-of-the-

[1]The Appellee=s brief was not served until April 25, 2005, the 96th day after service of the Appellant=s brief, and was not filed until April 27, 2005, the 97th day after the filing of the Appellant=s Initial Brief.

mill occurrence when irrefutable DNA evidence reveals, for the first time, that another male was in fact the source of the critical biological evidence from the crime scene that convicted one=s client and sent him to death row, yet the State refuses to so much as grant a new trial B much less to take simple measures within its sole control that could potentially identify the true perpetrator, and resolve the question of Appellant=s innocence beyond any doubt.

The ultimate hypocrisy of the State's current position is seen in the State=s claim on page 33 where it argues: Athe defendant is properly bound in his strategy at trial, and is not, and should not be, allowed to re-tool his evidence to fit >new evidence.=@ This admonishment comes from the State who argued at trial that semen and saliva recovered from the crime scene conclusively proved that Hildwin committed the crime, who is now claiming that the semen and saliva have nothing to do with the crime, and who is now claiming that a theory of rape/murder was not advanced at trial. Contrary to the theories now advanced in the State=s Answer Brief, the State described the trial evidence as follows to the jury in 1986:

> 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).

At this point, the State=s only pieces of direct physical evidence linking the Appellant to this murder have been proven false and misleading by modern technology. It is disingenuous at best for the State to now ignore and downplay the significance of this newly discovered DNA evidence. At trial, the State argued that the perpetrator deposited his semen and saliva at the crime scene. FBI agents testified and the State argued that Paul Hildwin was a member of that rare 11% of the male population who were nonsecretors. They argued that Paul Hildwin was the source of the semen and saliva located at the crime scene. They even paraded the victim=s tattered brasserie in front of the jury in closing argument in support of their theory that Paul Hildwin raped and murdered Vronzettie Cox.

The Appellant should be afforded a new trial in light of the newly discovered DNA evidence that refutes the State=s scientific evidence and theory presented at trial.

Due to the complexity of the issues in this case, the fact that this DNA case appears to be a case of first impression for the appellate courts of the State of Florida, and the fact that newly discovered DNA evidence reveals the actual innocence of a death-sentenced prisoner, the Appellant requests to be heard at Oral Argument.

The State=s specific arguments concerning the Appellant=s claims will be addressed in turn.

ARGUMENT I

THE STATE=S BRIEF IMPROPERLY SEEKS TO DENY APPELLANT THE POWERFUL EXCULPATORY INFERENCES FROM THE NEW DNA TEST RESULTS TO WHICH HE IS CLEARLY ENTITLED; WHEN THE POTENTIAL IMPACT OF THE DNA EVIDENCE ON THE JURY IS PROPERLY CONSIDERED, A NEW TRIAL AND/OR SENTENCE IS REQUIRED

The State Argued Rape/Murder at Trial

At trial in 1986, the State informed the jury as early as in their opening statement that Paul Hildwin deposited semen and saliva found on the victim=s panties and washcloth located at the crime scene:

> Finally 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).

The State argues at page 9 of their Answer Brief that AHildwin was not charged with sexual battery, and the State did not argue at trial, that the victim had been sexually battered.@ The State did, in fact, argue that the victim was sexually battered, and they argued that the person who sexually battered the victim also killed the victim.

The State obtained a conviction against Paul Hildwin primarily utilizing outdated serological evidence.

The following is an excerpt from the State=s closing argument at trial clearly showing that they did argue sexual battery at trial:

> 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 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 after**B**after Vronzettie Cox was choked to death, the man that did it washed his face with a white rag.

(Dir. ROA Vol. VI 971-2)

The State argued at trial that the panties, the washcloth, semen and saliva were an integral part of the crime scene. Now that DNA tests have refuted the erroneous claims that the blood type is consistent with Paul Hildwin, the State is desperately backpedaling and claiming that the panties, washcloth, semen and saliva had nothing to do with the crime. Paul Hildwin is entitled to a new trial because of the powerful effect the outdated serological evidence had on the jury. The effect that the newly DNA discovered evidence would have had on the 1986 jury is extreme and candidly undeniable. The DNA evidence is most significant and exculpatory when viewed cumulatively in conjunction with evidence revealed for the first time at the Appellant=s 1992 evidentiary hearing.

Theory that the Victim=s Boyfriend William Haverty Committed the Murder

A large part of the State=s Answer Brief discusses Paul Hildwin=s trial testimony and claims that because Paul Hildwin testified that William Haverty was perhaps the killer, the DNA evidence is meaningless. The State=s claim here is quite illogical. The State conceded at the hearing on the Defendant=s motion for DNA testing, held

January 23, 2002, that exculpatory DNA results would aid the Appellant based on the Appellant=s testimony at trial (PC current ROA Vol. IV 00658). The State claims on page 14 of their Answer Brief that Haverty had Aan alibi for the time of the murder@ and that Haverty=s Awhereabouts at the time of the murder were accounted for.@ They cite to AR964, TT 316, 327, 328" in support of Haverty=s alibi, but these citations are uncorroborated closing argument and testimony from Haverty himself, and actually do not support an alibi. Haverty=s Aalibi@ for the time of the murder was not corroborated at trial. Haverty=s Aalibi witness@ James Weeks testified on rebuttal, but his testimony was weak. James Weeks couldn=t remember if he went to Haverty=s trailer on a Monday or Tuesday, he didn=t know what month it was (only that it was a hot month), and he didn=t know what time he was there. (TT 854-855). In fact, Haverty=s testimony at trial concerning his whereabouts at the alleged time of the murder are suspicious. Furthermore, the body was found in a condition so decomposed that no one can be sure when the murder actually occurred. One thing we can be sure about, a missing person=s report was not filed by her Alive-in lover@ Haverty until *four days after her alleged disappearance*; and this is the same Alive-in lover@ who admitted to writing a cryptic and threatening note to the victim. The note was found in the trailer=s garbage can after the body=s discovery. At the time the note was discovered, Haverty was a suspect and was actually asked to provide a blood

sample to law enforcement. The note was directed to the deceased and it menacingly stated: AFuck off and die, if you don=t like it at the house you can leave.@[2] This note is in stark contrast to Haverty=s testimony at trial where he claimed:

Q: How well were you getting along with [the victim]?
A: Good, we got along real good.
Q: Never had any arguments?
A: Nothing sticks out in my mind.
Q: What about right about the time she disappeared?
A: No.
Q: None whatsoever?
A: No.
(TT 322-323)

At the evidentiary hearing in 1992, Exhibit 19 and State=s Exhibit 2 reflected the discovery of that note in the victim=s trailer. A deputy sheriff testified that Haverty admitted writing the AFuck Off and Die@ note (PC past 3728, 3746). Given that Haverty was the initial suspect in the murder, he was living with the deceased at the time of her death, he failed to report her missing for four days, he was acting suspicious during questioning by law enforcement, and he lied about arguments they were having, had the jury known of the menacing note and the DNA evidence at the time of trial, reasonable doubt would have resonated and the jury would have acquitted. Mr. Lewan testified at the 1992 evidentiary hearing that he had not seen

[2]This note was not considered by the original jury, and was not revealed and introduced into the record until the 1992 evidentiary hearing.

the note until just before taking the stand at the evidentiary hearing, and there was Ano question@ that he would have introduced the note at trial. (PC past 3858-59).

Introduced for the first time at the evidentiary hearing in 1992 were police reports written at the time of the discovery of the victim=s body which reflected that Haverty was acting Atheatrical in his motions@ during questioning, he Ashowed no remorse,@ was Aquick in his responses,@ he Asounded rehearsed,@ he Adid not mention having sex with the victim before she left to do laundry,@ but when he was asked to provide hair standards, he Asaid had sex with her so therefore hair standards would not help,@ and he was Anervous.@ (PC past EH Exhibit 41).

Another police report surfaced for the first time at the evidentiary hearing in 1992 reflecting that an interview with the victim=s nephew Terry Moore was conducted at the time of the murder. He revealed that he was Asure@ he had seen the victim at the bar about 11:15p.m. on September 9, 1985 (PC past EH Exhibit 18), more than 12 hours after the time the State contended the victim had been murdered. Moore informed that she spoke to the victim for 3 or 4 hours, and then the victim left in her car with her boyfriend (Id.). While at the bar, the victim=s boyfriend Aappeared not to be too happy@ (Id.). If granted an evidentiary hearing, the Appellant was prepared to present the testimony of bartender Paula Gullege who would also confirm that the victim was in her bar the evening of September 9, 1985.

The Appellant is entitled to a cumulative analysis of the newly discovered evidence in this case. ABecause this appeal involves a second evidentiary hearing in which claims of newly discovered evidence were presented and evaluated by a trial judge, we must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial.@ Jones v. State, 709 So.2d 512 (1998) at 522.

William Haverty testified cryptically and suspiciously as follows on direct examination at trial:

Q: (By Mr. Hogan) Mr. Haverty, going back to Monday, the 9th of September, 1985, after Vronzettie Cox left your residence between 8:30 and 9:00 o=clock in the morning, did you see anybody else at your residence that day?
A: Yes, sir, there was a man mowing the grass.
Q: I believe you may have testified to this, but when did you move into that residence?
A: The weekend of the hurricane. I guess Labor Day weekend.
Q: So you had been living there one week?
A: Yes, sir.
Q: And on Monday the 9th, a man came to mow your grass?
A: Yes, sir.
Q: Do you recall what time he got there?
A: It had to have been around 9:30, 10:00 o=clock.
Q: Do you recall how long it took him to mow your grass?
A: Just about all day.
Q: Do you recall anything else about the man?
A: Not really.
Q: Do you recall offering him anything to drink?
A: Oh, yes, I brought him out a couple of glasses of water, and after noon, when he was about done, I took him out a beer.
Q: Okay. So you stayed there with him all day?

A: Yes, sir.
Q: Now, Mr. Haverty, Vronzettie Cox did not come home September the 9th?
A: Right.
Q: What did you do about that?
A: I guess about 3:00 or 4:00 I went out to look for her, went to all the laundromats, bars, where she might have went, friends houses, sister=s house.
Q: Did you go to the Lone Star Bar?
A: I don=t think so. I might have drove by looking for the car.
Q: But you might have gone to the Lone Star Bar?
A: I don=t think I went in.
Q: It is possible you would have gone there and you don=t recall it.
A: It=s possible.
Q: On the following day, what did you do about locating Ms. Cox?
A: The same thing. I just drove around, asking people if they=d seen her.
Q: On September 12th, what did you do about locating Ms. Cox?
A: 12th, was that Thursday?
Q: Yes, sir.
A: That=s the day Bernice came over and got me and seeing if I seen her. I said, I ain=t seen hide nor hair of her.
Q: Who is Bernice?
A: Her sister. So we went down, came down to the Sheriff=s Department and filed a missing person=s report.
Q: Did you go to some friends of her house [sic] in Pinellas County looking for her?
A: I went down looking for her, yes, in Safety Harbor.
Q: Mr. Haverty, as a later time, were you asked to give blood to the Hernando County Sheriff=s Office for comparison purposes?
A: Yes, sir.
Q: Did you do that?
A: Yes, sir.
(TT pp. 316-318)

Vronzettie Cox leaves the trailer to simply do the laundry, never returns, and her Alive-in lover@ Haverty waits until four days later to file a missing persons report with law enforcement. Found in the garbage can at the trailer is a threatening note from Haverty to the victim. Haverty testifies that he searched the bars for his girlfriend. A

witness testifies at the 1992 evidentiary hearing that he saw the victim with Haverty at a bar the evening of the 9th, and Haverty did not look happy. Haverty acts extremely suspicious during questioning. Hildwin need not conclusively prove who the killer was. Hildwin need not prove his innocence. He need only show a probability of acquittal on retrial in light of the newly discovered evidence under Jones. In light of the DNA evidence alone, Paul Hildwin meets the threshold requirement for a new trial. Had the lower court performed the mandatory cumulative analysis of all of the newly discovered evidence in this case, it should have ordered a new trial.

Theory that an Unknown 3rd Party Perpetrator Committed the Murder, and Reasons why the Appellant is Entitled to Argue this Possibility

The State is wrong to suggest that the Appellant is barred from arguing that someone other than Haverty may have committed the murder just because his trial counsel may have failed to make this argument at trial. The State=s claim that the exculpatory potential of new DNA evidence cannot be viewed outside the narrow prism of defense counsel=s *arguments* to the jury at trial **B** before the new evidence was even available **B** has no support in Jones or its progeny (and with good reason, the State offers none to support it).

Hypothetically, assume a defendant was charged with raping and murdering a female co-worker in whom he had an admitted, unrequited romantic interest. At trial, the defendant asserts his innocence, arguing in support of reasonable doubt that the

likely perpetrator was her estranged husband, but the jury disbelieves that claim and convicts him. Assume that ten years after trial, newly available DNA testing is conducted on semen from the victim=s autopsy, and the tests both exclude the convicted defendant and yield a CODIS hit on the donor **B** a serial sex offender who, unbeknownst to the parties at the time of trial, was a former neighbor of the victim=s. Even though the neighbor=s name was never mentioned to the jury by anyone at the original trial, *of course* the defendant would *not now* be precluded from arguing -- in a 3.850 motion and at retrial -- that the neighbor was the real killer, merely because at the first trial he had asserted that Athe husband did it.@ Indeed, under Jones he would surely be entitled to argue on a 3.850 motion that notwithstanding any other evidence that had been offered against him at the original trial (motive, opportunity, suspicious statements, etc.), the new DNA evidence linking the serial-offending rapist neighbor to the crime would lead the jury to Aprobably acquit@ the original defendant on retrial **B** and would almost surely succeed in doing so. Any other result would defy common sense and the core purposes of Rules 3.850 and 3.853. It would also run counter to long-settled principles regarding his Due Process right to present affirmative evidence in his own defense. Chambers v. Mississippi, 410 U.S. 284 (1973).

Appellant is similarly entitled to the full benefit of the remarkable new DNA results in this case. Having conclusively excluded Appellant himself as the source of

the semen and sweat deposited by a male in the car where the victim=s nude corpse was found, and with the State=s own serology expert concluding at trial that the victim=s boyfriend, Bill Haverty, was also excluded as the source, they provide powerful new **B** and previously-unavailable **B** support for a jury=s finding that another male (either as her lover, or her killer) played a critical role in circumstances surrounding her rape and murder. The fact that the State has refused to close the circle by putting the unknown male profile into the DNA databank should only entitle Appellant to the further benefit of the doubt **B** i.e., that were the State to seek the truth and enter the profile, it would yield a hit on the real perpetrator that would wholly exonerate Appellant.

The Effect of False Scientific Facts, Evidence and Testimony

The courts realize that jurors are so over-awed by forensic testimony, that if a Ascientist@ says something that turns out later to be false, it requires that the case be retried so that the jury can base a verdict on accurate, valid science. The gatekeeping functions of Frye and Daubert are in place to prevent the presentation of unsound scientific evidence to a jury given the dangers of confusing the jury and their over-reliance on unsound scientific principles. Due to advancements in science and due to DNA testing, we know now that Mr. Hildwin=s jury was presented with unsound, misleading, and flatly incorrect scientific evidence. Mr. Hildwin=s blood type is *not*

consistent with the semen and sweat recovered from the crime scene as the FBI experts claimed at trial in 1986.

A recent case out of Texas that received widespread national media attention is illustrative of the significance, weight and dangerous effect the presentation of false scientific facts has on a jury, and how courts have dealt with such issues. Andrea Yates drowned her 5 children, partly out of an irrational fear that Satan would harm them if she did not end their lives and drown them. The state hired psychiatrist Dr. Park Dietz to rebut the defense of insanity. State forensic expert Dr. Dietz informed the jury that he had been consulted by the producers of the television show ALaw and Order@ many times, and that one particular episode involved a woman who drowned her children and claimed postpartum depression and insanity at trial. Dr. Dietz informed the jury that this particular show aired on television shortly before Andrea Yates drowned her own children. The state then cross-examined a defense mental health expert on this issue and highlighted the fact that Andrea Yates regularly watched ALaw and Order,@ and that she may have viewed that particular episode before she drowned her own children. The state then suggested in closing argument: A[W]e heard some evidence that [Andrea Yates] saw some show on TV and knew she could drown her own children and get away with it.@ Yates v. Texas, 2005 WL 20416 at pg. 4 (Tex. App.-Houston, 1st Dist., January 6, 2005).

It was later revealed that Dr. Dietz=s testimony was false. No such show ever was produced by ALaw and Order.@ The appellate court reversed the denial of the appellant=s motion for mistrial based on this factual revelation. The court reasoned that there was a reasonable likelihood that the false testimony could have affected the judgment of the jury and that the testimony affected the substantial rights of the appellant. Id. at pg. 7. In the case at bar, the false testimony concerning the serological evidence definitely affected the judgment of the jury, and it definitely affected the Appellant=s rights, including his right to due process and a fair trial. In light of the newly discovered DNA evidence which proves that the conclusions drawn from the original trial evidence were false, one thing is absolutely certain: we cannot have confidence in the verdict of the Appellant=s 1986 trial. To suggest that Paul Hildwin should remain on death row and be executed notwithstanding the newly discovered DNA evidence manifests the view that there is no order or value in human life or in the universe. Though the State may not have known the falsity of the serology evidence at trial, they know of it now; the State should be ashamed to even be contesting Mr. Hildwin=s simple request for a new and fair trial. The State put Paul Hildwin on death row utilizing false scientific evidence, they know now of its falsity, they have the ability to concede error, yet amazingly refuse to concede error in this case or place the known sample into the CODIS system.

The State argues that the DNA results are insignificant because the Defendant was not formally charged with sexual battery. Contrary to the State=s assertions, this fact in no way diminishes the significance of the newly discovered DNA evidence. The Appellant notes that he was not formally charged with theft either in the case at bar, but the State still advanced the theory that the Appellant unlawfully took the victim=s purse, ring, and radio. Just as the State now cannot candidly claim that they never argued theft at trial, they cannot now candidly claim that they never argued sexual battery at trial.

Admissibility and Relevancy of the DNA Results

The State apparently disputes the admissibility of the newly discovered DNA results according to pages 16 and 17 of the Answer Brief. The lower court already made a finding in support of admissibility of DNA evidence in a written order rendered June 10, 2002.[3]

---

[3]The lower court=s AOrder on Defendant=s Motion for Postconviction DNA Testing@ specifically held, AThe results of DNA testing of that physical evidence likely would be admissible at trial.@ In that same order, the lower court held that A[T]he defense ha[d] shown good cause why a laboratory other than the Florida Department of Law Enforcement should conduct the DNA testing.@

In the State=s closing argument at trial, the State highlighted and argued that Sergeant Haygood testified that the panties and washcloth were located *on top of the laundry bag*. Sergeant Haygood did indeed provide this testimony at trial (TR Vol. IV 683-687). Now that DNA testing has proven that the semen and saliva *did not* come from Paul Hildwin, the panties that the state once argued were noxiously *on top of the laundry bag* have now conveniently crept *inside the laundry bag*. FDLE Assistant General Counsel Jim Martin=s January 27, 2005 letter to Senior Assistant Attorney General Kenneth Nunnelley, filed with this Court by the State on January 28, 2005, now innocuously places the panties Ain[side] a dirty laundry bag@ to suggest that a CODIS submission would be improper under FDLE regulations and that any match to a registered felon would be rendered meaningless. The State argues at page 16 of their Answer Brief that A[t]he underwear and washcloth at issue here were located **inside** of the laundry bag.@ (emphasis supplied by the Appellee). Detrimental to the State=s current and unreasonable position is that the panties and washcloth as well as the semen and sweat contained thereon played a prominent role and were made a feature at trial. Now that DNA testing has proven that Paul Hildwin did not deposit the biological fluids found on those items of evidence, the State would ask that this Court to disregard the once-featured evidence and place it backstage.

The State is arguing in the case at bar that the Defendant was never charged

with sexual battery, that Athere is no **physical evidence** that the victim was sexually assaulted at all, much less that the sequence of events was such that the killer=s semen could have been deposited on the victim=s underwearBin the absence of such evidence, there is no connection between the body fluid and the murder,@ and that Athere is nothing to suggest that the DNA evidence is even related to the murder, and everything to suggest that it is connected to an unrelated sexual encounter that occurred at some remote time.@ (Appellee=s Answer Brief page 16-17, emphasis supplied by Appellee). If this is the case, a jury needs to hear this concession from the State on retrial because they argued a completely different scenario to the jury and presented **physical evidence** at the 1986 trial. The newly discovered DNA evidence is absolutely relevant to this case.

CODIS Considerations

The State now refuses to submit the DNA samples into the CODIS databank to determine if the source of the semen and saliva may be a known violent felon or registered sexual predator. This simple process of CODIS submission, which would take mere minutes, could reveal the identity of the true perpetrator of this murder. The CODIS Administrator for Florida, a Florida Department of Law Enforcement employee, apparently has Areservations@ about submitting the DNA profile into the databank. He fears that NDIS Procedure Rule 6.4.2 may be violated if the sample is

entered into the databank because the DNA profile cannot actually be Aattributed to the putative perpetrator.@[4] At trial the State had no qualms or reservations about advancing the theory that the perpetrator deposited his semen at the crime scene, and that perpetrator was Paul Hildwin based on compelling serology statistics. Rather than just a simple rule of NDIS Procedure being violated here, Paul Hildwin=s constitutional rights, including his right to life and liberty, are being violated.

The real concern here should be that serious doubts concerning the identity of the perpetrator have been created through DNA results, and that Paul Hildwin may not be the Aputative perpetrator,@ rather than a concern that an administrative rule may be violated if the known DNA sample is entered into CODIS. From Orchid Cellmark=s analysis and report, we know that the semen and saliva found on the underwear and washrag comes from the same unknown male. The state has the ability to submit the known DNA sample into CODIS to find out who that person is, and yet they stubbornly refuse to do so. As suggested by the State, if we are forced to accept the reliability of the old serological tests that excluded the victim=s live-in boyfriend William Haverty as the donor of the semen and saliva, this supports Hildwin=s testimony and theory that Haverty may have killed his

[4]See the Appellee=s Notice of Filing dated January 28, 2005, correspondence from James Martin, Assistant General Counsel for FDLE.

girlfriend in an angry jealous rage because he suspected infidelity on the part of the victim.

The State argues in a footnote at page 27 of their Answer Brief that the DNA profile should not now be compared to William Haverty because he was Aexcluded@ at trial due to his secretor status, and that AIn any event, finding genetic material from Haverty in the victim=s laundry would prove absolutely nothing.@ Contrary to the State=s position, this would further disprove the State=s scientific evidence and theories presented at trial, create additional reasonable doubt that was not afforded to Paul Hildwin at trial, and provide corroboration to the his trial testimony. Specifically, if Haverty=s DNA is found not just on the semen on the victim=s underwear, but also on *the same white washcloth that Appellant described in his alleged statements to law enforcement*, it would provide powerful, scientific corroboration for Appellant=s testimony. Indeed, it would provide the jury with a clear basis to find that **B** in the prosecutor=s own words **B** Appellant told the truth

when he said that Athe man who did it wiped his face with a white rag.@[5]

Paul Hildwin Never Said He Had Consensual Sex with the Victim

The State in its Answer Brief claims that because prior counsel for Paul Hildwin advanced the theory that sex was consensual between the Appellant and the victim, Paul Hildwin is deemed to have admitted having sex with the victim. The Appellant never admitted having sex with the victim, not in his statements to law enforcement, not during his testimony at trial, not to anyone. Prior counsel advanced a theory of consensual sex only in response to the State=s allegations that this case was a rape/murder case, and in desperate counterproposal to the State=s seemingly-powerful secretor evidence. The jury did not accept such an argument, the trial court did not accept such an argument, and this Court did not accept such an argument. In this new millennium, with advances in science and technology, and presenting exculpatory DNA results, the Appellant need not advance a theory of consensual sex, and he need

[5]The State=s closing argument reminded: 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.@(Dir. ROA Vol. VI 971-2)

not be compelled to acquiesce to such arguments of prior counsel. The State forced the defense to defend against a sex crime, and only defense counsel conceded to seemingly-powerful scientific evidence. The trial proceedings were actually suspended for the defense to research the serology issue and take depositions of the FBI agents concerning this important issue. Because of the powerful and misleading nature of the secretor evidence that he could not rebut, Lewan basically conceded identity of the perpetrator and gave up the Appellant=s defense. Rather than weak arguments concerning rough consensual sex gone bad and accidental sexual homicide, the Appellant now brings all-powerful exculpatory evidence. Had the jury heard this newly discovered DNA evidence that he now brings before this Court, the result of the Appellant=s trial would have been different.

The Sireci Case

On May 12, 2005, the Appellee filed a Notice of Supplemental Authority citing this Court=s recent opinion in Sireci v. State, 30 Fla. L. Weekly S308 (Fla. April 28, 2005). This case is procedurally-distinguishable because it concerns the denial of a basic 3.853 Motion for Postconviction DNA Testing, not a 3.851 Motion based on exculpatory results received from court-ordered DNA testing. More importantly, the case is quite substantively-distinguishable. Fla. R. Crim. Proc. 3.853(d)(2) contemplates the procedural stance that this case currently finds itself in. Fla. R.

Crim. Proc. 3.853(d)(2) states:

> A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under rule 3.851, **which is based solely on the results of court-ordered DNA testing obtained under this rule**, shall be treated as raising a claim of newly discovered evidence and the time periods set forth in rules 3.850 and 3.851 shall commence on the date that the written test results are provided to the court, the movant, and the prosecuting authority pursuant to subsection (c)(8). (**emphasis added**).

As noted above, our rules of criminal procedure in Florida contemplate a situation where a 3.851 motion would be based **solely** on newly discovered DNA evidence. DNA evidence that refutes scientific evidence presented at an original trial is so significant that it is contemplated by the rules to hold enough weight on its own to overturn a conviction. This case is such a scenario. Such a motion in the case at bar was erroneously denied at the circuit court level without the benefit of an evidentiary hearing even though the Appellant was prepared to present powerful evidence in support of his claims. This case appears to be a case of first impression for this Court and for the State of Florida, and it is imperative that this Court reach a just result. It poses the novel yet simple question, AIs the Appellant entitled to a new trial based on newly discovered DNA evidence refuting the limited and scientific circumstantial evidence of guilt presented at the original trial?@ The Appellant urges that the answer to this question is a resounding AYes.@ In the Sireci case, DNA testing was

denied based on arguably overwhelming evidence of guilt, including seven different murder confessions by Mr. Sireci. This Honorable Court held in a unanimous opinion that had DNA testing been performed, and had exculpatory results been received, there would be no reasonable probability of an acquittal in retrial given the remaining evidence of guilt[6]. The DNA testing that was the subject of the Sireci opinion was simply a hair found on the victim=s sock that the state claimed at trial was consistent with the defendant=s hair.[7] This Court reasoned that even if DNA testing were to show that the hair did not belong to the defendant, this would not have caused the jury to acquit or impose a lesser sentence. In the case at bar, the situation is much different. The DNA results in the case at bar were obtained from testing of a pair of semen-encrusted panties and a sweat-stained washcloth located at the crime scene. At trial, the State did not simply argue that the semen and sweat located at the crime scene was generically consistent with Paul Hildwin=s, they argued that the blood type was consistent with only that rare 11% of the population that included Paul Hildwin=s blood type and excluded William Haverty=s blood type. It is further noted that Paul Hildwin did not confess to seven people as Mr. Sireci did; as a matter of fact he

[6]It is noted though that the Sireci case was decided without oral argument.

[7]Sireci sought testing of blood found on a denim jacket located in his motel room in attempts to show that the blood did not come from the victim, but this Court found this request procedurally barred because it was not raised in the original 3.853 Motion.

emphatically denied committing the murder. Confessions, eyewitness testimony, and scientific evidence hold such great weight with juries. In the case at bar, there are no confessions, there are no eyewitnesses, and the conclusions drawn from the scientific evidence presented at trial have now been proven false through DNA testing.

It is important to note that at trial, the State argued that key statements made by Paul Hildwin to law enforcement indicated that he was confessing to the crime, as if in some type of code. Specifically, it was alleged that Paul Hildwin informed law enforcement during questioning that he observed that the killer had a tattoo of a cross on his back. At trial, the State made Paul Hildwin take off his shirt in front of the jury to reveal a tattoo of a cross on his back. Additionally, investigator Jane Phifer testified at trial that Paul Hildwin informed her during questioning that the killer wiped his brow with a wash rag after he choked the victim. The State then argued that because Paul Hildwin had a tattoo of a cross on his back, and because the sweat on the wash rag was found to be consistent with Paul Hildwin=s rare blood type, he was actually confessing to the murder. The DNA evidence in the case at bar not only refutes the State=s contentions that Paul Hildwin raped the victim, it refutes the State=s contentions that Paul Hildwin somehow admitted to murdering the victim. Although the facts in Sireci may arguably not warrant DNA testing of a hair found on the victim=s sock, the facts not only warrant DNA testing in the case at bar, but the exculpatory DNA results

warrant a new trial. DNA testing was granted by the trial court, the State conceded at the hearing on the Defendant=s motion for DNA testing, held January 23, 2002, that exculpatory DNA results would aid the Appellant (PC current ROA Vol. IV 00658). Opposing counsel even forewarned postconviction counsel at the 3.853 hearing that he was prepared to utilize any inculpatory results at future hearings should the testing reveal a Ahit@ on the Appellant, and urged that postconviction counsel discuss dangers of the DNA testing with his client. The lower court acknowledged that proposed DNA testing was a Atwo-edged sword.@ The State=s message was that postconviction counsel may be deemed ineffective should the DNA match the Appellant. [Huff hearing, August 1, 2001, pp. 93, 101-03] Testing was conducted, and Paul Hildwin is excluded as the source who left semen and saliva at the crime scene. The Hildwin case is completely distinguishable from Sireci.

The State claims at page 17 of their Answer Brief that Athere is no connection between the body fluid evidence and the murder.@ They only now advance this argument because DNA testing proved that the bodily fluid found on the panties and washcloth does not belong to the Appellant. At the 1986 trial the State argued convincingly that the bodily fluid *was* connected to the murder. Because the State is now changing their theory of the case, the Appellant is equitably entitled to a new trial with the benefit of the powerful DNA rebuttal evidence. The State certainly will be

free to argue at a new trial that the DNA evidence is inadmissible, irrelevant, and that the body fluid evidence is not connected to the murder. They certainly did not make these arguments at trial in 1986. Furthermore, the State=s arguments are contrary to holding of Chambers v. Mississippi, 410 U.S. 284 (1973) allowing the defense in due process to present affirmative exculpatory evidence .

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

The State claims on pages 29-30 of their Answer Brief that standard of review to be applied on the above-cited claim is abuse of discretion rather than de novo. This is contrary to settled Florida law on Frye issues. 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. Even if this claim does include elements that would require the Appellant to show abuse of discretion, it is the Appellant=s position that the lower court abused its discretion in refusing to even view the mock trial simulation evidence before making the decision on admissibility. The Appellant gathered evidence to present at an evidentiary hearing, requested an

evidentiary hearing to present this evidence, and the lower court refused to consider the evidence or allow the testimony of Dr. Harvey Moore from Trial Practices, Inc. This is truly a question of weight to be afforded the evidence rather than a question of admissibility.

The State claims on page 32 that the mock juries did not consider the evidence from trial along with the DNA evidence. This is untrue and is refuted by the evidence on videotape and on record. All evidence from the original trial was condensed, presented and considered by the mock juries just as is commonly done by jury trial consultants around the nation everyday. The videotapes and reports from the two mixed simulations reveal that, as mandated by Jones, the newly discovered DNA evidence was analyzed in conjunction with the evidence presented at trial. The verdicts, reasoning, and videotaped deliberations of the mock jurors reveal not just the probability of an acquittal on retrial, but two actual acquittals on retrial in light of the newly discovered DNA evidence.

The State and the lower court cite to no case law which has specifically excluded mock trial simulations from the current procedural context of this case. The State claims on page 37 of their Answer Brief that "Because Hildwin can identify no Court that has allowed 'mock jury' testimony as substantive evidence, he falls short with respect to the general acceptance component of *Frye*." As pointed out in the Appellant's prior briefs, and in articles attached to lower court filings, the United States Supreme Court has considered this type of sociological

evidence in their decisions in the past. The trial simulations are sound and accepted scientific evidence that should have been considered by the lower court.

ARGUMENT III

THE TRIAL COURT ERRED IN HOLDING THE APPELLANT'S CONSTRUCTIVE AMENDMENT/FATAL VARIANCE CLAIM PROCEDURALLY BARRED

The State argues in one page of their Answer Brief that the trial court properly found this claim procedurally barred. It was not until the discovery of the DNA evidence that this claim became clear. The State argued at trial that the Defendant raped and murdered the victim due to the secretor evidence. Now that the secretor evidence has been proven false and misleading due to DNA evidence, we know that not only did the Appellant lack notice of the charges against him, but that the evidence utilized to support those charges was false and misleading. The Appellant stands by the arguments made in his Initial Brief to support this claim.

ARGUMENT IV

THE TRIAL COURT ERRED IN FAILING TO PERFORM A CUMULATIVE ERROR ANALYSIS

In its Answer Brief, the State points out that the Court previously denied Brady and ineffective assistance of counsel claims concerning new information and evidence casting suspicion on Haverty. It is clear that for whatever reason, vital exculpatory

evidence revealed at the 1992 evidentiary hearing in addition to the DNA evidence was not presented to the jury in 1986. Although not previously-pled as Anewly discovered evidence,@ the Haverty note and information concerning Haverty has previously been introduced into this record. In order to gain a complete picture of this case and conduct a fair analysis of the evidence in this particular case, the DNA evidence should be analyzed in conjunction with the aforementioned exculpatory evidence presented at the 1992 evidentiary hearing. Instead of performing the cumulative analysis mandated by Jones, the lower court erroneously performed a mere cumulative analysis of Paul Hildwin=s conflicting and inculpatory statements to law enforcement. The Appellant asks that this Court find that the lower court erred when it found the cumulative evidence claim procedurally barred.

The exculpatory evidence from the 1992 evidentiary hearing was considered by this Court, but claims for a new trial were previously denied in part because of remaining Aoverwhelming@ evidence. Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). Now that DNA evidence has proved false a significant portion of that Aoverwhelming@ evidence, the evidence must again be analyzed.

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.

CERTIFICATE OF COMPLIANCE

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

_____

David Dixon Hendry
Florida Bar No. 0160016
Mark S. Gruber
Florida Bar No. 0330541
Assistant CCCs
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorneys For Appellant

CERTIFICATE OF SERVICE

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

_____

David Dixon Hendry
Florida Bar No. 0160016
Mark S. Gruber
Florida Bar No. 0330541
Assistant CCCs
CAPITAL COLLATERAL REGIONAL

COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorneys For Appellant

Copies furnished to:

The Honorable Richard Tombrink, Jr.
Circuit Court Judge
Hernando County Courthouse
20 N. Main Street
Brooksville, FL 34601-2817

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Rock E. Hooker
Assistant State Attorney
Office of the State Attorney
19 NW Pine Avenue
Ocala, FL 34475

Paul Hildwin
DOC #923196; P4212S
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026