IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1417

PAUL CHRISTOPHER HILDWIN

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

BILL McCOLLUM
ATTORNEY GENERAL

COUNSEL FOR APPELLEE
KENNETH S. NUNNELLEY
Fla. Bar No. 998818
SENIOR ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX-(386)226-0457

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

Cases

Statutes

Rules

STATEMENT OF THE CASE

The "statement of the case" found on pages 1-35 of his brief is argumentative and, in addition, improperly argues matters that have no relevance at all to the issue before this Court. Hildwin's hyperbole about the vacated sentencing proceeding is irrelevant here. The State relies on the following, which is taken from this Court's decision in Hildwin's most recent appeal, for the factual and procedural background of this case:

> Paul Hildwin appeals the denial of a motion to vacate his conviction of first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), *Fla. Const.* Hildwin challenges the trial court's rulings on four issues: (1) denial of a new trial and new penalty phase based on newly discovered DNA evidence that excludes him as the source of semen on underpants and saliva on a wash cloth found at the top of a laundry bag in the victim's car; (2) exclusion of the results of "mock jury" presentations conducted using the new evidence; (3) denial of a new trial on grounds that the evidence suggesting he raped the victim constituted a fatal variance from or constructive amendment of the indictment; and (4) cumulative error. For the reasons that follow, we affirm the denial of his motion on each of these grounds.

PROCEDURAL HISTORY

> **This is Hildwin's first postconviction appeal since this Court affirmed the death sentence imposed upon resentencing.** Hildwin's original judgment and sentence of death were affirmed on direct appeal. *See Hildwin v. State*, 531 So. 2d 124 (Fla. 1988), *aff'd*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). In Hildwin's previous postconviction appeal, we affirmed the denial of Hildwin's postconviction motion in respect to his conviction but granted a new penalty phase. *See Hildwin v. Dugger*, 654 So. 2d 107 (Fla.

1995). In the new penalty phase, Hildwin again received a sentence of death, and this Court affirmed the sentence. *See Hildwin v. State*, 727 So. 2d 193 (Fla. 1998). [FN1]

> [FN1] The trial court found the following aggravating factors in imposing the sentence of death: (1) Hildwin committed the murder for pecuniary gain; (2) the murder was especially heinous, atrocious and cruel (HAC); (3) Hildwin had previously been convicted of prior violent felonies; and (4) he was under a sentence of imprisonment at the time of the murder. The trial court also found two statutory mitigators, both of which it accorded some weight: (1) Hildwin was under the influence of an extreme mental or emotional disturbance at the time of the murder; and (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Finally, the trial court found five nonstatutory mitigators, all of which it also accorded some weight: (1) Hildwin had a history of childhood abuse, including sexual abuse by his father; (2) Hildwin had a history of drug or substance abuse; (3) he had organic brain damage; (4) he had the ability to do well in a structured environment like prison; and (5) his type of mental illness was readily treatable in a prison setting.

FACTS OF THE CRIME

The following facts of the crime are set out in our opinion in *Hildwin*, 531 So. 2d at 125-26:

> 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 a 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 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.

PRESENT RULE 3.851 MOTION

> In 2002, pursuant to *Florida Rule of Criminal Procedure* 3.853, Hildwin's postconviction counsel obtained an order permitting DNA testing of the underpants and wash cloth identified at trial as containing bodily fluids of a nonsecretor such as Hildwin. In January 2003, Orchid Cellmark, a laboratory certified by the American Society of Crime Laboratory Directors, issued a report excluding Hildwin as the source of the DNA obtained from the underpants and wash cloth. Hildwin then moved for postconviction relief, asserting inter alia that the newly discovered DNA results demonstrated his actual innocence or would result in his acquittal or a lesser sentence. In a written order, the trial court denied the motion.

Hildwin v. State, 951 So. 2d 784, 786-787 (Fla. 2006). This Court affirmed the denial of Hildwin's Rule 3.851 motion, saying:

> We have carefully reviewed the record and find no error in respect to the postconviction court's denial of the Amended Successive Motion to Vacate Judgment of Conviction and Sentence. We therefore affirm.

Hildwin v. State, 951 So. 2d at 793.

After the appellate proceedings were concluded in the 3.851 motion based on the DNA evidence, Hildwin then sought to "reactivate" the 3.851 motion that had been filed on January 16 and supplemented on June 29, 2001. (V10, R1761-62). Over the State's objection that Hildwin had abandoned this proceeding when he appealed the Rule 3.851 motion based on the DNA evidence, the circuit court ordered a hearing on specific claims contained in the motion. (V12, R2035-68). The State relies on the following statement of the facts from that hearing.

EVIDENTIARY HEARING FACTS

Dr. Richard Greenbaum, psychologist, examined Hildwin in 2000, and diagnosed him with posttraumatic stress disorder. (V13, R2352, 2357, 2417). In 2008, Hildwin's counsel contacted Greenbaum for another evaluation. Greenbaum reviewed a vast amount of material which included prior evidentiary hearing testimony, depositions and affidavits, school and mental health records, Florida Supreme Court opinions, as well as a consultation with Dr. Robert Berland, forensic psychologist. (V13, R2358-59, 2380).

Dr. Greenbaum re-examined Hildwin[1] on January, 14, 2009.[2] (V13, R2359). Hildwin was suffering from cancer which affected

[1] Dr. Greenbaum utilized the DSM IV-TR in diagnosing Hildwin. (V13, R2382). American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text

the evaluation process.[3] (V13, R2360). However, Greenbaum diagnosed Hildwin with borderline personality disorder, posttraumatic stress disorder, underlying paranoid schizophrenia, and anti-social personality disorder. (V13, R2362, 2410). Hildwin has not been treated for paranoid schizophrenia. (V13, R2413-14).

Test results from the Bender-Gestalt indicated "marked emotional upset or stress" and "evidence of great upset around the ages of 10 or 11." (V13, R2364-65). The house/tree/person drawings indicated Hildwin had a tendency "to decompensate; that is, to come apart." (V13, R2365). There was further indication that Hildwin had a "tendency to act out, difficulty in maintaining ... realty/fantasy barriers, no inner security ... underlying depression ... emotional deadness ... paranoid projection." (V13, R2365-66). The results from the Rorschach test with "overwhelming grades" were consistent with posttraumatic stress. (V13, R2376, 2379).

Revision. Washington, DC, American Psychiatric Association, 2000.

[2] Dr. Greenbaum administered the Rorschach Inkblot Test, Bender-Gestalt Designs, Sentence Completion Form, house/tree/person drawings, as well as requesting Hildwin draw the first and second most upsetting and traumatic experiences in his life. (V13, R2362-63).

[3] Hildwin did not have cancer when Dr. Greenbaum diagnosed him with posttraumatic stress disorder in 2000. (V13, R2417).

At the time of Hildwin's resentencing phase in 1996, posttraumatic stress was an acceptable disorder. (V13, R2383). During World War I, it was referenced as "shell shock." Greenbaum said, "it's been around forever." (V13, R2383). The battery of tests to assess posttraumatic stress disorder was finalized almost 45 years ago. (V13, R2384).

Hildwin told Dr. Greenbaum that his mother died when he was approximately three years old. His father, who beat him repeatedly, blamed him for his mother's death. On one occasion Hildwin's father told him, "I'm going to blow your brains out." (V13, R2386). As a result of Hildwin's father abandoning him at age 13, he was placed in numerous foster homes. (V13, R2386). He suffered one traumatic event after the other. (V13, R2387).

Dr. Greenbaum said other symptoms indicative of Hildwin's posttraumatic stress disorder include the following: 1) a sense of entrapment or estrangement from others; 2) a sense of a foreshortened future (death row and cancer); 3) irritability/apathy; 4) difficulty in concentrating (possibly due to chemotherapy); 5) hypervigilance; and 6) exaggerated responses. (V13, R2387-89, 2403, 2404). Hildwin also suffers from functional borderline personality as well as "some paranoid schizophrenia." (V13, R2391). He suffered from substance abuse problems but was treated for it. (V13, R2393).

Some people with posttraumatic stress disorder have a normal life. However, there is no cure for the disorder, "It's always there." (V13, R2393). Greenbaum opined Hildwin was suffering from posttraumatic stress disorder at the time of the murder. (V13, R2395).

Dr. Greenbaum admitted that Hildwin did not meet all the criteria for a diagnosis of posttraumatic stress disorder. (V13, R2398-99). He could not connect the posttraumatic stress disorder to the murder. However, Greenbaum was "sure it's there." (V13, R2407, 2408). Greenbaum did not know if Hildwin was delusional at the time of the murder. (V13, R2411).

Dr Robert Berland, forensic psychologist, testified at Hildwin's 1996 re-sentencing. (V14, R2433). Berland did not agree with the sentencing order and Florida Supreme Court opinion pertaining to the 1996 re-sentencing. (V14, R2438-39). "There was some miscommunication, would be the nice way to put it, between me and Mr. Howard (trial counsel)." (V14, R2439). Berland said he did, in fact, ask defense counsel for contact information for witnesses that saw Hildwin the night of the crime. He was told they were unavailable. (V14, R2441). However, the record on appeal from the 1996 proceeding indicated Berland "admits he is unsuccessful in speaking with anybody who had contact with the defendant since 1979." Subsequent to the 1996 proceeding, Berland contacted witnesses he had attempted to

interview prior to the resentencing: Jeannie Freder, Michelle Hope,[4] Cynthia Wriston, as well as Matthew Sandy. (V14, R2443-44, 2471). **These witnesses did not provide any significant information that would have changed Dr. Berland's 1996 testimony.** (V14, R2443-44, 2471-72, 2477).

Dr. Berland's clinical opinion has not changed. (V14, R2444-45, 2451, 2472).[5] Hildwin suffers from a "chronic psychotic disturbance ... a biologically-caused mental illness." (V14, R2445). The most common cause of a defect in brain functioning is a "brain injury or inheritance, or as in many cases, some combination of the two." (V14, R2445).

Dr. Berland seeks corroboration from lay witnesses to verify what a defendant tells him. (V14, R2446-47). Corroboration "can make a big difference." (V14, R2454). He would ask lay witnesses about a defendant's alcohol or drug usage, demeanor, paranoid-type questions, as well as any mood disturbances. (V14, R2449-50). Berland communicated with Hildwin's trial counsel and investigator up to the day he testified in 1996. (V14, R2453). Hildwin's **current counsel**

---

[4] Dr. Berland's 1996 phone records indicated a 17-minute phone call to "Michelle Hope" or, someone at a number listed for her. (V14, R2464). There was some question about just how good a witness Michelle Hope would be. (V14, R2551-52).

[5] Hildwin concedes this. *Initial Brief*, at 22. That concession establishes that Hildwin can never satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

provided Berland with an extensive amount of material to review, **some of which he never reviewed.** (V14, R2453).

Dr. Berland could not say at the 1996 proceeding if Hildwin suffered from "extreme" emotion disturbance as he did not have a legal definition for the word "extreme." He did not recall discussing this with the defense team. (V14, R2456-57). He felt he was "rushed" into this case. (V14, R2459-60, 2479). He did not evaluate Hildwin for posttraumatic stress disorder. (V14, R2460). Berland could not distinguish what documents he reviewed prior to, and subsequent to the 1996 proceeding. (V14, R2465). More often than not, he diagnoses death row inmates as psychotic. (V14, R2466-67).

Berland administered the 1940 version of Minnesota Multiphasic Personality Inventory ("MMPI") to Hildwin, even though the newer 1989 version was available in 1996. (V14, R2467-68). There was more research on the older version even though Berland currently uses the 1989 "more user-friendly version." (V14, R2470). Berland has not seen Hildwin since 1996. (V14, R2478).

William Hallman was co-counsel with Richard Howard[6] for Hildwin's 1996 re-sentencing proceeding. (V14, R2491-92). Mr.

[6] William Hallman and Richard Howard are currently Circuit Court judges with the Fifth Judicial Circuit. (V14, R2491-92, 2528).

Howard, lead counsel, had been working on the case for several months. (V14, R2492). Dr. Carbonell, Dr. Berland, and Dr Maher were the experts working on the case. Mr. Hallman focused his attention on Dr. Maher. (V14, R2492, 2542). Hallman and Howard were paid a flat fee, and were not required to keep a record of the number of hours they worked on the case.[7] (V14, R2493). Although Mr. Hallman did not have any capital experience prior to defending Hildwin, Mr. Howard did. (V14, R2494-95). Mr. Hallman communicated with the defense investigator (Everett Dick) regarding contact with the experts. (V14, R2496, 2517). However, correspondence between Mr. Hallman and Dr. Maher (Def. Exh. 4) revealed Dr. Maher thought his deposition was "unexpected." Dr. Maher's letter explained "there was a significant amount of additional work" he needed to do in preparation for his testimony. (V14, R2499). Mr. Hallman could not recall why Dr. Maher thought his deposition was unexpected. "I don't know why that would have been said." (V14, R1499).

Mr. Hallman vaguely recalled that Dr. Carbonell had been deposed and was to testify at the resentencing. (V14, R2500-01). However, on the morning of the proceeding, Hallman and Howard

[7] For reasons that are not clear, Hildwin tries to attribute a sinister purpose to the absence of timesheets kept by defense counsel. The testimony about the contract terms speaks for itself, and Hildwin's efforts to attack the credibility of Judges Howard and Hallman because they did not keep a record that their contract did not require them to keep is frivolous.

decided not to call Dr. Carbonell as a witness. (V14, R2501-02, 2511). Dr. Carbonell said that if she had to testify, "it'd be against her will." (V14, R2504, 2516). She was very angry at being served with a subpoena. (V14, R2508). **She stated she would not be helpful to Hildwin's case.** (V14, R2521). Hallman and Howard believed Dr. Maher and Dr. Berland would present "very well" to the jury. (V14, R2521-22).

Hallman said lead counsel Richard Howard presented the arguments to the jury. As such, Hallman was not responsible for making objections to arguments made by the State. (V14, R2513-14).

Hallman did not recall talking to Dr. Berland about his request to interview witnesses. He was "99 percent sure" he did not have conversations with Dr. Berland. (V14, R2517). Both Hallman and Howard had "very good communications" with Hildwin and his prior counsel, Marty McClain, who attended the resentencing proceeding.[8] (V14, R2518).

Richard Howard, lead counsel on Hildwin's 1996 resentencing proceeding, did not keep records of every minute he worked on the case. (V14, R2528). Mr. Howard worked primarily with Dr.

---

[8] The discussion of this issue found on pages 30-32 of Hildwin's brief is an improper attempt for present counsel to present evidence that is not subject to cross-examination and which is in contravention of the advocate witness rule. Current counsel can be an advocate or a witness, but not both. This portion of the *Initial Brief* should be stricken.

Berland. He could not recall how much time he spent on communications with Berland, but, based upon documents in his files, Mr. Howard had clearly discussed Berland's testimony with him. (V14, R2531-34, 2535, Def. Exh. 5). Howard recalled Hallman advised him that Dr. Carbonell was adamant about not testifying. (V14, R2536). In addition, her testimony would have been harmful, which Howard relayed to Hildwin.[9] (V14, R2538). At the time of Dr. Carbonell's deposition, **she was incorrect in thinking she would not be called as a witness at the pending resentencing hearing** -- at that time she had not been told that she would not be testifying. (V14, R2540, 2541).[10] As Judge Howard put it, Carbonell was a very important witness at the prior post-conviction proceeding, and he did not want to lose her for the penalty phase. (V14, R2540).

Howard could not recall witnesses being excluded from the courtroom. (V14, R2544). He was aware Dr. Berland had requested to interview witnesses that knew Hildwin. Howard directed Investigator Dick to assist Berland. (V14, R2545, 2546-47). The defense team "tried to give him as much as we had on these

---

[9] Judge Howard pointed out that Carbonell's willingness to hurt Hildwin's case called everything else she had done in the case into question. (V14, R2538). At the very least, trial counsel cannot be faulted for not calling Carbonell as a witness.

[10] Hildwin did not call Carbonell as a witness at the evidentiary hearing.

people.” (V14, R2554). Mr. Howard could not recall specifics about witnesses -- he had to rely on the trial record. (V14, R2544, 2555). However, between Mr. Howard and the defense investigator, a concerted effort was made to provide as much information as possible to Berland about the various potential witnesses. (V14, R2554).

Howard said, when objecting to arguments made in front of the jury, “you’re factoring everything in ... tactical decisions ... have to be made.” (V14, R2548-49). He made a tactical decision not object to the portion of the State’s closing argument complained of in the rule 3.851 motion. He did not want to draw the jury’s attention and harm his client. (V14, R2549). In any event, Mr. Howard did not think that the argument was “particularly objectionable,” and was certainly not worth highlighting for the jury with an objection. (V14, R2550-51). As to the various witnesses, Mr. Howard testified that he and co-counsel Hallman made decisions about the witnesses based upon what the Florida Supreme Court told them to look at. (V14, R2553).

STANDARD OF REVIEW

The standard of review applied by an appellate court when reviewing a trial court’s ruling on a post-conviction relief motion following an evidentiary hearing is: “As long as the trial court’s findings are supported by competent substantial

evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, **likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.**"'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), (emphasis added), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson,* 82 So. 2d 504, 506 (Fla. 1955)*; Melendez v. State*, 718 So. 2d 746 (Fla. 1998).

Whether counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984), is reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffectiveness claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* standard, *i.e.,* deficient performance and prejudice, present mixed questions of law and fact that are reviewed *de novo* on appeal. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

SUMMARY OF THE ARGUMENT

On January 7, 2000, Hildwin filed a motion to vacate conviction and sentence attacking the death sentence imposed on resentencing. Hildwin filed an amended motion on January 16, 2001, and then filed a "successive" postconviction motion (attacking that sentence) on June 29, 2001. The State filed a response, a *Huff* hearing was held, and the circuit court issued an order on that hearing on September 14, 2001.

Hildwin next sought DNA testing pursuant to the *Rules of Criminal Procedure*. The court allowed that testing, and, on August 26, 2003, after DNA testing had been conducted, Hildwin filed an "amended successive" motion containing five (5) claims which were **an amendment** to the June 29, 2001, postconviction motion. Following a *Huff* hearing on the amendment to the successive motion, the Circuit Court issued an order denying relief on the claims contained **in the amendment**. Hildwin filed a motion for rehearing, **but at no time suggested that there were any unresolved issues relating to the post-conviction proceedings before the circuit court**. The court denied the motion for rehearing and, Hildwin filed notice of appeal from the circuit court's denial of relief on June 16, 2004. The appeal was briefed and argued, and, on December 14, 2006, this Court affirmed the denial of post-conviction relief. The mandate was issued on March 23, 2007, and the case became final for all purposes. On May 24, 2007, Hildwin claimed, for the first time,

that there were unresolved matters pending before the circuit court. Under settled Florida law, Hildwin abandoned those claims and issues when he appealed only a part of the circuit court proceedings.

The circuit court properly rejected the ineffectiveness of counsel claims, finding that Hildwin could establish neither deficient performance nor prejudice.

ARGUMENT

I. HILDWIN ABANDONED HIS FIRST MOTION TO VACATE WHEN HE APPEALED THE DNA-BASED POST-CONVICTION MOTION

INTRODUCTORY MATTERS

Hildwin's first postconviction relief motion resulted in penalty phase relief being granted on appeal, and a resentencing proceeding was ultimately conducted by the circuit court. On January 7, 2000, Hildwin filed a motion to vacate conviction and sentence attacking the death sentence imposed on resentencing. (V1, R92-114). Hildwin filed an amended motion on January 16, 2001, (V3, R514-569), and filed a "successive" postconviction motion (attacking that sentence) which pleaded various claims for relief on June 29, 2001. (V4, R662-706). The State filed a response, a *Huff* hearing was held, and the circuit court issued an order on that hearing on September 14, 2001. (V5, R912-919).

Subsequently, Hildwin sought DNA testing pursuant to the *Rules of Criminal Procedure*. The court allowed that testing,

and, on August 26, 2003, after DNA testing had been conducted, Hildwin filed an "amended successive" motion containing five (5) claims -- those claims were **an amendment** to the June 29, 2001, postconviction motion.[11] (V6, R1010-1078). Following a *Huff* hearing on the amendment to the successive motion, the Circuit Court issued an order denying relief on the claims contained **in the amendment**. (V8, R1439-1447). Hildwin filed a motion for rehearing, (V8, R1449-1479), **but at no time suggested that there were any unresolved issues relating to the post-conviction proceedings before the circuit court**. The court denied the motion for rehearing on May 20, 2004, (V8, R1480-1481) and, on June 16, 2004, Hildwin filed notice of appeal from the circuit court's denial of relief. (V9, R1644-1650). The appeal was briefed and argued, and, on December 14, 2006, this Court affirmed the denial of post-conviction relief. *Hildwin, supra*. The mandate was issued on March 23, 2007, and the case became final for all purposes. Again, at no time did Hildwin suggest that there were any issues to be decided **other than those contained in the appeal**. It was not until May 24, 2007, (V10, R1772) that Hildwin claimed that there were any unresolved matters pending before the circuit court.

---

[11] Hildwin claims that the DNA results were "favorable" to him. This Court rejected this conclusion when it affirmed the denial of post-conviction relief.

HILDWIN ABANDONED THE ISSUES THAT WERE NOT RAISED ON APPEAL

Florida law is well-settled that the filing of a notice of appeal deprives the trial court of jurisdiction to further consider issues contained in the appealed proceeding. *State ex rel. Faircloth v. District of Court of Appeal,* 187 So. 2d 890, 891 (Fla. 1966) ("There can be no doubt that **the filing of a notice of appeal** in the manner and within the time prescribed by the statutes and rules of this Court vests in the appellate court complete and exclusive jurisdiction of the subject matter and of the parties to the appeal."). (emphasis added). Likewise, the law is equally well settled that the failure to raise an issue on appeal is an abandonment of that issue. *Smith v. Moore,* 336 So. 2d 145, 146 (Fla. 1st DCA 1976) ("...the only point briefed by appellants relates to the propriety of the dismissal of the amended complaint as to the claim sought to be asserted by Kenneth and Elizabeth Smith against M. S. Linton, as sheriff of Taylor County; therefore, that is the only issue preserved for our review, all other issues being deemed abandoned.").

This Court has explicitly held that raising an issue without argument is an abandonment of that issue:

> "Shere [the defendant] did not present any argument or allege on what grounds the trial court erred in denying these claims. **We find that these claims are insufficiently presented for review.** *See State v. Mitchell,* 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998) (finding that issues raised in appellate brief which

> contain no argument are deemed abandoned), *review denied,* 729 So. 2d 393 (Fla. 1999)."

Shere v. State, 742 So. 2d 215, 218 (Fla. 1999). (emphasis added). If **raising an issue without argument** is an abandonment of that issue, and that is the law, then not briefing an issue at all is an abandonment of that claim as well. *See, Fla. Hometown Democracy, Inc. v. Cobb,* 953 So. 2d 666 (Fla. 1st DCA 2007) ("The **point of an appellate brief is to present arguments in support of the points on appeal,** and without further elucidation on the arguments, this court may not engage in meaningful appellate review. *Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990)."); *Lawrence v. State,* 831 So. 2d 121, 133 (Fla. 2002) (same).

In the context of this case, Hildwin never suggested to the circuit court that there were issues to be resolved other than those contained in the August 26, 2003, motion, nor did he suggest that further proceedings were necessary in his motion for rehearing filed after the Court's May 20, 2004, denial of relief. When Hildwin filed notice of appeal, the circuit court lost jurisdiction to consider any issues contained in the June 29, 2001, motion. And, when Hildwin failed to brief any claims based on that motion in his appeal to this Court, he abandoned those claims, and cannot resurrect them now.

Hildwin is not entitled to litigate his claims in a

piecemeal fashion, and has abandoned the c1aims that were not raised on appeal from the circuit court's denial of relief. In a related context, the Eleventh Circuit has said that "[w]e do not have one set of rules for petitioners and their attorneys in capital cases and another set for everyone else." *Jackson v. Crosby*, 375 F.3d 1291, 1300 (11th Cir. Fla. 2004) (Carnes, J., concurring). Hildwin sought, and ultimately received, an evidentiary hearing when further proceedings were foreclosed by the settled procedural rules. The circuit court should have enforced those rules, and declined Hildwin's invitation to conduct an evidentiary proceeding that Hildwin had abandoned. After all, "the Constitution does not require one-sidedness in favor of the defendant." *Davis v. Kemp*, 829 F.2d 1522, 1529 (11th Cir. 1987).

To the extent that Hildwin suggests that attorney error or inadvertence caused this case to follow the path it has taken, that is an insufficient basis to exempt Hildwin from compliance with Florida's procedural rules. In *Coleman v. Thompson*, a case in which notice of appeal from the denial of state post-conviction relief was filed **three days late**, the United States Supreme Court enforced the state procedural rule and denied relief, stating:

> There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct.

> 1990 (1987); *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Wainwright v. Torna*, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear the risk of attorney error that results in a procedural default."

Coleman v. Thompson, 501 U.S. 722, 752-753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). This Court should enforce Florida's settled procedural rules in order to ensure that those rules are afforded the proper deference in any subsequent federal proceedings in this case.

Finally, Hildwin's claim that this Court "remanded" this case for further proceedings is refuted by the final sentences of that decision, which state:

> We have carefully reviewed the record and find no error in respect to the postconviction court's denial of the Amended Successive Motion to Vacate Judgment of Conviction and Sentence. We therefore affirm.
>
> It is so ordered.

Hildwin v. State, 951 So. 2d 784, 793 (Fla. 2006) (emphasis added).[12] Nothing in this language can be in any way construed as

---

[12] When this Court remands a case for further proceedings, there is no doubt that that is what the Court intends. One need look no further than the decision in Hildwin's previous post-conviction appeal to find the clarity with which a remand order

remanding anything to the circuit court. That Court should have declined to conduct any further proceedings in this case.

II. THE "PRESENTATION OF MITIGATING EVIDENCE" CLAIM

On pages 39-56 of his brief, Hildwin says that his counsel were constitutionally ineffective at the penalty phase of his capital trial. Assuming that this claim is even properly before this Court, the Circuit Court decided the claim correctly. In denying relief on this claim, the court said:

> **THIS CAUSE** comes before this Court after evidentiary hearing[1] wherein Defendant presented oral argument limited to two discrete claims of ineffective assistance of counsel during the penalty phase of Defendant's 1996 re-sentencing proceeding[2]. This Court, having reviewed the file, considered argument of counsel, the instant Motion, the Response filed thereto, the Reply, and being otherwise fully advised in the premises hereby finds as follows:
>
> 1. The Defendant alleges that his counsel was ineffective for failing to adequately investigate, prepare, present, and provide to expert witnesses certain mitigating evidence as to the level of Defendant's mental or emotional disturbance at the time of the offense. At the evidentiary hearing on this issue it was uncontroverted that Dr. Richard Greenbaum, psychologist, examined Defendant Hildwin in 2000, and diagnosed him with posttraumatic stress disorder[3]. In 2008, Hildwin's trial counsel[4] contacted Dr. Greenbaum for anther evaluation. Dr. Greenbaum reviewed a vast amount of material.[5]
>
> Dr. Greenbaum re-examined Hildwin on January 14, 2009[6]. Dr. Greenbaum then diagnosed Hildwin with borderline

---

is stated. *See, Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995).

personality disorder, posttraumatic stress disorder, underlying paranoid schizophrenia and anti social personality disorder.

[1]Conducted January 20-21, 2009.

[2]Specifically these are the claims numbered II and VIII initially raised in Defendant's June 29, 2001 Motion To Vacate Judgment Of Conviction And Sentence.

[3]Dr. Greenbaum that a number of traumatic events that occurred in Hildwin's childhood had contributed to the diagnosis including his mother's death when he was a young child, his father's physical and mental abuse and abandonment by his father and his numerous placements in foster care.

[4]Richard A. Howard was trial Counsel and William H. Hallman was co-counsel both of whom are now circuit court judges.

[5]Some information Dr. Greenbaum reviewed prior to the re-evaluation included prior evidentiary hearing testimony, depositions, and affidavits, school and mental health records, Florida Supreme Court opinions, as well as a consultation with Dr. Robert Berland, forensic psychologist. (R14-15, 36, 84.)

[6]In 2009 Hildwin was suffering from cancer which affected the evaluation process. He was not diagnosed with cancer when he was examined and diagnosed in 2000.

At the time of Hildwin's resentencing proceeding in 1996, posttraumatic stress disorder was an accepted and recognized order. Dr. Greenbaum opined that Hildwin was suffering with posttraumatic stress disorder at the time he committed the murder. Dr. Greenbaum could not opine as to whether Hildwin was delusional at the time of the murder, but was "sure" that Hildwin was suffering from the disorder at the time of the murder.

Dr. Robert Berland, forensic psychologist, testified at Hildwin's 1996 re-sentencing. Berland did not agree with the sentencing order and Florida Supreme Court opinion pertaining to the 1996 re-sentencing. Dr. Berland testified that he did, in fact, inquire of defense counsel regarding receiving any information pertaining to any possible witnesses that may have seen Hildwin on the night of the crime. He said that he was told the witnesses were unavailable. To corroborate this testimony the record on appeal from the 1996 proceeding indicates Berland "admits he was unsuccessful in speaking with anybody who had contact with the defendant since 1979." Subsequent to the 1996 proceeding, Dr. Berland contacted witnesses he had attempted to interview prior to the re-sentencing[7]. However, these witnesses would not and did not provide any testimony that would have changed Dr. Berland's 1996 testimony[8]. (R. 95, 123, 124, 128-129).

William H. Hallman, co-counsel for the 1996 re-sentencing portion of this case, testified that Dr. Carbonell, Dr. Berland, and Dr. Maher were the experts working on the case. Hallman focused his attention on the work and anticipated testimony of Dr. Maher. Mr. Hallman testified that he relied heavily on the information provided by the defense investigator assigned to the case regarding contact with the experts. Throughout a series of letters between Mr. Hallman and Dr. Maher, Dr. Maher, at one point, described the scheduled deposition as being "unexpected". The correspondence also referred to a significant amount of time and work that Dr. Maher anticipated doing prior to providing testimony. Mr. Hallman could not recall why the deposition would have been unexpected or if, in fact, it was "unexpected" as described.

Mr. Hallman further recalled that Dr. Carbonell had been deposed and was scheduled to testify at the re-sentencing. However, on the morning of the proceeding both Howard and Hallman strategically decided not to call Dr. Carbonell as a witness. Dr. Carbonell said that if she had to testify "it would be against her will." She was very angry at being served a subpoena and further stated that she would not be helpful to Hildwin's case if she was called to testify. Clearly, defense counsel cannot be admonished for the strategic

decision not to call an expert witness who openly admits that they would not be helpful to the defense.

> [7]Specifically, Jeannie Freder, Michelle Hope, Cynthia Wriston and Matthew Sandy.
>
> [8]Dr. Berland was able to finally locate, contact and interview a number of these individuals in preparation for the present post conviction relief proceeding. **In short, Dr. Berland testified that the interviews provided little or no information which would have altered the substance of his 1996 testimony.**

2. The defendant has a two part burden in an ineffective assistance of counsel claim as set forth by the Supreme Court in *Strickland v. Washington,* 464 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show deficient performance by counsel and second, that the deficient performance prejudiced the defendant.

3. A defendant who claims ineffective assistance of counsel must show that the acts or omissions of counsel were of a substantial and serious deficiency "measurably below the standard of competent counsel" and must show that the deficiency probably affected the outcome of the proceeding. The defendant's showing of that deficiency must withstand the State's rebuttal. *See Armstrong v. State,* 429 So. 2d 287 (Fla. 1983); *Smith v. State,* 445 So. 2d 323 (Fla. 1983); *Ricco v. State,* 474 So. 2d 327 (Fla. 4th DCA 1985).

4. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. *Francis v. State,* 529 So. 2d 670, 672 n. 4 (Fla. 1988); *Lusk v. State,* 498 So. 2d 902 (Fla. 1986). In *Downs v. State,* 453 So. 2d 1102, 1108 (Fla. 1984), the Florida Supreme Court emphasized that "counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. Strategic choices after a thorough investigation of

> the law and facts are virtually unchallengeable, and a particular decision not to investigate is to be assessed for reasonableness considering the circumstances and applying a 'heavy measure of deference to counsel's judgments."
>
> 5. The fact that a more thorough or detailed presentation could have been made does not establish ineffective assistance of counsel. It is almost always possible to imagine a more thorough job being done than actually was done. *Maxwell v. Wainwright,* 490 So. 2d 927 (Fla. 1986). "A defendant is not entitled to perfect error-free counsel, only to reasonably effective counsel." *Waterhouse v. State,* 522 So. 2d 341, 343 (Fla. 1988).
>
> 6. Defendant's allegation that counsel was ineffective for "failing to adequately investigate, prepare, present, and provide to expert witnesses certain mitigating evidence as to the level of Defendant's mental or emotional disturbance at the time of the offense" simply fails to meet either prong of *Strickland, i.e.* that counsel provided a deficient performance and second, that the deficient performance prejudiced the defendant. In fact, Dr. Greenbaum interviewed Hildwin twice and his testimony was the same, that Hildwin had suffered from post traumatic stress disorder**. Dr. Berland testified that even if he had been able to locate and interview the witnesses prior to the re-sentencing his opinions and conclusions would not have changed. Thus, the defendant has failed to demonstrate any prejudice. Further, Dr. Carbonell may have in fact, hurt the defense. Both Hallman and Howard testified that after speaking with Dr. Carbonell her testimony would not be helpful to Hildwin's case if she was called to testify. As such, the Defendant has failed to overcome the burden as set forth by *Strickland* on this issue.**

(V13, R2265-2269). The circuit court's order is comprehensive, reached the proper result under settled law, and should not be disturbed.

To the extent that further discussion is necessary, Hildwin's ineffective assistance of counsel claims, which are the only matters before the Court, are governed by the well-settled *Strickland v. Washington*, 466 U.S. 228 (1984), standard. This Court has described that standard in the following way:

> In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court established a two-pronged standard for determining whether counsel provided legally ineffective assistance. A defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant also must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.; see Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.").

Reese v. State, 14 So. 3d 913, 917 (Fla. 2009). Or, stated somewhat differently:

> The yardstick by which we measure ineffective assistance of counsel claims is the seminal decision of the United States Supreme Court in *Strickland*. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudiced the defendant. To establish the deficiency prong under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Garcia v. State*, 949 So. 2d 980, 987 (Fla. 2006). To establish the

> prejudice prong under Strickland, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007) (*quoting Strickland*, 466 U.S. at 694).

Duest v. State, 12 So. 3d 734, 742 (Fla. 2009). In the context of a case similar to this one, where the claim concerned an "uncalled" mental state expert, this Court said:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted). Because both prongs of the S*trickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Bates v. State, 3 So. 3d 1091, 1100 (Fla. 2009). A mental state evaluation is not constitutionally required in every case, and a defendant certainly has no constitutional right to a **favorable**

mental state evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). This Court has said:

> While we do not require a mental health evaluation for mitigation purposes in every capital case, *Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005), and "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every case," *Wiggins*, 539 U.S. at 533, "an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Riechmann*, 777 So. 2d at 350. Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty."' *Arbelaez*, 898 So. 2d at 34 (*quoting Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

Jones v. State, 998 So. 2d 573, 583 (Fla. 2008). Hildwin was evaluated by several mental state professionals, and cannot complain that he did not receive far more process than he was due. In the final analysis, Hildwin's complaints about the mental state aspect of his penalty phase boil down to no more than a complaint about the result. Hildwin presented nothing that was not before the jury at his resentencing proceeding.

Moreover, Hildwin's claims of prejudice were insufficiently pleaded, and relief could have been denied on that basis, as well as because Hildwin has not shown that trial counsel's performance was in any way deficient. With regard to the sufficiency of pleading necessary to properly present an

ineffectiveness of penalty phase counsel claim, this Court has been clear:

> [Jones] offers nothing more than the blanket assertion that "[h]ad the evidence been presented, the result of the penalty proceedings would have been different." A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different -- that is, a probability sufficient to undermine confidence in the outcome. *See Holland v. State*, 916 So. 2d 750, 758 (Fla. 2005) (defendant's claim that "**he was prejudiced because penalty phase counsel's deficiencies substantially impair confidence in the outcome of the proceedings is merely conclusory and must be rejected**"); *Brown v. State*, 894 So. 2d 137, 160 (Fla. 2004); *Armstrong v. State,* 862 So. 2d 705, 712 (Fla. 2003) (finding that a mere conclusory allegation of prejudice was legally insufficient).
>
> Notwithstanding the insufficiency of the claim, we are confident that had the additional mitigation evidence been introduced, there is no reasonable probability that the outcome would have been different -- *i.e.*, our confidence in the outcome remains. "**Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings**." *Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999). Here, the mental mitigation evidence presents a "double-edged sword" and is not sufficient to overcome the substantial aggravation. *See Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.").

Jones v. State, 998 So. 2d at 585. (emphasis added). Hildwin has offered nothing more than the conclusory, *ipse dixit* arguments

that were found insufficient in *Jones* to support ineffectiveness claims. His arguments are legally insufficient, and, because Hildwin has the burden of proof, his claim fails.

His complaints seem to focus on mental state experts Carbonell and Berland. Hildwin makes the erroneous assertion that Carbonell's 1992 post-conviction testimony factors into the "prejudice analysis" **even though Carbonell did not testify in the 2009 hearing.** Hildwin's argument makes no sense.

On re-sentencing appeal, this Court framed the aggravation and mitigation as follows:

> In its resentencing order, the trial court found four aggravators: (1) that Hildwin committed the murder for pecuniary gain; (2) that the murder was especially heinous, atrocious and cruel ("HAC"); (3) that Hildwin had previously been convicted of prior violent felonies; and (4) that he was under a sentence of imprisonment at the time of the murder. The trial court also found two statutory mitigators, both of which it assigned "some weight": (1) that Hildwin was under the influence of an extreme mental or emotional disturbance at the time of the murder; and (2) that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Finally, the trial court found five nonstatutory mitigators, all of which it also assigned "some weight": (1) that Hildwin had a history of childhood abuse, including sexual abuse by his father; (2) that Hildwin had a history of drug or substance abuse; (3) that he had organic brain damage; (4) that he had the ability to do well in a structured environment like prison; and (5) that his type of mental illness was readily treatable in a prison setting. The trial court, after evaluating the aggravators and the mitigators, again sentenced Hildwin to death.

Hildwin v. State, 727 So. 2d 193, 194 (Fla. 1998). Hildwin's argument is not that he has now produced "changed" mental state testimony -- in fact re-sentencing expert Berland emphasized in his January 2009 testimony that even **after** interviewing the witnesses he implies that trial counsel kept from him, **his opinions and conclusions did not change.** Because that is so, Hildwin cannot meet the prejudice prong of *Strickland* even if he could show some performance deficiency. Stated differently, the weight given the mental mitigators does not change, and, because that is so, the balance of aggravation and mitigation remains the same. There is no reasonable probability of a different result.

With respect to the prejudice prong of *Strickland*, it is apparent that a great deal of information was made available to Berland. Trial counsel Howard had no independent recollection of what information was given to Berland, but the fact is that Hildwin has the burden of proof, and, when the evidence does not show why (or why not) a particular event took place, the party with the burden loses.[13] *Walton v. State/Crosby*, 847 So. 2d 438, 444 (Fla. 2003). In any event, Berland's evidentiary hearing

---

[13] Of course, counsel is presumed to have acted competently, and is presumed to have made each decision in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690 (U.S. 1984). That is the presumption that Hildwin must overcome, and he has not done so.

testimony was, at least to some extent, motivated by what he perceived as a professional affront because the courts commented on the fact that he had not interviewed a great deal of individuals familiar with Hildwin. Be that as it may, it makes no sense at all to suggest that counsel's performance was deficient when the expert's testimony did not change at all, as is the case here. As to Berland, Hildwin has not carried his burden of proof. There is no basis for relief. As to whether or not Berland "knew" the definition of an "extreme mental or emotional disturbance," that is a legal conclusion in the first place, and Berland is not qualified to offer such testimony. *Gurganus v. State*, 451 So. 2d 817, 821-822 (Fla. 1984). In any event, that mitigator was found, so there is no prejudice.

As to Carbonell, Hildwin has, once again, failed to carry his burden of proof. Carbonell was not called as a witness, and the testimony of trial counsel Hallman and Howard stands unchallenged. It stands reason on its head to suggest that trial counsel should insist on calling a witness who has made it clearly known that her testimony will be harmful to the client. That is what happened in this case, and Mr. Howard's decision not to call Carbonell was wholly reasonable. It certainly was not deficient performance. Hildwin has done nothing to challenge the testimony by Mr. Howard, did not attempt to contest that testimony through any testimony by Carbonell, and has failed to

carry his burden of proof as to the performance prong of *Strickland.* Moreover, Hildwin has made no allegation sufficient to demonstrate prejudice in light of the unchallenged testimony of Mr. Howard that Carbonell made clear that her testimony would be harmful to Hildwin. Hildwin has not shown to the contrary, and has not carried his burden in this proceeding.

With respect to Greenbaum, he admitted that Hildwin did not meet all the criteria for a diagnosis of posttraumatic stress disorder. (V13, R2398-2399). He could not connect the posttraumatic stress disorder to the murder, (V13, R2407, 2408) and did not know if Hildwin was delusional at the time of the murder. (V13, R2411). In view of that vague, non-specific, and unconnected testimony, trial counsel was not deficient in "failing" to offer that sort of testimony. And, because of the weakness of that testimony, there is simply no possibility of prejudice. There is no reasonable probability of a different result. The Circuit Court properly denied relief.

Finally, to the extent that Hildwin says that the DNA results factor into this case in some manner, that assertion has no legal basis. Specifically, Hildwin would have this Court consider the DNA results under a "lingering doubt" theory, which has been expressly rejected by this Court. *Darling v. State*, 808 So. 2d 145, 162 (Fla. 2002). Likewise, the DNA does not in some way "lighten . . . the aggravating side of the scales." *Initial*

Brief, at 56. This Court's prior decision rejected the DNA evidence -- that decision is final for all purposes, and is the law of the case. Hildwin cannot revive that claim here. The ineffectiveness claim is not a basis for relief, and the Circuit Court should be affirmed in all respects.

III. THE CLOSING ARGUMENT CLAIM

On pages 57-62 of his brief, Hildwin says that trial counsel were ineffective for "failing" to object to an "improper" closing argument. The circuit court rejected this claim, stating:

> . . . Defendant alleges Defense Counsel was ineffective for failing to object to certain portions of the State's closing arguments during the penalty phase of the proceeding. Argument as to this claim was specifically limited to the "limited issue of whether trial counsel were inclined to object and did not, and if not, why not." *(See* September 14, 2001 Order On August 1, 2001 *Huff* Hearing, page 4 of 8). Presumably, the objectionable portion of the argument which is in question is the following:
>
> > "...And for Vronzettie Cox, Paul Hildwin chose death and not life. As we choose, our lives are formed. In choosing for Vronzettie Cox, Paul Hildwin chose for himself. He chose his own fate. And just as for Vronzettie Cox, he chose death and not life."
>
> Lead Defense Counsel, Richard Howard, testified at the evidentiary hearing that he did not object to the argument, as he did not think it was "particularly objectionable" argument. Further, he stated that he felt that it would do more harm than good to highlight the issue for the jury. He stated that he did not want to continually draw attention to the jury. Therefore he made a tactical decision not to object to the

statement that he did not feel was particularly objectionable in the first place.

Hildwin has cited no decision holding that this argument, or one like it, is reversible error either under a preservation or fundamental error theory. If this argument is not error from the onset, and no case law known to the Court holds that it is, then there is no theory under which Hildwin can establish the deficient performance/prejudice prongs of *Strickland. Belcher v. State,* 851 So. 2d 678 (Fla. 2003); *Waterhouse v. State,* 792 So. 2d 1176 (Fla. 2001). While Hildwin relies on *Rhodes v. State,* 547 So. 2d 1201 (Fla. 1989) for the proposition that the prosecution's closing argument was "an necessary appeal to the sympathies of the jurors, calculated to influence their sentencing recommendations" and therefore improper, when read *in toto,* it was the frequency and egregiousness of the comments[9] of the prosecutor in *Rhodes* which justified a reversal of the defendant's death sentence and remand for a new sentencing proceeding. In the instant case, a single isolated comment by the prosecutor is not, on its face, either clearly improper or objectionable. Unlike *Rhodes,* the prosecutor's comments in the instant case were neither, frequent, egregious or clearly improper.

Lastly, the Defendant has not established that there is a reasonable probability that the outcome would have been different had counsel objected to the statement and if the objection had been sustained. In light of the facts and circumstances surrounding this case, this Court finds it highly unlikely that this particular argument contributed at all to the result of this case.

> [9]Rhodes objected to five remarks made by the prosecutor in his closing argument. In the first remark the prosecutor asked the jurors to try to place themselves in the hotel during the victim's murder. This remark is similar to the Golden Rule argument condemned in *Bertolotti v. State,* 476 So.2d 130 (Fla. 1985), in which the prosecutor urged the jury to place themselves in the position of the victim and imagine the victim's "final pain, terror and

defenselessness."

Second, the prosecutor argued that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. The law is clear that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. *Jackson v. State,* 451 So. 2d 458 (Fla. 1984); *Herzog v. State,* 439 So. 2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Third, Rhodes claimed the prosecutor made several remarks that suggested Rhodes might be paroled before he had served his twenty-five-year minimum mandatory term if the jury recommended life imprisonment rather than the death penalty. This statement was a misstatement of the law.

Fourth, the prosecutor insisted that Rhodes acted like a vampire when he committed both the Florida and a Nevada crime. The record did not support this contention, and the comments were not relevant to aggravation.

Finally, the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

After each comment was made, Rhodes' counsel objected and moved for a mistrial. The trial judge overruled the objections and denied each motion. The Court held that, prosecutorial error alone does not automatically warrant a mistrial. *State v. Murray,* 443 So. 2d 955 (Fla. 1984). The Court in Rhodes went on to find that "while none of these comments standing alone may

> have been so egregious as to warrant a mistrial, this [was] not a case of merely a single improper remark. The prosecutor's closing argument was riddled with improper comments, and not once did the trial judge sustain an objection and give a curative instruction to the jury to disregard the statements. We believe the cumulative effect of the improper remarks in the absence of curative instructions was to prejudice Rhodes in the eyes of the jury and could have played a role in the jury's decision to recommend the death penalty." *Rhodes v. State,* 547 So. 2d 1201, 1205-1206 (Fla. 1989).

(V13, R2265-2271). That order is correct in all respects and should not be disturbed.

Hildwin has cited no decisions holding that this argument, or one like it, is reversible error either under a preservation or fundamental error theory. If this argument is not error to begin with, and no case law holds that it is, then there is no theory under which Hildwin can establish the deficient performance/prejudice prongs of *Strickland*. *Belcher v. State*, 851 So. 2d 678, 682-683 (Fla. 2003); *Waterhouse v. State*, 792 So. 2d 1176, 1190 (Fla. 2001). And, even if that argument is arguably objectionable (again, no case holds that it is), trial counsel Howard testified clearly that he did not believe that an objection was appropriate, and that he did not want to highlight the argument for the jury. That is the sort of tactical decision that, under *Strickland*, is "virtually unchallengeable." *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984). Finally,

even if an objection was arguably proper, Hildwin cannot satisfy the prejudice prong of *Strickland*. Under the facts of this case, which are, at best, horrible, there is no reasonable probability of a different result even if counsel had objected to that argument and even if that objection had been sustained. In light of the facts and circumstances of this case, that argument did not contribute at all to the result. Hildwin's own actions did that. Under the most generous view of the facts possible, there was no prejudice. Because that is so, there is no basis for relief.

CONCLUSION

Hildwin abandoned the issues that were contained in the pre-DNA-amendment Rule 3.851 motion when he appealed the denial of relief on his DNA claims (which were an amendment to the already-pending motion). The claims at issue in this appeal should not have been entertained by the circuit court. Despite his claims to the contrary, Hildwin abandoned the claims that he did not raise in his last appearance before this Court. He is not entitled to preferential treatment, and this appeal should be dismissed.

Alternatively, the circuit court correctly denied all relief. That result should not be disturbed.

Respectfully submitted,

BILL McCOLLUM

ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Martin McClain,** Sp. Asst. CCRC-S, 141 N.E. 30th St., Wilton Manors, FL 33334-1064 on this 4th day of August, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL