IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN,
PETITIONER,

Case No. SC10-1082

v.

STATE OF FLORIDA,
RESPONDENT

REPLY BRIEF IN SUPPORT OF PETITION SEEKING TO INVOKE THIS COURT'S ALL-WRITS JURISDICTION

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Pursuant to this Court's order of June 15, 2010, Petitioner respectfully submits this Reply in further support of his Petition Seeking to Invoke this Court's All-Writs Jurisdiction.

SUMMARY OF ARGUMENT ON REPLY

The State's Response further strengthens Petitioner's claim for the relief sought in his Petition. This is because the State has failed to offer any refutation of his core factual and legal claims, which provide ample grounds to issue a one-time writ for the simple DNA database search that Petitioner seeks. In particular, the State's Response does not dispute that granting the writ (1) would impose no cost or prejudice on the State, (2) has the scientific potential to establish Petitioner's actual innocence of the crime for which he is presently sentenced to death (for example, by revealing that a previously-unidentified serial offender in the database is the actual perpetrator), and (3) thereby constitutes precisely the sort of unique, discrete, and compelling claim for relief that this Court has the long-recognized authority to issue under its all-writs jurisdiction, particularly in capital cases.

Further – and perhaps most significant – the State has not even alleged that the DNA profile in question is ineligible for entry into either the state or national DNA databases, much less stated any specific ground upon which this Court or any other

trier of fact could or would find it ineligible. Yet the State proceeds to make the rather puzzling suggestion that this Court nonetheless defer a ruling on the merits of the Petition by remanding the matter for a hearing, whose broad purpose the State obliquely describes as "evidentiary development . . . as to the scope, reach, and meaning of the mandated criteria for submission of a DNA profile into the CODIS database". (State's Response ("Resp.") at 1).

Because the State has raised no factual dispute to be resolved at such a hearing, however, a remand for that purpose is inappropriate. Worse, it will serve only to further delay the relief to which Petitioner is entitled, and for which he has already waited more than five years. Moreover, while it would be troubling for the State to propose that any death-sentenced prisoner undergo months or years of unnecessary litigation to obtain a simple act of discovery that could prove him innocent of any wrongdoing, it is even more egregious for the State to so callously suggest such a course of action at this juncture in Petitioner's case – when, as the State well knows, he is battling not only to clear his name, but to survive a cancer diagnosis that could well end his life before that day comes.

For these reasons and others discussed herein, the State's objections should be overruled, and the writ granted.

I. Because There is No Longer Any Factual Dispute as to the CODIS Eligibility of the DNA Profile at Issue, Nor Any Legal Dispute as to This Court's All-Writs Jurisdiction, the Writ Should Be Granted Without Further Delay

Petitioner has submitted 46-page memorandum of fact and law with extensive supporting exhibits, detailing, *inter alia*, the scientific potential of the requested DNA database searches to conclusively establish his actual innocence of the crime at issue; the fact that the State's sole, previously cited barrier to CODIS submission in this case (testing at a private laboratory) no longer exists; and that the FBI's and State of Florida's own authorizing statutes, publicly disseminated database materials, and/or established practice in similar cases provide ample grounds for this Court to compel a one-time DNA database search where, as here, the State inexplicably refuses to do so of its own accord. He was thereafter joined by a group of prominent *amici* (including the former Director of the FBI, and a longtime former Florida State Attorney) who affirmed that the writ Petitioner seeks is consistent with the CODIS database's function and scope, and that the DNA profile at issue is the sort routinely uploaded into state and federal DNA databases without objection.

The State's "Response" to the Petition did not address – much less dispute – any of these allegations (save a grudging acknowledgment that in 2008, the private DNA laboratory in this

case did obtain "approved status," allowing the FDLE to now upload its results to CODIS) (Resp. at 4). Nor did the State deny that it assured this Court five years ago that any "eligible" profile would have been entered into CODIS, on the State's own initiative, "long ago." *See* Pet. at 18-20.

That day has surely arrived. At first glance, it may be easy to overlook the fact that the State's Response nowhere claims that the profile in Petitioner's case is "ineligible" for immediate entry into CODIS. Instead, lacking any particularized objection to Petitioner's request, the State urges this Court to further delay access to the discovery for which Petitioner has already waited over five years by asking it to order a hearing – whose purpose would be (variously) to determine "the scope and meaning of the mandated criteria" for CODIS submission (Resp. at 1); to remedy the fact that (according to the State) "the full scope of [the CODIS] guidelines has never been developed" (*Id.* at 7); and to "bring the issue [of CODIS eligibility] to a close" so it can be "resolved" (*Id.* at 7).

The State's proposal makes no logical sense, however, since in the case at bar, there is no longer any actual dispute over CODIS eligibility for a factfinder to "resolve." Put another way, the generalized "scope and meaning" of the CODIS eligibility criteria are simply irrelevant to a resolution of

Petitioner's specific request for a CODIS search where the State no longer asserts that the profile in this case is not eligible for entry. Nor does the fact that the State has (in its own words) previously "mentioned" that multiple criteria govern the CODIS database (Resp. at 4) – without naming any specific criterion that Petitioner's case actually fails to satisfy – create a dispute as to eligibility.

In seeking to forestall a ruling on the merits, the State has not come close to meeting its burden of obtaining an evidentiary hearing. *See, e.g., State v. Trowell,* 739 So. 2d 779 (Fla. 1999)(emphasizing, in context of petition to file belated appeal, that evidentiary hearing to resolve "limited disputed issues of fact" may be ordered only where "the State raises a good faith basis to dispute the defendant's claims through affidavit or specific contrary allegations", and citing other authorities) (emphasis supplied); *see also Schubert v. State,* 737 So.2d 1102 (Fla. App. 1st Dist. 1998) (same; state entitled to appointment of special master for evidentiary hearing only upon "specific allegations to raise a disputed question of fact" material to petitioner's claims). Here, only one party (Petitioner) has made specific, good-faith allegations of fact

and submitted affidavits and other materials in support of his claims.[1] The State has not, and thus has not met its burden.

Furthermore, the State's failure to assert that the DNA profile is now ineligible for a CODIS search cannot be considered mere oversight. When appearing before this Court in 2005, counsel for the State (a) asserted unequivocally that the profile was, at that time, "ineligible" for CODIS entry, and (b) cited a specific technical barrier (Petitioner's choice of laboratory) as the ground for this purported ineligibility. *See*

[1] The State does fault undersigned counsel (particularly in light of the expertise brought to this issue by Innocence Project co-counsel) for what it claims is our "studied ignorance" regarding "the various CODIS submission criteria" (even while it fails to name a single criterion that we have not satisfied or about which we should have known). Resp. at 5 n.4. Yet it is precisely because of counsel's DNA expertise that we may represent to this Court that we are familiar with all publicly available regulations governing the database; that we know of not a single provision in those regulations, nor any other reason, why this profile cannot be immediately searched in CODIS; and that we have consulted about the case with DNA experts at private and public laboratories, as well as prosecutors, who have uploaded forensic profiles such as this one in factually indistinguishable cases.

Unfortunately, the State's Response is replete with such personal attacks on Petitioner's counsel (*see, e.g.*, Resp. at 3-5 (calling the Petition "vituperative," full of "histrionics," "devoid of factual allegations that can withstand scrutiny" [even while it fails to actually scrutinize the allegations made], and "based on . . . innuendo, speculation, and slander"). However, the State does not support these charges with any actual cites to the Petition, other than one passage in which we admittedly used the word "recalcitrant" to describe the State's continued opposition to the relief sought. *See* Resp. at 4. And this characterization hardly seems out of line given the State's resistance to a simple DNA database search that it does not dispute could exonerate a death-sentenced prisoner.

Pet. at 3-4, 20-21. It now concedes that barrier no longer exists. The State was specifically given the opportunity by this Court to raise any new objections in its Response to the Petition, but did not, which is a silence that speaks volumes.

One can only speculate about the State's motive for proposing a hearing to "resolve" a factual dispute between the parties that does not actually exist. But it is certainly not unreasonable to conclude that it proposes such a hearing simply to try and delay the inevitable. Moreover, the State does not even concede that it will comply with its longstanding promise to utilize the "truth-seeking" function of CODIS to further Petitioner's claim of actual innocence even if the evidentiary hearing it proposes yields a conclusive judicial finding that the profile is fully CODIS eligible. Instead, it reserves the right (buried in a footnote) to later raise, as "altogether another issue," the question of "whether it would ever be proper for a court to order FDLE to submit a profile to the CODIS database" – at which time, presumably, it would then oppose relief on remand and (if unsuccessful) in a yet another appeal to this Court. (Resp. at 5 n.5) (emphasis supplied).

Yet on the issue of legal authority, too, the State's inchoate objection is without any support. It does not even articulate a theory under which any Court (especially this one)

would find itself barred from compelling the State to provide a death-sentenced prisoner with access to potentially exculpatory DNA evidence in its exclusive possession where the State chooses – even for the most arbitrary of reasons – not to do so voluntarily. Nor does it offer any rebuttal to Petitioner's well-pled claims that such relief is (a) the sort expressly authorized and contemplated by the all-writs clause of the Florida Constitution, and (b) is an appropriate exercise of this Court's commitment to ensure the full and fair administration of justice in capital cases, particularly where, as here, the parties agree that no other provision of law expressly governs the relief sought. *See* Pet. at 30-44. If anything, the State's concessions that "the posture of this case is somewhat unique" (Resp. at 7) and that Petitioner's request for a database search is "in a sense 'collateral' to [his] capital case" (*Id.* at 5) are at least indirect admissions that an all-writs proceeding is the appropriate vehicle to decide Petitioner's claim.

Petitioner thus respectfully submits that the absence of any factual dispute on the present record as to (a) the CODIS eligibility of the DNA profile here, and (b) the potentially outcome-determinative new evidence of Petitioner's innocence the requested search may yield, warrants granting the writ on the pleadings and record already before this Court.

II. Because the State Neither Opposes Nor Even Asks for a Hearing on the Eligibility of the DNA Profile from This Case for Submission to the Florida State DNA Database, This Court Should Order It Without Further Delay

Petitioner has sought a writ directing the State to conduct a search of not one but two DNA databases: (1) the national database ("CODIS" or "NDIS") maintained by the FBI in which Florida and other States participate, and (2) the Florida State DNA database. (*See, e.g.,* Pet. at 11-12 & n. 4, 38, 46.) Those databases contain some – but not all – of the same convicted-offender DNA profiles, and thus the State database may yield additional results when searched separately. And while they serve comparable purposes, the two systems are governed by different authorizing statutes and regulations. *See id.*

Notably, while this Court directed the State to respond to the entire petition, its Response only speculates as to potential barriers to a search that may exist in the "CODIS submission criteria," and to seek a hearing "so this issue can be resolved." *See*, e.g., Resp. at 5. By contrast, it does not once mention – much less dispute - Petitioner's contention that the DNA profile in his case is eligible for immediate entry into the Florida State database, which would permit the instantaneous comparison of the unknown DNA profile from the crime scene here

against nearly 700,000 DNA profiles of offenders in this State,[2] potentially resulting in a "hit" to one with a history of kidnapping-murders identical to the one committed here. The State's lack of opposition to this aspect of the Petition may well be due to the fact that the authorizing statute for the Florida database contains broad, explicit eligibility criteria that unquestionably apply to the DNA profile in this case (which was obtained from the victim's underwear and saliva-stained washrag, both items having been recovered at the scene of the crime during the original investigation, and both entered into evidence against Petitioner at his trial). *See* Fl. Stat. Ann. § 943.325(a) (all "crime scene samples" may be included in State DNA database); § 943.325 (c) (all "samples lawfully obtained during a criminal investigation" may be included in database).

III. The Procedural Bars Governing Rule 3.850 Motions for Post-Conviction Relief Are Inapplicable to This Petition

The State also claims (at 6-7) that Petitioner's request for a writ directing these DNA database searches is barred by Rule 3.850(b) and (f), because (according to the State) it was not expressly raised as a claim for relief in his prior 3.851 proceedings. This claim is meritless. The State cites no

[2] *See* FDLE News Release, "Commissioner Bailey Recognizes DNA Database," Oct. 16, 2009, *available at* http://tinyurl.com/fdlestats (noting that Florida's database held 690,000 offender profiles as of October 2009).

authority – because there is none – to support its application of Rule 3.850's bar on *successive applications for post-conviction relief* to the context of this petition – which, of course, is not a 3.850 petition at all, but is a petition to invoke all-writs jurisdiction for the purpose of compelling a discrete act by the State. And the text of the Rule makes clear that it has no application in this context. Rule 3.850(a), for example, limits the grounds for all 3.850 motions only to those that involve "claims for relief from judgment or release from custody" by a person who alleges his conviction and/or sentence were illegally obtained. Similarly, Rule 3.850(b) applies its one-year statute of limitations only to a "motion filed or considered pursuant to this rule" (emphasis supplied), and Rule 3.850(f) only bars successive Rule 3.850 motions that fail to show good cause for raising "new or different grounds for relief" from the conviction or sentence. The State cites no authority (and Petitioner knows of none) to support the view that the Rule does not mean exactly what it says, *i.e.,* it expressly applies only to successive Rule 3.850 motions, but not to collateral actions brought by death-sentenced prisoners.

As is clear from the Petition, this matter (a) is not a 3.850 (or 3.851) motion, and (b) nowhere asks this Court to grant "relief" from Petitioner's conviction or sentence.

Instead, he merely seeks to compel the State to perform an act of discovery – a state and/or federal DNA database search – under the auspices of this Court's all-writs jurisdiction. *See* also Resp. at 7 (State "recognizes that the posture of this case is somewhat unique"). The DNA database search Petitioner seeks, of course, could well provide grounds for a subsequent 3.851 motion to vacate his conviction based on newly discovered evidence of actual innocence, and the State would, at that time, be free to assert whatever procedural defenses it chose (though it is difficult to imagine doing so successfully, and one hopes that if a DNA database search established Petitioner's innocence by identifying another man as the perpetrator, the State would join in his motion for relief rather than opposing it). But its present objection is both premature and without basis.

IV. Although Granting the Discrete Relief Petitioner Seeks Would in No Way Prejudice or Burden the State, He Will Be Severely Prejudiced by Further Delay

If "[t]he quintessential miscarriage of justice is the execution of a person who is actually innocent," *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995), the death of a prisoner in custody who, during his lifetime, was denied access to conclusive DNA evidence of his innocence surely runs a close second. This State is, unfortunately, not unfamiliar with such tragic circumstances. As was reported worldwide, in December 2000,

Florida earned the dubious distinction of being the first state in the nation to discover the innocence of one of its death row prisoners – Frank Lee Smith of Broward County – through posthumous DNA testing. What made the Smith case even more egregious was the fact that for more than two years before his death from cancer, he had sought – yet been denied – access to the very DNA evidence that later led prosecutors to posthumously concede his innocence. And not only did Mr. Smith suffer enormous physical pain during his final stages of terminal cancer, but he died on death row still begging his legal team to continue his longstanding fight to prove his innocence through DNA science. It was not until more than ten months *after* his death that prosecutors allowed the testing that showed Mr. Smith was not the source of DNA from the crime, and that the real perpetrator was a serial rapist and murderer elsewhere confined in the Florida Department of Corrections named Eddie Lee Moseley (the same man that an eyewitness to the crime had, during post-conviction proceedings, identified as the killer). *See, e.g.,* Sydney Freedberg, "DNA Clears Inmate Too Late," *St. Petersburg Times*, Dec. 15, 2000; PBS *Frontline*, "Requiem for Frank Lee Smith: Frank Lee Smith's Many Lost Judicial Appeals," available at http:// tinyurl.com/smithdna (attached as Appendix A).

Surely, no one wants to repeat the Smith travesty here. Yet even while the State does not deny that a simple DNA database search has the scientific potential to establish Petitioner's innocence by identifying another serial offender as the actual perpetrator of the crime for which he languishes on death row, it callously suggests that this Court postpone that action to conduct a hearing on the "scope and meaning" of a DNA database whose availability is not disputed. And it does so even while it knows that Petitioner has, for over three years, suffered from lymphoma and endured several rounds of painful radiation and chemotherapy, with his prognosis still uncertain.[3]

There is, of course, no way to know whether these DNA databases will yield a "hit" to another offender as the source of the DNA from this crime until they are searched (just as there was no way to know whether Frank Lee Smith was innocent until the testing he sought for years was finally allowed). But the prospect that they could yield such conclusive proof of innocence is neither disputed nor farfetched. This is so not merely because of the new DNA evidence already in the record (excluding Petitioner as the source of the only forensic

[3] Moreover, undersigned counsel and his law partner have represented three individuals who died of cancer or other terminal illnesses on Florida's death row in the last year alone (Jim Chandler, Byron Bryant, and William Cruse), while legal challenges to their convictions were still pending.

evidence that was used to convict him, which only narrowly failed to win him a new trial by a 4-3 vote of this Court). It is also because of other exculpatory evidence that came to light after Petitioner's conviction, and which casts further doubt on the jury's verdict - including, *inter alia,* the fact that the victim was seen alive by her own nephew more than twelve hours after the limited window of time in Petitioner could have abducted and killed her (see *Hildwin v. State,* Initial Brief of Appellant (appeal from denial of Rule 3.851 petition, filed June 8, 2010), at 7-8); and that he was represented by a woefully inexperienced young lawyer who had never handled a murder case, and who failed to conduct even a basic pretrial investigation into his claim of innocence or the identity of other potential perpetrator(s), save a cursory inquiry into the possibility that her boyfriend committed the crime (*Id.* at 2, 2 n.3, 16-17). Fortunately for Petitioner, however, it is still not too late for DNA database technology to reveal who committed this horrible crime – as long as the State is finally compelled to make that technology available.

WHEREFORE, for the foregoing reasons and those set forth in his Petition to Invoke this Court's All-Writs Jurisdiction, Petitioner respectfully requests that this Court grant the writ and order the relief prayed for at page 46 of the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, on June 8, 2010.

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MARTIN J. MCCLAIN

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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MARTIN J. MCCLAIN