IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1082

LOWER COURT CASE NO. 85-499-CF

PAUL C. HILDWIN,

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION SEEKING TO INVOKE ALL WRITS JURISDICTION

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RESPONSE TO PETITION SEEKING TO INVOKE
ALL WRITS JURISDICTION

COMES NOW the State of Florida, and responds as follows to Hildwin's petition seeking the exercise of this Court's "all-writs" jurisdiction. That petition can be resolved in one of two ways, neither of which reaches the merits.

The nature of the claim contained in the petition suggests that evidentiary development may be appropriate as to the scope, reach and meaning of the mandated criteria for submission of a DNA profile into the CODIS database despite the fact that Hildwin could (and should) have presented this claim (or at least tried to) at the time of his prior collateral proceedings, and despite voluntarily foregoing the opportunity for a hearing on this issue in Federal court last year (Appendix, at Tabs B-H). That constitutes a procedural bar under Florida law.[1] Accordingly, while the state maintains this claim is procedurally barred, the state, nevertheless, welcomes the opportunity to put the issue to rest by allowing an evidentiary hearing to determine whether Hildwin can truly prove his claims.

[1] The claim contained in the petition is procedurally barred because it is both successive and untimely. That procedural basis, in and of itself, is a sufficient basis for dismissal of the petition, which cannot function as a way to present claims that are otherwise barred from collateral review. This petition is an attempt to end-run the procedural requirements of *Florida Rule of Criminal Procedure* 3.850/3.851 -- it can properly be dismissed on that basis.

INTRODUCTION

The linchpin of Hildwin's petition is the following exchange which took place during the December 2, 2005, oral argument in Hildwin's last appeal to this Court:

> CHIEF JUSTICE: MR.NUNNELLEY TO THAT ONE STATEMENT YOU MAY RESPOND.
>
> WITH RESPECT TO THE CODIS DATABASE ISSUE, I THINK YOU ARE CORRECT THAT THE, YOU, JUSTICE PARIENTE, ARE CORRECT THAT THAT ISSUE IS NOT BEFORE THIS COURT. THE NOTION THAT THE STATE HAS CONCEDED THAT THE PROFILE IS ELIGIBLE FOR SUBMISSION, IS ABSOLUTELY FALSE. THE STATE, THE LETTER FROM THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT IS SELF-EXPLANATORY. I WOULD RELY ON THAT.
>
> CHIEF JUSTICE: WE WOULD HOPE, MR. NUNNELLEY, A THAT IF THIS IS ELIGIBLE FOR SUBMISSION, THAT THE STATE IN ITS TRUTH-SEEKING FUNCTION, WOULD CERTAINLY WANT TO PLACE THERE IN THE DATABASE, TO MAKE SURE THAT MR. HILDWIN IS NOT THE, THAT THERE MIGHT BE SOMEONE ELSE INVOLVED IN THIS CASE.
>
> YOUR HONOR, HAD THIS PROFILE BEEN ELIGIBLE FOR SUBMISSION TO CODIS, IT WOULD HAVE LONG AGO BEEN SUBMITTED.
>
> CHIEF JUSTICE: THANK YOU VERY MUCH.[2]

When read in context, this portion of the transcript makes two things clear: the "CODIS eligibility" of the DNA profile was not

[2] This portion of the argument appears on the last page of the transcript which is found at http://wfsu.org/gavel2gavel/transcript/04-1264.htm. By quoting from the transcript, the State should not be construed as conceding that the transcript is an official document akin to a trial court transcript, nor does the State concede that Hildwin's citation to the transcript is proper. However, since Hildwin has taken that course, the State is entitled to also rely on the same document to place the truth before this Court.

before this Court, and the only information about the eligibility issue contained in the record was in the form of a letter from the Florida Department of Law Enforcement which is found at Tab A of Hildwin's appendix. While that letter makes clear that there are CODIS submission criteria in addition to the "approved status" of the testing laboratory, the status criteria was the focus of the letter, and, at the time of that argument, was the focus of the State's response to the Court. **However, especially in the context of an issue that was not before the Court and had not even been briefed, it is absurd in the extreme to twist the words of the State's counsel in the way that Hildwin has done. The implication that the State attempted to mislead this Court in any fashion is not only unprofessional, but also has no basis in fact.**

RESPONSE TO PRELIMINARY STATEMENT

The preliminary statement found on pages 1-6 of the petition alternates between attacks on the state and its counsel and discussion of unrelated cases that have no pertinence to this case. When that hyperbole is stripped away, the preliminary statement is virtually devoid of factual averments that can withstand scrutiny. [3]

[3] Hildwin makes much of a statement made during oral argument by counsel for the state. Each such transcript (including the one in this case) has the following heading:

Hildwin's petition accuses the State of being "recalcitrant" and of attempting to circumvent justice. However, the true facts, which are evident from the documents contained in Hildwin's appendix, are that Hildwin simply refuses to recognize that the "approved status" of the testing laboratory is not the sole criteria governing submission to the CODIS database. This fact was mentioned in the January 27, 2005, letter from FDLE, the January 19, 2005, letter from the Office of the Attorney General (Tab A), in the State's federal pleading filed on April 13, 2009, (Tab D, at 16-17), and in the State's federal pleading filed on May 28, 2009 (Tab E, at 4 and n. 3). Simply put, Hildwin well knows that there are criteria for CODIS submission other than the "approved status" of the testing

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> The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

That heading (which was copied verbatim from the December 2, 2005, argument transcript in this case) is unambiguous. As discussed above, references by the State to the transcript are for the sole purpose of insuring that the true facts are before this Court.

laboratory.[4] The "preliminary statement" consists of little more than histrionics, and contributes nothing to the brief, the case, or the professionalism of Hildwin's counsel. It should be disregarded.

RESPONSE TO JURISDICTION

It is debatable at best that an "all-writs" petition is the proper vehicle to raise Hildwin's claim. While it is true that this is a capital case and that the issue of whether FDLE should be ordered[5] to submit certain DNA results to the CODIS database is in a sense "collateral" to that capital case, it is also true that the facts concerning the submission of a DNA profile to the CODIS system have never been developed in any trial court.[6] Because the petition contains multiple conclusions camouflaged as fact, repetitive and vituperative attacks on counsel which

[4] Hildwin's studied ignorance of these requirements is curious, given that the Innocence Project originally appeared in this case announcing their significant expertise in all things concerning DNA. It is incredible for them to suggest that they do not know about the various CODIS submission criteria.

[5] The question of whether it would ever be proper for a court to order FDLE to submit a profile to the CODIS database is altogether another issue. Upon information and belief, the State represents that there are multiple criteria that must be satisfied in order for a profile to be eligible for submission. Whether a court can order the submission of a profile that fails to satisfy the criteria is an area that should not be decided on the basis of the incomplete information before this Court at this time.

[6] Hildwin withdrew this very claim from his federal court proceeding.

have no factual basis, and because the facts necessary to an informed decision by this Court on a full record are simply not present because they have never been developed, this case cannot be decided on the facts before this Court.[7]

RESPONSE

The State responds as follows to the averments contained on pages 8-46 of the petition:

Procedural Bar

The "CODIS eligibility" issue was not raised in Hildwin's last appearance before this Court. *Hildwin v. State*, 951 So. 2d 784 (Fla. 2006). There is no doubt that the claim **could** have been raised at that time had Hildwin chosen to do so. *Florida Rule of Criminal Procedure* 3.850(f) flatly prohibits litigating claims that were available previously in successive motions for collateral relief. And, Florida Rule of Criminal Procedure 3.850(b) prohibits litigation of claims that were not raised within one year of their discovery.[8] Both of those well-settled

[7] There should be no confusion about this aspect of the case -- Hildwin did not take his CODIS issue to the circuit court before attempting to litigate the issue in this Court. Hildwin made that procedural choice, and should not be heard to criticize the State for objecting to his error.

[8] According to Hildwin's brief, he learned that the testing laboratory became an "approved vendor" for FDLE in August of 2008. Even taking the most charitable view of the events that is possible, this motion is untimely.

provisions of Florida law foreclose Hildwin's claims. The State does not waive the applicability of those defenses.

THE FACTS NECESSARY FOR A DETERMINATION ON THE MERITS ARE NOT BEFORE THIS COURT

While the State does not waive the procedural bar defenses set out above, the State also recognizes that the posture of this case is somewhat unique. Simply put, there is more to the CODIS eligibility guidelines than Hildwin has admitted. The full scope of those guidelines has never been developed, and nothing appears in the appendix that is sufficient for this Court to make an informed and just decision on the petition. Hildwin could have developed this issue fully at the time of his prior proceedings, but he chose not to do so. While there is no principled reason that Hildwin should not be bound by his choices, the State suggests that evidentiary development of the CODIS submission criteria may be appropriate to bring this issue to a close. The State would welcome the opportunity for a hearing so this issue can resolved based on facts rather than innuendo, speculation and slander.

CONCLUSION

WHEREFORE, based upon the foregoing, the State submits that the all-writs petition should either be relinquished to the circuit court for an evidentiary hearing developing the criteria

for submission of a DNA profile to the CODIS database, or dismissed as procedurally barred and untimely.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Martin J. McClain, Esquire, McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, FL 33334; Nina R. Morrison, Esquire, Innocence Project, Inc., 100 Fifth Avenue, 3rd Floor, New York, NY 10011; Stephen F. Hanlon, Esquire, The Constitution Project, 2099 Pennsylvania Avenue, N.W., Suite 100, Washington, DC 20006; Gigi Rollini, Esquire, P.O. Drawer 810, Tallahassee, FL 32302; Carol Folsom, Esquire, and Erin K. Allen, Esquire, 50 North Laura Street, Suite 3900, Jacksonville, FL 32202; and Abigail E. O'Connor, Esquire, 2115 Harden Blvd., Lakeland, FL 56623 on this 22nd June, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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