IN THE SUPREME COURT OF FLORIDA

PAUL HILDWIN,

Case No. SC10-1082

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE

RULE

INTRODUCTION

In 2006, Hildwin claimed that the results of DNA testing entitled him to relief from his conviction. This Court rejected that claim, stating that "there is no basis to Defendant's claim that the newly discovered DNA evidence shows that he is innocent of the crime, or that he would probably be acquitted on retrial." *Hildwin v. State,* 951 So. 2d 784, 788 (Fla. 2006). If there is no basis for relief based upon the newly discovered DNA evidence, there is no basis or justification for further reliance on that rejected evidence. Because the DNA evidence is not a basis for relief, this proceeding is no more than an attempt to re-litigate "evidence" that this Court has already rejected.[1]

STATEMENT OF THE CASE

Hildwin filed an all-writs petition in June of 2010. On November 10, 2010, this Court relinquished jurisdiction to the Circuit Court of Hernando County to hold a hearing and answer five (5) specific questions. Following an extension (at Hildwin's request) of this Court's original deadline, the hearing took place on February 9 and 10, 2011. On February 16,

[1] Hildwin's brief consists of histrionic attacks against the State. That unprofessional and unnecessary language is unworthy of our profession, and deserves no further response.

2011, the circuit court answered "yes" to the first four questions (which were substantive in nature), and "no" to the fifth question, which is essentially a catch-all.[2]

STATEMENT OF THE FACTS

The State relies on the following statement of the facts. Hildwin's argumentative statement of the facts is not accepted.

Christopher Carney, Supervisor of DNA investigative support database for the Florida Department of Law Enforcement, manages the day-to-day activities of the DNA database, as well as members in the database. Carney was accepted as an expert in the CODIS, NDIS and SDIS systems. (V6, R32) Carney supervises the CODIS[3] administrator and is an alternate CODIS administrator. (V6, R23, 25-6, 83).[4] CODIS was implemented by the Federal Bureau

---

[2] While the circuit court answered question 5 in the negative, it made various findings in connection with that negative answer. Those findings, which are speculative at best, and in derogation of the only competent testimony on the issue at worst, are addressed *infra*.

[3] "CODIS" is an acronym for "Combined DNA Index System" which includes the national DNA database, "NDIS," and each state's database, "SDIS." (V6, R27, 44). NDIS participating laboratories must be law enforcement agencies. (V6, R34). CODIS was created by the 1994 DNA Identification Act. (V7, R162).

[4] FDLE's main CODIS administrator is located in Tallahassee. (V6, R45). Each of FDLE's six labs also has a local CODIS administrator. If the local administrator cannot make a decision on uploading sample, the main administrator in Tallahassee does so. (V6, R46). If the decision cannot be made within the State, the State asks the FBI NDIS custodian whether or not a sample can be uploaded. (V6, R87).

of Investigation and contains the databases and software that drive NDIS and SDIS. (V6, R27, 28). NDIS is maintained by the FBI which inputs DNA samples from all states as well as federally-mandated samples. (V6, R27). States participating in NDIS also have SDIS, the State DNA Index System. (V6, R27). Each of the databases -- CODIS, NDIS, and SDIS -- contain indices made up of DNA profiles from various sources. (V6, R29).[5]

There are specific criteria governing eligibility of a DNA profile for submission to the forensic index. (V6, R30). The sample must be probative to the case and the sample must be developed under FBI quality assurance standards. (V6, R30, 31). In this case, DNA testing was conducted by Orchid Cellmark Laboratory in 2003, generating an "unknown DNA" profile.[6] (V6, R32, 33, 37). FDLE reviewed Orchid Cellmark's DNA analyst's qualifications and the documented results. (V6, R33). In Carney's opinion, the 2003 DNA sample is not a forensic unknown and is not eligible for entry into NDIS or SDIS due to its known location in relation to the victim's body. (V6, R37-8, 40-41). The sample would not be probative to Hildwin's case. (V6, R54).

[5] Indices include the offender index, forensic index, suspect index, unidentified human remains index, missing persons index, and relatives of missing persons index. These indices are maintained in both the state and national systems. (V6, R29). This case only involves the forensic index.

[6] The DNA profile came from items in the victim's dirty laundry bag. (V6, R51, 55, 63).

Since the DNA sample was found on the victim's panties found in her dirty laundry bag, it can be assumed that the semen came from a consensual partner. (V6, R103).

There are specific guidelines in NDIS, SDIS, and CODIS documents that define when a "forensic unknown" is eligible for upload to the forensic index. (V6, R34-5). The forensic unknown sample must be probative to the case in order for it to be uploaded. (V6, R35). Under the NDIS requirements, the sample must be "directly linked to the crime." (V6, R36, 72). These procedures ensure that DNA from victims and innocent bystanders is kept out of the system so that a suspect will not be created inadvertently. (V6, R36, 85). The DNA profile must be linked to the "putative suspect." (V6, R36, 40). The facts of this case determine whether or not the DNA profile would have come from the putative perpetrator. (V6, R86).

A "keyboard search" consists of entering an unknown DNA sample into Florida's SDIS without uploading it into CODIS. This is basically a "one-shot search" to see whether or not there is a match. The DNA profile is not permanently left in the database. (V6, R38). Only the CODIS unit and NDIS custodian of the FBI could make a decision as to whether or not a profile in

this case would be eligible for a one-time **NDIS** keyboard search.[7] (V6, R38). NDIS keyboard searches are "very, very rare." (V6, R40). The 2003 DNA sample is not eligible for a one-time CODIS/NDIS keyboard search. (V6, R40-1). The FBI could terminate an agency's access to the CODIS system for failure to follow the FBI's rules and procedures regarding eligibility of a DNA sample. (V6, R41). FDLE had previously determined the DNA profile in this case was not eligible for submission into the CODIS database "because it did not meet the criteria of a forensic unknown."[8] (V6, R42, 43). A reasonable attempt should be made to determine whether an elimination standard would be able to clarify a forensic unknown. (V6, R60). DNA samples in Florida can only be uploaded into the State's database (SDIS) or NDIS, not another state's database. (V6, R44).

NDIS Procedure DNA Data Acceptance Standards section 6.4.2 (probative value of a DNA sample) states:

> A laboratory submitting a DNA profile to the forensic index at NDIS that is derived from forensic evidence shall only offer those alleles that are attributed to the putative perpetrator(s). Alleles derived from forensic profiles that are unambiguously attributed to

[7] NDIS searches are conducted by FBI personnel on Mondays of each week. (V6, R39, 43).

[8] Carney spoke with FDLE analyst David Coffman who said he had "reservations as to whether the submission of the profile would comply with NDIS procedure." (V6, R55, 56, 64). Coffman was previously the DNA database supervisor and CODIS administrator for the state of Florida.

> a victim or individuals other than the perpetrator(s), such as, but not limited to a husband or boyfriend, shall not be offered to NDIS.

(V6, R58). In Carney's opinion, this provision precludes uploading the DNA profile at issue here.[9] (V6, R57, 58). Further, **the FBI NDIS custodian informed Carney that the profile in this case is not eligible for submission to NDIS.** (V6, R90-1). While NDIS and SDIS contain forensic indices that include DNA profiles of unknowns from crime scenes (V6, R71), NDIS Procedure 6.4.2 only allows the upload of profiles that can be attributed to the putative perpetrator. (V6, R101). Carney knew that the DNA evidence in this case had previously been raised and litigated and that the Florida Supreme Court held that it "wouldn't be probative to the case." (V6, R94).

DNA samples can be uploaded into SDIS that are not NDIS-eligible. (V6, R122, 123). "Suspect profiles" (profiles from suspects) and "elimination standards" (*i.e.,* consensual partner or a victim) are allowed in the State database but not in NDIS (V6, R133-4). FDLE must follow NDIS procedures for profiles to be uploaded. (V6, R135).

Lawrence Presley is the "lead scientist" for the U.S. Army Criminal Investigation Laboratory in Atlanta, Georgia. (V7,

[9] This provision has been the same at all times relevant to this case. (V6, R84).

R149-50). Presley oversees “all the science” that is performed in these labs to ensure the quality of work and reports, as well as meet the goals of the troops that send the evidence to him. (V7, R150). His job does not include making determinations in the role of a CODIS administrator. (V7, R170). **Presley has never been a CODIS administrator.** (V7, R168-69, 170-71). Presley said there are certain procedures that govern state-only profiles that are then uploaded into NDIS. (V7, R182). However, there are certain profiles entered in SDIS that would not be acceptable for uploading into NDIS. (V7, R183).

Presley said the stains on the panties and washcloth belonged to a non-secretor. Hildwin is a non-secretor. (V7, R193). The victim’s boyfriend at the time of her murder was a secretor. (V7, R194). The testing performed in 2003 indicated the sperm cells on the panties and the saliva stain on the washcloth did not match Hildwin. The two DNA profiles matched each other, consistent with coming from the same person. (V7, R194). In Presley’s opinion, the DNA profiles from the panties and washcloth could be uploaded in NDIS to include or eliminate whoever was the contributor to the semen stain. (V7, R196). Further, “there would be no barrier to uploading this profile because it actually meets the definition of an unknown profile in a forensic case.” (V7, R197).

Presley said a CODIS administrator would have to know the facts of a case in order to determine who is a "putative perpetrator." (V7, R199). Profiles that are uploaded into NDIS and SDIS that are found to match innocent people are expunged from the databases. (V7, R204). In Presley's opinion, the DNA profile in this case should be uploaded into CODIS. (V7, R206).

Presley explained that a DNA keyboard search is used as a very specific, limited search for a particular set of alleles that the agency is looking for. (V7, R209). If there are not a set number of alleles, the sample cannot be uploaded into NDIS. However, this type of search may yield a large number of potential candidates. (V7, R210). Rules differ for the length of time that these types of profiles remain in the SDIS database. NDIS keeps uploaded profiles indefinitely. (V7, R211, 212). Presley said there are cases where unknown DNA profiles were permanently uploaded into NDIS where someone was already convicted of the crime, and the case was in the post conviction stage. (V7, R213).

In Presley's opinion, the DNA in Hildwin's case is eligible to be uploaded into CODIS, eligible for a one-time manual keyboard search in CODIS, eligible to be uploaded into the Florida statewide DNA database, and eligible for a one-time

manual keyboard search in the Florida statewide DNA database. (V7, R216-17).

Presley said the NDIS administrator/custodian would have the final decision on uploading a DNA profile. (V7, R218). However, in Presley's opinion, an informed court could make a determination in this case as to whether or not the questioned DNA profile satisfies the putative perpetrator components, and therefore could be uploaded into the database. (V7, R229).

James Trainum is a retired homicide detective from the Washington, DC, Metropolitan police department and is a self-employed, part-time consultant on open and closed homicide cases. (V7, R233-34). As a detective, Trainum worked on the Violent Crime Case Review Project and evaluated potentially probative DNA evidence in the cases. He made the final decision as to what cases would be submitted to the FBI for a CODIS search. (V7, R240).

Trainum said that when his department submitted evidence to the FBI, he sent a transmittal letter containing the basic facts of the crime, along with the evidence. The letter requested the evidence be tested "and if a DNA profile is obtained please put it into CODIS."[10] (V7, R251). The FBI CODIS administrator "never"

[10] Trainum described one case where CODIS eliminated a suspect charged with the murder of a local known homosexual commissioner based on the suspect's possession of the victim's wallet and

requested that Trainum provide any original case documents such as investigative reports or postconviction transcripts. (V7, R252-53). Trainum was familiar with the facts of Hildwin's case. Trainum knew the victim's boyfriend had been eliminated as a suspect based on no match from him to the serology obtained from the semen on the panties and saliva on the washcloth. (V7, R259). When compared to Hildwin's serology type, it was found to be compatible, "a match of a certain percentage." (V7, R259). Trainum said if he was the investigator on a case like Hildwin's that occurred present day, he would consider Hildwin a suspect based on Hildwin's possession of the victim's belongings. He would have submitted the panties and washcloth for a DNA profile and compared it to Hildwin and the victim's boyfriend. If there was no match, he would have submitted it to CODIS. (V7, R261).

Trainum said no one at the FBI ever told him that submitted DNA samples absolutely had to come from the perpetrator. (V7, R264). According to Trainum, CODIS can "give you an investigative lead." (V7, R267). In all the homicide cases Trainum worked, the FBI never rejected a submission from him on any item of evidence from a crime scene that contained

---

credit cards. A sample of a blood trail which led away from the victim's body and down the street was submitted to the FBI. Through CODIS, it was determined the blood matched another suspect who had been robbing homosexuals in the area where the murdered commissioner lived. (V7, R253-54). Respectfully, that is not this case.

unidentified seminal fluid or any unidentifiable profile found on a homicide victim. (V7, R267, 268, 271). However, **Trainum was not aware of any case where genetic material found in the laundry was submitted for testing. The location of genetic material controls whether or not it is pertinent to the crime.** (V7, R272). **Trainum has never been a CODIS administrator**. (V7, R276). However, he said submissions have to have probable probative value associated with the suspect. (V7, R279).

Michael Ware is currently an assistant district attorney in Dallas County, Texas, and supervises the Conviction Integrity Unit. (V7, R286-87). The unit's primary duty is to investigate postconviction claims of actual innocence and related matters. (V7, R288). In his four years supervising this unit, Ware has come across hundreds of cases with a claim of actual innocence that needed further investigation. (V7, R289-90). CODIS is very valuable in determining whether a convicted person is actually guilty of the offense. (V7, R303). In Ware's opinion, CODIS would be helpful in evaluating these types of cases. (V7, R290).

Ware regularly consults with CODIS administrators from the labs that upload CODIS information. (V7, R293). **Ware has never been a CODIS administrator.** (V7, R332). However, he said a conviction and/or denial of postconviction relief would not preclude the inmate from being considered as a **potential** CODIS

case.[11] (V7, R292). In Ware's opinion, he "would be in favor of running that DNA, the unknown profile in CODIS." (V7, R321). **Ware said he assumed there was "strong evidence" that the victim had been sexually assaulted**.[12] Therefore, "then chances are the person who sexually assaulted her also was involved in her murder." (V7, R322). There has to be some connection between the DNA and the crime and some reasonable basis to believe that it belongs to the perpetrator. (V7, R326, 332). The labs that Ware uses typically do not ask for trial records or transcripts in order to verify facts or ensure their accuracy. (V7, R330).

Elizabeth Ramsey is an assistant public defender in Palm Beach, Florida, and supervises the major crimes/homicide unit. (V8, R353-54). Ramsey has never been a CODIS administrator. (V8, R371). Ramsey is currently representing a defendant, Todd Campbell,[13] whose DNA was linked to a crime when a crime scene DNA profile was uploaded into CODIS. (V8, R355). Campbell had

---

[11] Ware described two separate Texas cases (Entre Karage and Patrick Waller) where the defendants had been convicted of various crimes and subsequently filed for postconviction DNA testing that eventually led to them being exonerated. **Unlike this case, the DNA profile in both cases was obtained from sexual assault kits**. (V7, R318-19; 335-36).

[12] Ware said **the fact that Hildwin was neither charged with nor convicted of a specific count of sexual assault was "not really relevant."** (V7, R323-24).

[13] Campbell's case is currently in the pre-trial stage. (V8, R361).

not been a suspect in the murder until a CODIS match was developed. (V8, R360). Ramsey also represented a defendant (Samuel Arnold) who was charged in 2008 with a 2006 homicide. The fully-clothed victim (Mary Blanc) was a prostitute who had been beaten and strangled and found in an abandoned lot.[14] (V8, R362, 368). A used condom located nearby contained the DNA of the victim on one side and Arnold's DNA on the other side. (V8, R369). Arnold went to trial and was acquitted in 2010. (V8, R371). In Ramsey's experience, the Palm Beach County Sheriff's Office "is the most liberal regarding uploads into CODIS. And, essentially, they will put items into CODIS whenever recommended to do so by the lead detective." (V8, R372).

Maryanne Luciano is an assistant district attorney in Westchester County, New York. (V8, R378). She is not a trial attorney but handles post-conviction litigation. (V8, R379-80). Luciano requests DNA testing of evidence in cold cases. (V8, R381). She was involved in the 1989 Jeffrey Deskovic case, who had confessed to (and been convicted of) the rape and murder of 16-year-old Angela Correa. (V8, R382-83). DNA samples were sent to the FBI and Deskovic was excluded. (V8, R383, 385). Nonetheless, the case proceeded to trial and Deskovic was

[14] There was no evidence of a sexual assault in this case. (V8, R375).

convicted of rape and murder.[15] (V8, R383, 385). In 2006, the Innocence Project contacted Luciano's office regarding the possibility of postconviction DNA testing in Deskovic's case. (V8, R386, 387). The district attorney's office agreed to have the DNA profile uploaded into New York State's DNA system **(SDIS)**. (V8, R409). The results matched an inmate in state prison on another murder conviction from 1991. That inmate confessed to the Correa murder. (V8, R389, 394-95). Deskovic's conviction was vacated and the indictment was dismissed based on actual innocence. (V8, R404).

Luciano said every case is fact-specific. (V8, R404-05). **DNA testing can be dispositive in one case and meaningless in another.** (V8, R405).

ARGUMENT

PRELIMINARY MATTERS

CODIS stands for "Combined DNA Index System" -- CODIS is the software that integrates the National DNA Index System ("NDIS") and the State DNA Index Systems ("SDIS"). NDIS is operated by the FBI, as is CODIS. Florida's SDIS is operated by the Florida Department of Law Enforcement ("FDLE"). Florida (and

[15] It was the State's theory that the victim had a prior consensual partner and Deskovic had not ejaculated. (V8, R383). A request for a DNA sample from a prior boyfriend was refused. (V8, R385).

all other states that submit DNA profiles in CODIS) has a state "CODIS Administrator" who is responsible for submitting DNA profiles into the NDIS database, and is charged with insuring that those profiles satisfy the submission criteria established by NDIS regulations.

INTRODUCTION

The circuit court's order gave undue weight to some testimony and too little weight to other testimony. Despite the quantity of testimony presented by Hildwin, the quality of that testimony is not what the circuit court said it was. Hildwin's witnesses did little more than offer anecdotal testimony about (mostly non-Florida) cases in which DNA played some part. That anecdotal testimony is not competent substantial evidence, and does nothing to assist in answering the questions this Court posed. That testimony does not speak to the technical requirements established by CODIS for the submission of profiles. The witnesses uniformly recognized that each case is different and stands solely on its own facts, but the circuit court failed to recognize that fact. The anecdotes Hildwin offered do not support the circuit court's findings.

The circuit court did not recognize that no witness called by Hildwin has **ever** been the administrator of **any** DNA database, nor has **any** witness called by Hildwin **ever** had training from the

FBI with regard to the criteria for submission of DNA samples. Only the State's witness had those credentials, and the circuit court erroneously discounted that witness's expert testimony. The **only** competent substantial evidence that was presented came from the State, and supports answering the four substantive questions in the negative.

The CODIS Administrator's Testimony

FDLE Analyst Chris Carney is one of Florida's CODIS Administrators. He testified at length about the criteria that govern whether or not a DNA profile is eligible for submission into CODIS/NDIS. The submission criteria are contained, *inter alia*, in NDIS regulation 6.4.2.[16] That regulation is the one that establishes that the DNA profile at issue in this case is not eligible for CODIS submission. The purpose of this narrowly-written regulation is to ensure, as much as possible, that DNA profiles submitted to the Forensic Index[17] are DNA profiles that are connected to a crime.[18] The first sentence of the regulation

[16] That regulation is set out at pages 5-6, above. There are other eligibility criteria which deal with the credentialing and accreditation of the laboratory performing the testing. For purposes of this litigation, those criteria are not at issue.

[17] There are other "indices" contained within the NDIS/CODIS framework. They are not at issue here.

[18] While not necessarily within the scope of the hearing, there are significant privacy issues attached to any collection and comparison of identifying material. To put it simply, the quoted

is the operative sentence, and it serves to limit the pool of "submittable" profiles to those that can be linked to the perpetrator in some fashion (be it by testimony in an example such as the baseball cap in footnote 18, or by proximity to the victim, such as semen recovered from the vaginal swabs of a rape-murder victim). Without some nexus between the genetic material and the crime, the resulting DNA profile has no value to the investigation, and is probative of nothing. The second sentence of NDIS regulation 6.4.2 does not expand or otherwise affect the scope of eligible profiles. That sentence specifically excludes from submission a narrow and specific class of DNA profiles -- the second sentence is independent of the first, and it would be improper to read them in any other fashion.[19]

---

regulation operates to preclude submission of DNA profiles that are not connected to the offense being investigated. The example given at the hearing is a baseball cap found at a crime scene. In the absence of some information linking the cap to the perpetrator, the cap has no significance to the case under investigation. The items found in the victim's laundry in this case are no different than the baseball cap in the parking lot.

[19] Hildwin imports the word "unambiguously" from the second sentence into the first. That is not what the rule says, nor is it consistent with the testimony of the **only** individual trained in the determination of eligibility for submission. Any contrary interpretation is wrong because it changes the meaning of the entire rule. Hildwin is re-writing the rule to suit his purposes.

In Carney's opinion **as one of the CODIS Administrators for Florida**, the DNA profiles generated from the victim's laundry are not eligible for submission to the NDIS or SDIS databases. There is an insufficient nexus between the genetic material and the offense under investigation. Of all of the witnesses who testified, **Carney is the only individual who has ever had any training in the proper interpretation, implementation and application of the NDIS procedures.** This case is not in the same posture as a "fresh" case would be. Hildwin has already been found guilty beyond a reasonable doubt, had his conviction affirmed on direct appeal and on collateral review, and has been the subject of a finding by this Court that the DNA profiles did not entitle him to relief of any sort. In the face of those facts, the suggestion that the DNA profiles should be subject to further review makes no sense. This Court, and the circuit court, already denied relief based on the DNA testing. Since this Court has already said that the result of the DNA testing did not change the outcome of the case, that is a sufficient basis, by itself, to answer all of this Court's questions in the negative. Hildwin does not get a second bite at the apple.

This Court said that "**there is no basis to Defendant's claim that the newly discovered DNA evidence shows that he is innocent of the crime, or that he would probably be acquitted on**

retrial." *Hildwin v. State*, 951 So. 2d 784, 788 (Fla. 2006). In light of that finding, Mr. Carney quite properly determined that the DNA profiles were not appropriate for submission to NDIS or SDIS since this Court has already said that the test results do not change the outcome. For him to have done otherwise would have amounted to second-guessing of this Court's clear statement.

The circuit court, and Hildwin, complain that Carney obtained some information from consulting with other individuals with knowledge of the case. That criticism is wrong as a matter of law given that Carney was testifying as an expert and, under the plain language of *Florida Statues* § 90.704, is clearly entitled to rely on just that sort of information.[20] Carney obtained information through appropriate consultations, and should not be criticized for doing his job. His opinion testimony is based on nothing improper, and, **unlike Hildwin's evidence**, Carney's testimony is based in fact rather than speculation.

THE DEFENSE WITNESSES

In paragraph 10 of the order, the court discusses the testimony of Presley, who was of the opinion that the "DNA

[20] Hildwin's "experts" relied on the same sort of information, a fact that he does not acknowledge. The rules apply to both sides.

profile **should** be entered" into the various databases. Whether the profile "should" be entered is a subjective opinion that is far removed from the issue of whether the profile **meets** the submission criteria. That question is controlled by the NDIS criteria, with which Presley has no expertise or training. What Presley thinks "should" happen is wholly irrelevant because of his lack of qualifications. The fact that Trainum did not know of any of his cases where a DNA profile had "been rejected for entry into CODIS" is relevant to nothing. Trainum has no knowledge or training with respect to the submission criteria, and whatever was done in his cases has no weight in deciding whether the profiles at issue here meet the criteria for submission. That determination is case-specific -- the fact that a profile from one crime scene was uploaded does not mean that a profile from another crime scene is also proper for upload. This testimony has no relevance to the issue in this case.[21]

Hildwin's remaining three witnesses were attorneys,[22] each of whom has had some involvement in cases in which DNA evidence

[21] Neither Presley nor Trainum identified specific cases in their testimony. Instead, their testimony was general in nature and impossible to independently verify.

[22] Public Defender Ramsey has never been a CODIS administrator and has no training or expertise to offer to the issue before this Court. She testified about two cases in which DNA was an issue. Those anecdotes have nothing to do with the eligibility of the

played a role. The first such witness, Michael Ware, believed that Hildwin's case was a rape-murder case, even though he claimed to have extensively reviewed the decisions of this Court. (V7, R321-22). Ware has no training as a CODIS administrator, and has never been employed in such a capacity. His opinion that the DNA profile in this case "should be entered into CODIS" is nothing more than an opinion without a basis.[23]

New York Assistant District Attorney Luciano testified about a single, extreme, prosecution that resulted in the release of a defendant following a DNA exclusion after the profile was compared in the New York **state (SDIS)** database. (V8, R409). Simply put, CODIS was not a part of that case, and that case has no relevance at all to Hildwin's case. Luciano is not, and has never been, a CODIS administrator, nor has she had any training to qualify her to hold such a position. Her testimony, like that of the other attorney witnesses, is a mere anecdote, and a limited one at that. This testimony, like the rest of Hildwin's evidence, is not the sort of "expert opinion" that should be given any weigh at all, especially when considered

---

DNA profile at issue here for submission into CODIS, and her testimony can be entirely disregarded.

[23] Whether Ware is qualified to give opinion testimony about the upload eligibility of DNA profiles is very questionable.

against the testimony of a trained CODIS administrator. The court abused its discretion.

THE "ANSWERS" TO THE QUESTIONS

The first question posed by the Court is whether the DNA profile is eligible to be uploaded into CODIS. There is no competent substantial evidence supporting an affirmative answer to this question. None of Hildwin's witnesses have **ever been** a CODIS administrator, nor have any of those witnesses received any training whatsoever in how to make the decision as to whether or not to submit a profile using the settled and standardized NDIS procedures. **FDLE witness Carney is the only witness who has that training and responsibility and he testified that the profile was not eligible for submission into CODIS because it did not have a nexus to the offense (and indeed this Court effectively said that in its prior decision).** The lower court abused its discretion when it rejected that testimony in favor of the testimony of untrained persons who have never had any role, or training, in CODIS administration. Carney's testimony was specific and direct, and the circuit court should have credited it.[24] The testimony of Hildwin's witnesses, who are untrained in the CODIS/NDIS/SDIS regulations,

[24] As an expert, Carney was entitled to rely on consultations with others. The circuit court forgot that evidentiary rule.

cannot supply competent substantial evidence to disregard the testimony of a witness who has had that specific training and is actively employed as a CODIS administrator.

The second question is whether the DNA profile is eligible for a "one-time keyboard search" in CODIS. The problem with the court's "yes" answer is that this "keyboard search" would be performed by FBI personnel located outside the jurisdiction of this Court. Carney was the only witness to have any knowledge of the keyboard search procedures used by the FBI and is the only witness to have consulted with that agency. He testified that such a search is only done in limited, extreme, circumstances, and that **this case does not present the sort of circumstances under which the FBI would conduct such a search**. The lower court completely ignored that testimony.

With respect to both questions one and two, the circuit court overlooked the fact that FDLE has no say about what profiles go into the CODIS database. That is the prerogative of the FBI, where the ultimate eligibility decision is made utilizing the NDIS rules.

With respect to questions three and four, only Carney actually spoke to whether the DNA profile could be submitted to the Florida SDIS database. Carney testified that Florida uses the same criteria for SDIS eligibility that are used for NDIS

eligibility, and, because the profile is not eligible for NDIS submission, it is not eligible for SDIS submission, either. No evidence supports the circuit court's contrary conclusion. At the end of the day, while this Court has jurisdiction to direct FDLE to upload the profile into SDIS, the question becomes whether such an excursion into the executive branch is necessary or even desirable. And, serious privacy concerns attach to the notion of uploading a DNA profile into a database where it will remain for all time.

In the context of this case, the DNA profile was generated from items found in the victim's laundry bag, and she was admittedly on the way to a laundromat when she was killed. Hildwin has offered no more than a pyramid of unsupported and unsupportable inferences to support the notion that the DNA is linked to the crime.[25] **This Court** has already found that the "no match" from the prior DNA testing **is an insufficient basis to set aside Hildwin's conviction**. The absence of a nexus between the DNA and the crime is clear. The circuit court was in error to answer the questions in the affirmative.

With respect to question five, the circuit court has interpreted the NDIS rules inconsistently from the testimony of

[25] Hildwin's theory is that the victim's boyfriend Haverty is the "real" killer. Respectfully, the DNA evidence has nothing at all to do with that theory.

the sole witness with any training about those rules. The express purpose of the training given CODIS administrators in the interpretation of the NDIS rules is to ensure uniformity across jurisdictions -- the circuit court's interpretation undercuts that. Only Carney has training in the interpretation of the rules, and no evidence (and certainly no evidence from anyone with training like Carney has had) has been presented by Hildwin to suggest or imply that his testimony is in error. Carney's testimony should have been respected.[26]

CONCLUSION

The circuit court ignored the specific, technical evidence in favor of emotional, and largely uninformed, anecdotal testimony. That evaluation of the evidence led to an erroneous result the evidence does not support. The **only** competent evidence about the database submission criteria came from Carney, who answered the questions put by this Court in the negative. It was an abuse of discretion not to credit that testimony.

Respectfully submitted,

PAMELA JO BONDI

ATTORNEY GENERAL

[26] The circuit court makes reference to an "uncharged accomplice" as being a possible contributor of the DNA. Not even Hildwin has suggested that possibility.

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. **Nina Morrison**, Esq., Innocence Project, Inc., 40 Worth Street, Suite 701, New York, NY 10013 on this 6th day of April, 2011.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL