IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1082

PAUL C. HILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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Pursuant to the Order of this Court, Petitioner Paul C. Hildwin, by and through undersigned co-counsel, hereby files this post-hearing supplemental brief in support of the Petition.

I. PRELIMINARY STATEMENT

Petitioner has waited six years for a simple DNA database search that could be conducted in a matter of hours, at no cost or prejudice to the State. The search requested has the undisputed scientific potential to clear him of the crime for which he has spent a quarter-century on death row, and may also permit the identification and prosecution of one or more perpetrators of that brutal crime. The State's inexplicable (and oft-changing) justifications for refusing to permit this simple act to proceed cannot stand in the wake of the detailed and well-supported findings by the Circuit Court that this DNA profile is, in fact, fully eligible for both federal and state DNA database searches. The Petition should be granted.

II. PROCEEDINGS BELOW

A. Pre-hearing Submissions

Prior to the evidentiary hearing held on Feb. 9-10, 2011, the Court ordered the State to identify and explain its position as to the five database-eligibility questions posed by this Court. Subsequently, in writing and at a status hearing held on Jan. 18, 2011, the State conceded that the fact that the testing

here was performed at the Orchid Cellmark ("Cellmark") laboratory in 2003 was not a barrier to eligibility. Instead, it cited only one potential barrier: a provision of the federal ("NDIS") database regulations, NDIS Procedure 6.4.2 ("DNA Data Acceptance"), which states: "A laboratory submitting a DNA profile to the Forensic Index at NDIS that is derived from forensic evidence, shall offer only those alleles that are attributed to the putative perpetrator(s). Alleles derived from forensic profiles that are unambiguously attributed to 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." (Record on Appeal ("ROA") Vol.I p.29, 62-64).

B. Evidentiary Hearing: State's Case

The State lone witness at the evidentiary hearing was Christopher Carney. Mr. Carney has spent his entire professional career at the FDLE, and is presently its "DNA Database Supervisor." (ROA Vol. VI, pp. 23-24).[1] He manages the day-to-day operations of Florida's DNA database, "help[s] people come to decisions on if there's problematic cases," and supervises the FDLE's CODIS administrator. (26). Mr. Carney explained the terminology used to describe the databases at

[1] Unless otherwise indicated, all numerical citations in parentheses refer to the consecutively-paginated testimony found at Volumes VI, VII, and VIII of the Record on Appeal, taken at the evidentiary hearing held on February 9 and 10, 2011.

issue: (1) the National DNA Index System, or "NDIS," which is a database of convicted offender and unknown forensic profiles maintained by the FBI, to which each State contributes certain federally-regulated DNA profiles that can be searched simultaneously; (2) the State DNA Index System, or "SDIS," which consists of DNA databases maintained and accessed by each state, including Florida, individually; and (3) the Combined DNA Index System, or "CODIS," which refers to these databases collectively as well as the software that drives them. (27-28).

Mr. Carney testified that he was asked by counsel to assist with the CODIS issues in this case in November 2011. He stated that the process of determining CODIS eligibility requires a two-track review: one for "quality assurance" (to ensure that the DNA testing data and the credentials of the laboratory meet the FBI's national standards), and one to determine, in his words, "whether the sample is probative to the case." (30)

Mr. Carney delegated the task of reviewing Cellmark's testing data and other quality-assurance documentation to Chris Bacot, the "technical leader" for the Tallahassee regional office; no defect or barrier to NDIS/SDIS submission of the profile was identified. (48-49, 62-63) Mr. Carney also testified that the quality-assurance review of Cellmark's profile was conducted pursuant to the standards governing DNA testing data by private laboratories in effect in 2003, rather

than at the present time; indeed, there is no reason that the same review of Cellmark's credentials and data conducted by Mr. Bacot in 2011 could not have been done in 2005, when it was first requested by Petitioner. (68-69; ROA Vol. I, pp. 36-37).

Turning to what Mr. Carney had described as the "probativeness" prong, Mr. Carney claimed that this inquiry is required by NDIS Proc. 6.4.2, which concerns the submission of DNA profiles to NDIS that are attributed to "putative perpetrator(s)", as opposed to profiles "unambiguously attributed to the victim" or another known individual. (36, 58; Pet. Exh. 10 (regulations filed under seal)). He acknowledged, however, that there is no rule, regulation, or other document in which the FBI explains or defines the term "putative perpetrator(s)." (98, 124, 126) Nor do the documents that govern NDIS or SDIS define (or even utilize) the terms "probative" or "probativeness" in the context alleged by Mr. Carney. (74; ROA Vol.III; ROA Vol. IV pp. 513-610, 617-624).

When reviewing a DNA profile for "probativeness," Mr. Carney explained that "the facts around the case that come into the case file" would determine NDIS eligibility. (37). However, at no time did Mr. Carney or anyone under his supervision actually review the facts of the instant case, or otherwise conduct a so-called "probativeness" review. (37, 39, 49). This is because no one from the State ever asked him to do so. (49).

Accordingly, at the time he testified as the State's sole witness at the hearing on NDIS/SDIS eligibility, Mr. Carney had no knowledge of the facts of Mr. Hildwin's case or even the crimes at issue. (37). Counsel for the State/FDLE never provided him with investigatory, trial, or court documents that related or summarized the case facts. (53-54). (He did, however, resort to a Google search to try and learn some basic information about the case before testifying.) (50). As a result, Mr. Carney did not know the condition of the victim's body when it was discovered; the location where the body was found; or where it was located in relation to the semen-stained underwear containing the unknown male DNA profile. (51.) Nor did Mr. Carney know whether the unknown DNA profile in question was also found on a saliva-stained washcloth at the scene [which it was], or the location from which the washcloth was recovered (51, 62).

Mr. Carney agreed, however, that this would all be important information to know if one were to meaningfully assess the potential probative value of a DNA profile for NDIS purposes (62, 87). He also acknowledged that ordinarily, the FDLE would consider "both sides," including not only the State's theory of guilt, but also the theory of defense and how submission of an unknown profile to NDIS might further it. (103, 105) However, he did not consider, seek out, or know anything about Petitioner's theory of innocence, or the reason why Petitioner

wanted the profile submitted to NDIS/SDIS. (106). Nor was he aware of any of the facts contained *Brady* material suppressed by the State at Petitioner's trial that supports his claim of innocence -- such as the fact that the victim's own nephew told police he spent two hours with her at a local bar nearly twelve hours after the limited window of time that morning in which Petitioner was alleged to have murdered her. (72-73).

Despite the fact that Mr. Carney lacked the sort of basic factual information he said he would need to conduct a review of NDIS/SDIS eligibility, the State offered him as its one and only witness on the issue. The State elicited Mr. Carney's expert opinion that the profile here was not eligible for either upload or a one-time keyboard search in NDIS or SDIS. (32, 37, 41).

When asked on cross-examination to explain the basis for his opinion, Mr. Carney admitted that he had only formed it by relying upon the opinions of two other individuals who may have had some knowledge of the case facts: David Coffman, another FDLE employee who was the agency's CODIS administrator in 2005, and an unnamed "NDIS custodian" at the FBI. Regarding Mr. Coffman, Mr. Carney explained that he had reviewed a January 2005 letter by FDLE counsel James Martin, in which Mr. Martin described a preliminary review of NDIS eligibility by Mr. Coffman six years ago; and that he spoke personally with Mr. Coffman at some point in the days just prior to his testimony,

in order to find out what Mr. Coffman remembered about the Hildwin case and "what his thoughts on it were" (49, 56-57, 64-65). He did so because "I wanted to know where these panties [containing the unknown DNA profile] had come from," and no one on the State's side had provided him with that information. (66) It was only after talking to Mr. Coffman that Mr. Carney decided that he, too, was of the opinion that the profile from Mr. Hildwin's case was ineligible for NDIS or SDIS. (64-65).

Mr. Carney relied on Mr. Coffman's opinion notwithstanding the fact that he had no idea what factual information, if any, Mr. Coffman had been provided about the case. (79-80) Nor did he know whether any information Mr. Coffman was given was complete or accurate. (78-79). He also did not know whether Mr. Coffman had been given the specific kinds of information that Mr. Carney agreed is highly relevant to NDIS Proc. 6.4.2, such as whether the victim had any known consensual partners, and whether those partner(s) had already been eliminated from the DNA in question. (*Id.*) Mr. Carney also could not explain what (allegedly) led Mr. Coffman to conclude that the profile was ineligible in 2005, when counsel's letter stated only that Mr. Coffman had expressed "some reservations" at that time. (56; ROA Vol. I, p.136).

Finally, Mr. Carney's opinion was also based, in part, on a brief conversation with the "NDIS custodian" at the FBI, whom he

telephoned earlier that week. (75, 109).[2] He claimed that the FBI's NDIS custodian stated that the profile in the Hildwin case was "not eligible" for NDIS. (90-91, 103) However, Mr. Carney did not discuss the facts of the case with him, and had no idea whether the FBI administrator had been provided any case facts himself; or if he had been, whether those facts were accurate or complete. (109-10). Nonetheless, Mr. Carney gave the FBI official's purported opinion about the profile's ineligibility "a lot of weight" in forming his own (75-76).

C. Evidentiary Hearing: Petitioner's Case

Petitioner called five witnesses at the hearing. Three of them (a former chief of the FBI's DNA Unit, a former homicide detective specializing in CODIS/DNA cases, and a prosecutor specializing in post-conviction DNA investigations) were qualified by the court as experts; all testified for Petitioner on a *pro bono* basis. The other two (a public defender specializing in homicides, and another senior prosecutor) described cases they had handled in which unknown DNA profiles analogous to the one at issue here were found eligible for NDIS.

1. Lawrence A. Presley

[2] It is unclear why Mr. Carney solicited the FBI's opinion just prior to testifying, as his usual practice was not to consult the FBI about an eligibility issue unless he or someone else at the FDLE had "look[ed] at the facts surrounding the case" and were "unable to make a professional opinion on whether it can go in," which he claimed was not the case here. (87.)

Petitioner's first witness, Lawrence Presley, is the lead scientist with the U.S. Army's Criminal Investigation Laboratory. He supervises the U.S. Army's forensic laboratories in four areas, including DNA analysis, both in the U.S. and in combat overseas. (150). Mr. Presley has worked, lectured, and taught in the area of forensic DNA analysis since the late 1980s, including as chief of the FBI's DNA Analysis Unit from 1989-1993, and in other supervisory roles until he retired from the Bureau in 2001. (153-56; ROA Vol. IV p. 625-34). He also has experience with today's CODIS system and the FBI's earlier DNA databases on which CODIS is based. For example, he developed the first set of regulations for the early versions of CODIS and ensured the FBI's compliance with them; was consulted by the FBI personnel who drafted the current NDIS guidelines; and was a member of the federal DNA Advisory Board from 1995-1999, which promulgated the first CODIS regulations, the relevant language of which have remained largely unchanged to date. (153-58) In addition, Mr. Presley currently supervises DNA testing done by the U.S. Army's laboratory, which uploads profiles directly to NDIS; and from 2001-2010, he served as the director of forensic biology at a private DNA laboratory, 95% of whose clients were law enforcement agencies, and regularly advised clients as to the NDIS eligibility of DNA profiles they sought to have tested and uploaded. (151, 159-66).

Over the State's objection, the Court qualified Mr. Presley as an expert in DNA testing and the CODIS database, finding that he "certainly" possessed the necessary experience and knowledge to offer opinion testimony in these areas. (166, 174).

Mr. Presley proceeded to explain the history and purpose of NDIS Proc. 6.4.2. The prohibition on submission of profiles that are "unambiguously attributed" to someone other than the "putative perpetrator(s)," he testified, arose from an entirely different context than is present here. Specifically, he explained that in the early years of DNA testing, the FBI found itself in possession of many lawfully-obtained DNA profiles of individuals who were no longer suspects in a specific criminal case, because testing had eliminated them as suspects. (184-87.) Similarly, the FBI and other agencies possessed DNA samples from husbands or boyfriends of crime victims that had been given for elimination purposes. (188). The FBI concluded that it would be improper to take the profiles of those individuals who were no longer, or had never been, criminal suspects and submit them to CODIS to see if they had committed other offenses. That concern, he explained, led to the drafting of the NDIS regulation now known as 6.4.2. (187-88).

Prior to testifying, Mr. Presley familiarized himself with the facts of the Hildwin case by reviewing this Court's opinions, briefing, lab reports, and other case documents. (190-

91) He readily concluded that NDIS Proc. 6.4.2 was not applicable here. This, he explained, is because 6.4.2 prohibits only the NDIS submission of DNA profiles that are "unambiguously" attributed to someone other than the perpetrator, such as a victim's consensual partner. Here, by contrast, Mr. Presley noted that the victim's only known consensual sexual partner prior to her death was *excluded* as the source of these semen/saliva stains by the FBI's serology unit, and the donor's DNA profile is unidentified. (195-97).

Mr. Presley further testified that he knew of "no barrier" to uploading the profile under NDIS Proc. 6.4.2. (197). For an unidentified profile to be attributable to a "putative perpetrator," the donor of the profile must only be said to have had "some potential involvement in the crime at hand" that can be investigated through an NDIS search. (202). In Mr. Presley's view, NDIS eligibility was not even "a close call" in this case (205), because the profile was collected from the crime scene, remains unidentified, and clearly had at least a potential connection to the perpetrator(s) because (a) it was offered by the State at trial, and (b) there are numerous indications that the victim was sexually assaulted -- including that she was found nude and spread-eagled; that her clothing, including her bra, was ripped off; and that the male DNA profile from the

semen-stained underwear and saliva-stained washrag in the same vehicle excluded her only known boyfriend (191-92, 196-97, 203).

Mr. Presley did consider the fact that Mr. Hildwin was not charged with nor convicted of sexual assault, as well as the other inculpatory evidence offered against him at trial, but opined that these factors did not preclude the FDLE from merely trying to determine the unknown DNA donor's identity through CODIS. (192-96, 203, 230). In fact, Mr. Presley could not recall a single instance in his entire career in which anyone at the FBI, or any other CODIS-participating agency, had even suggested that an unidentified seminal stain on a homicide victim's underwear could not be uploaded into CODIS, much less found such a profile to be ineligible under 6.4.2. (205-206).

2. James Trainum

Petitioner's second witness, James Trainum, recently retired from the Metropolitan Police Department in Washington, D.C., after 27 years in service, including 17 years as a homicide detective. From 2000-2010, Det. Trainum ran the MPD's "Violent Crime Case Review Project," which screened nearly 2,000 cases to determine if new technology, particularly DNA and CODIS, could solve "cold" cases, exonerate wrongfully convicted individuals, and/or identify additional perpetrators. (234-40). During that time he was trained by the FBI regarding CODIS and its requirements; the FBI served as the MPD's DNA laboratory and

detectives made their requests for CODIS searches directly to the Bureau. (239, 2448-51). He was qualified by the Court as an expert in the use of CODIS in homicide investigations. (245).

Det. Trainum testified that CODIS had dramatically advanced homicide investigators' ability to identify perpetrators in a range of cases. CODIS "opened up the whole world" for homicide investigators, not only by identifying previously-unknown suspects, but in linking previously-unrelated cases. (247). These included cases in which investigators believed they had already identified the perpetrator, but a CODIS search revealed otherwise. For example, he described the stabbing of a local gay politician, in which investigators had arrested and charged a drug addict caught with the victim's wallet and credit cards. But when DNA from blood at the scene excluded the suspect, they ran the unknown profile in CODIS and identified another individual with a history of robbing gay men in that same part of the city, thus clearing the original suspect. (254-55).

Det. Trainum testified that investigators were prohibited under FBI guidelines from "going fishing" in the database by searching profiles of individuals who had already been eliminated from specific cases (much as they would have liked to have seen if those individuals had committed unsolved crimes) (255-56). But he also explained that investigators had wide latitude to search unknown profiles from crime scenes in CODIS;

and he had “absolutely” submitted cases to CODIS where he did not know one way or the other if the DNA in question actually came from the perpetrator(s), but was merely investigating that possibility. (263). For example, he had submitted multiple profiles from semen stains on the clothing of a murdered prostitute and a condom near her body, even though he had no way to know – in advance of running the search – whether those profiles came from her killer(s), or simply from customers who had paid her for sex but had no connection to her murder. If law enforcement was required to make that determination in advance of a CODIS search, he testified, “it would definitely strain our ability to follow through on these investigations.” (264-66). Det. Trainum emphasized even a hit to a consensual partner could be highly valuable for investigative purposes – because that person might have information about the victim’s last known whereabouts, or might be the killer. (267, 264-65.)

Det. Trainum familiarized himself with the facts of Mr. Hildwin’s case prior to testifying. (256-60). He testified that if the case were to have been assigned to him, he would without question submit the unknown DNA profile from the victim’s underwear and washrag to CODIS to investigate its source. (261).

Det. Trainum was unaware of any case among the hundreds he has reviewed or supervised over the last decade in which the FBI rejected a submission to CODIS on <u>any</u> item of evidence from a

homicide scene that contained unidentified seminal fluid. (267-68). He also knew of no case in which the FBI had rejected a CODIS submission involving unidentified DNA of any kind (*i.e.,* saliva, semen, blood, skin cells), found on any item of a homicide victim's clothing. (Id.) The only requirement, he testified, is that the DNA must have come from "a piece of evidence that could generate information that's relevant to our investigation." (275). Whether or not the DNA *necessarily* comes from the perpetrator, he explained, conscientious investigators can and do submit a profile to CODIS, because "if we do not follow up on that piece of evidence, there'll always be that doubt and we'll never know for sure." (Id.)

3. Michael Ware

Petitioner's third witness, Michael Ware, is Special Fields Bureau Chief for the District Attorney of Dallas County, Texas. In that position, ADA Ware supervises several divisions in the DA's office, including the Conviction Integrity Unit ("CIU"). (287). The CIU investigates defendants' claims of actual innocence, and prosecutes new/additional perpetrators who may be identified during these investigations; they have reviewed "hundreds" of post-conviction cases for potential innocence. (287-90). The CIU always considers whether DNA testing and CODIS "hits" might provide new evidence of innocence. (290). In his four years running the CIU, Mr. Ware and his staff have

handled 13 post-conviction DNA exonerations in Dallas County alone – that is, defendants convicted by juries or who pled guilty, but who were later found to be innocent. (296-98).

Mr. Ware was qualified by the Court as an expert in the investigation of post-conviction claims of actual innocence. (301). He described CODIS as an "extremely valuable" tool in furthering post-conviction investigations into claims of innocence, particularly where there may be doubts or ambiguities as to whether unidentified DNA from a crime scene actually came from the perpetrator(s), or when additional perpetrators have not previously been identified or known. (302-03).

Mr. Ware also described two cases in which – as in the instant case – courts had previously found unidentified male DNA from a crime scene to be insufficient, on its own, to yield an acquittal, but a CODIS "hit" to the actual perpetrator dramatically advanced the investigation and established innocence. For example, he described how Entre Karage was convicted after a bench trial of murdering his young girlfriend due to her suspected infidelity. Although unidentified DNA from semen was found in the victim's vaginal swabs, the trial and appellate courts found this did not require Mr. Karage's acquittal because it was consistent with the "jealous rage" theory of prosecution. Post-conviction, however, the DNA was entered in CODIS and traced to a violent sex offender with no

connection to the victim; he pled guilty to the murder, and Mr. Karage was pardoned on grounds of actual innocence. (305-12).

Mr. Ware also related the case of Patrick Waller, wrongfully convicted of an aggravated robbery in which one victim was also raped. Although the courts had previously rejected Mr. Waller's request for DNA testing, finding it would be insufficient to establish innocence, the State later tested the DNA on its own initiative and excluded Mr. Waller. A CODIS "hit" then led to the identification of two previously-unknown perpetrators, and Mr. Waller was exonerated. (312-18).

In addition to CODIS' potential to clear the wrongfully convicted, Mr. Ware also testified about the public safety risks caused by delaying access to CODIS in these investigations. For example, in the Waller case, seven years elapsed between the Mr. Waller's initial bid for DNA testing and when the CODIS search was actually performed. During that time, the statute of limitations expired on rape charges that could otherwise have been brought against the perpetrators, and both offenders – who were imprisoned on other charges – were paroled. (319).

Mr. Ware is familiar with the facts of the Hildwin case. He testified that if the CODIS request were made to him, he would ask that the profile be searched, and "would not anticipate any resistance" from any of the CODIS-participating labs to whom he regularly submits cases. (321). He opined that identifying the

semen donor on Ms. Cox's underwear "could be extremely probative in finding out either the truth as to what happened or probative in continuing the investigation," because "if that person could be identified, it would at the very least be someone who law enforcement would want to interview and talk to," and could well turn out to have committed the rape or the murder. (322-23). Mr. Ware opined that there need be only a "reasonable nexus" between the evidence and the investigation to permit a CODIS search. (323). And where, as here, the State already used a piece of evidence against a defendant at his trial, it "almost by definition has a sufficient connection to the crime or to the perpetrator to be entered into CODIS." (328).

4. Elizabeth Ramsey

Petitioner's fourth witness, Elizabeth Ramsey, is Chief of Major Crimes in the Palm Beach County, FL, Public Defender's Office, where she handles homicide cases at the trial level. Ms. Ramsey testified about two cases in which NDIS searches were performed and led to her clients' arrest and prosecution -- even though the evidence on which the DNA profile was recovered was far more attenuated in its apparent connection to those homicides than in Petitioner's case. (352-55).

The first was the 1984 homicide of Vicki Long, who was found strangled but fully clothed in an open field near her house. Ms. Long had at least three known consensual sexual

partners at the time (and could well have had more), and there was no finding of sexual assault. Nonetheless, in 2007, the DNA from an unidentified seminal stain on the underwear she had been wearing under her jogging shorts was entered into CODIS, yielding a "hit" to Todd Campbell – a former neighbor of the victim's whose profile was added to the database after a 2009 marijuana-sale conviction. Mr. Campbell is now being prosecuted for Ms. Long's murder. (355-60; ROA Vol IV., pp. 684-89).

The second case Ms. Ramsey described was the homicide of Marion Blanc, a 54-year-old prostitute who was also found fully clothed with no signs of sexual assault. The crime scene, an abandoned lot known to be frequented by prostitutes, was strewn with trash and debris. Among the items recovered at the scene was a condom with semen, several feet from Ms. Blanc's body. Even though investigators had no reason to believe, at that time, that the semen donor was the person who killed Ms. Blanc, as opposed to a nonviolent customer, the donor's DNA profile was submitted to CODIS. Ms. Ramsey's client, Samuel Arnold, was charged with (though ultimately acquitted of) the murder based on that CODIS "hit" between his DNA and the abandoned condom. (362-63, 368-71; ROA Vol. IV pp. 690-91).

5. Maryanne Luciano

Petitioner's final witness was Maryanne Luciano, a 30-year veteran prosecutor who is presently First Deputy District

Attorney in Westchester County, NY. (378-79). Ms. Luciano described how her office used CODIS in 2006 to exonerate Jeffrey Deskovic of the rape/murder for which he was wrongfully convicted and served 16 years in prison, and in so doing identified and secured the conviction of the true perpetrator.

Ms. Luciano explained that a potential barrier to CODIS in Mr. Deskovic's case that her office initially considered was the fact that the DNA at issue (seminal fluid on the rape/murder victim's vaginal swabs, from someone other than Mr. Deskovic) had *already* been presented to the trial jury. However, the fact that the jury and, later, the appellate courts, denied relief (at prosecutors' urging) despite the DNA exclusion did not turn out to preclude a CODIS search. Ms. Luciano's office considered CODIS to be an important and previously-unavailable investigative tool, and solicited the opinion of the CODIS administrator at their County laboratory, who in turn consulted the FBI, regarding the profile's eligibility. These officials concluded it was fully eligible and submitted the unknown DNA profile to CODIS. (382-94; ROA Vol. IV. pp.692-94).

Even though Mr. Deskovic had previously confessed to the crime, the CODIS search quickly exonerated him: the DNA "hit" to another convicted murderer with no connection to Deskovic, who admitted he had done the murder and had acted alone. With the prosecution's full support, Mr. Deskovic was freed from prison

and his conviction vacated within days, and two months later, prosecutors dismissed his original indictment on grounds of actual innocence. (394-98, 404; ROA Vol. IV. pp.695-724).

III. ARGUMENT

A. Standard of Review

The Circuit Court presided over two days of evidentiary hearings and, after hearing from and weighing the credibility of six testifying witnesses, answered all four factual questions posed by this Court as to the DNA profile's eligibility to be searched in NDIS and SDIS databases in the affirmative. "The standard of review applicable to a trial court decision based upon a finding of fact is whether the decision is supported by competent substantial evidence." *Pantoja v. State*, -- So.3d --, 2001 WL 722374 at *2 (Fla. 2011); *Teffeteller v. Dugger*, 734 So.2d 1009, 1017 (Fla. 1999) (internal citations omitted).

B. The Unknown DNA Profile is Fully Eligible to be Searched in Both NDIS ("CODIS") and SDIS, and this Court Should Order a Search Without Further Delay

The record contains a wealth of competent and substantial evidence supporting the Circuit Court's findings. It includes the testimony of a former FBI DNA Unit chief and internationally known DNA expert, two senior prosecutors, and a homicide detective specializing in "cold case" DNA investigations, whose testimony established that submitting agencies may search a crime scene profile in NDIS as long as two criteria are met: (1)

the profile is from an unknown source (*i.e.,* other testing has excluded the victim and her consensual partners/other known individuals), and (2) the database search has a reasonable potential to identify the perpetrator(s) or otherwise further an investigation into the perpetrator(s)' identity.

The broad latitude that NDIS gives investigators to search the database for this purpose was further shown by the numerous examples Petitioner's witnesses provided as to the kinds of DNA profiles that have been approved for submission to NDIS, despite the fact that the connection between the evidence and the perpetrator was – at least at the time the sample was deemed eligible and uploaded – far from certain. These included, among others, profiles obtained from seminal fluid on condoms and clothing of known prostitutes with a potentially unlimited number of sexual partners prior to their deaths; DNA from the underwear of a homicide victim who (unlike in Petitioner's case) was found fully clothed and had at least three known consensual sex partners, and possibly others; blood from a crime scene that did not match the prime suspect (who was in possession of the victim's stolen property, but was cleared by an NDIS "hit" to a serial offender); and unknown DNA from cases in which the mere existence of that foreign DNA had *already been rejected* by the courts as grounds to acquit the defendant.

The Circuit Court's finding that the underwear and washrag from which the unidentified DNA profile here comes have an equivalent or greater "forensic nexus related to the crime scene investigation" cannot seriously be challenged. (ROA Vol. V, p.731). The record reveals not a single rape or homicide case in the history of the CODIS database system in which any DNA profile from unidentified seminal fluid has ever been deemed ineligible. In this case, moreover, the State offered these very items into evidence at trial, and told the jury that they should be considered evidence of how -- and by whom – the crime was committed. (Id.; ROA Vol. VIII, pp. 439-442).

The Circuit Court was also correct to reject the State's characterization of NDIS Proc. 6.4.2 as a barrier to eligibility – or even applicable – in this context. As the Court noted, by its plain terms, 6.4.2 bars only submission of profiles that are "unambiguously attributed" to a known individual (such as a victim or her boyfriend), which is clearly not the case with the unidentified profile at issue here. (ROA Vol. V., p.726-28). Nor is there a single FBI regulation, manual, or other source that supports the State's claim to the contrary. The Court also properly gave little weight to the "weak[]" opinion of the FDLE's lone witness, Christopher Carney, as the State (a) deliberately did not provide him with any factual information about the case that would be needed to render an informed

opinion, and (b) solicited an "expert opinion" from him that was based solely on the alleged hearsay statements of other officials, and which may well have been based on dated, inaccurate, or incomplete information, none of which could be subjected to cross-examination. Id. at 727-28.

Finally, it bears noting that the case for exclusion from the Florida SDIS is even weaker than from NDIS. Mr. Carney claimed that NDIS 6.4.2 would also exclude any NDIS-ineligible profile from SDIS – but this is contradicted by the plain text of the very documents he cited as controlling, as well as Florida's own database authorization statute. *See* ROA Vol. IV p. 620 (FBI contract requirements apply to DNA profiles submitted by Florida "to NDIS"); Fl. Stat. Ann. § 943.325(a),(c) (authorizing inclusion of all "crime scene samples" and "samples lawfully obtained during a criminal investigation" to SDIS).

In sum, the record overwhelmingly supports the Circuit Court's findings that the profile at issue has a "definite . . . nexus related to the criminal investigation" and meets any arguable criteria for NDIS/SDIS eligibility, as well as its recommendation that this Court order a search to determine "whatever investigative leads it may give, if any," as to the perpetrator(s)' identity. (ROA Vol. V, p.731). The use of this Court's all-writs jurisdiction under Fl. Const. Art. V, §3(b)(7) to secure such relief is further appropriate where, as here, the

State has refused for over six years to conduct a simple database search of its own accord; only determined "eligibility" when under a court order to do so, and even then shielded its own expert from the information he needed to reach a fair conclusion; and where DNA testing and post-conviction *Brady* disclosures (including a police report showing that the victim's own nephew saw her alive and well 12 hours after the narrow window of time in which Petitioner was alleged to have committed the murder) have already undermined public confidence in the original verdict. *See, e.g., Hildwin v. State*, SC09-1417 (App. Br. filed 6/8/10, at pp. 5-19) (discussing undisclosed *Brady* material supporting Petitioner's trial theory of innocence); Tony Holt, "DNA unearths doubt in death row case," *Hernando Today*, Mar. 19, 2011; Tony Holt, "Questions remain in 1985 Hernando County murder investigation," Mar. 22, 2011.

If ignorance is ever bliss, it is surely not so here. For the reasons set forth above, and pursuant to the authorities set forth at length in the original Petition, the requested relief should be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Post-Hearing Supplemental Brief in Support of Petition Seeking to Invoke this Court's All-Writs Jurisdiction 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, and Rock E. Hooker, Assistant State Attorney, Office of the State Attorney, 19 NW Pine Avenue, Ocala, FL 34475, on March 30, 2011.

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CERTIFICATE OF FONT

This is to certify that this Post-Hearing Supplemental Brief in Support of Petition Seeking to Invoke this Court's All-Writs Jurisdiction has been produced in a 12-point Courier New type, a font that is not proportionately spaced.

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