IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1082

PAUL CHRISTOPHER HILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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REPLY TO INTRODUCTION

In its Introduction, the State seems amnesiac. After Mr. Hildwin filed the All Writs Petition on June 9, 2010, that began this proceeding, the State filed a Response on June 22, 2010. In that Response, the State first argued that the matter was procedurally barred. Response at 6. Then, the State included a section entitled: "THE FACTS NECESSARY FOR A DETERMINATION ON THE MERITS ARE NOT BEFORE THIS COURT" (Response at 7). Within this section of its Response, the State said:

> 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 be resolved based on facts rather than innuendo, speculation and slander.

(Response at 7)(emphasis supplied).

After this Court received the State's Response, it entered an order on November 10, 2010, stating:

> **The Court has determined that this petition is not procedurally barred**. **The Court notes** that although the State opposes the petition, the State has suggested relinquishment to the trial court as an alternative, stating that "evidentiary development of the CODIS submission may be appropriate" and **that the State would "welcome the opportunity for a hearing so this issue can be resolved**."

(Emphasis added).

The State did not seek rehearing or otherwise challenged this Court's determination that the All Writs Petition was not and is not procedurally barred. The time for seeking to revisit or relitigate this Court's determination that the issue raised in the All Writs Petition is not procedurally barred has thus long since expired. Yet, the State argues in the Introduction of its Supplemental Answer Brief that Mr. Hildwin's All Writs Petition "is no more than an attempt to re-litigated 'evidence' that this Court has already rejected."[1] Supplemental Answer Brief at 1. The State's argument in this regard is an improper and untimely attempt to re-litigate this Court's ruling "that this petition is not procedurally barred."

REPLY TO STATE'S STATEMENT OF THE FACTS

In its Statement of the Facts,[2] the State completely ignores the factual findings made by the judge who presided at the

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[1] Implicit in the State's Introduction to its brief is the notion that the evidentiary hearing was a waste of time and apparently taxpayer money. Yet, it was the State that wanted and welcomed an evidentiary hearing.

[2] The State begins its Statement of the Facts with this assertion: "The State relies upon the following statement of the facts. Hildwin's argumentative statement of the facts is not accepted." Supplemental Answer Brief at 2. However, Mr. Hildwin was the prevailing party in the circuit court, and the presiding judge made findings of facts in Mr. Hildwin's favor.

evidentiary hearing. The law of this State is quite clear. After a nonjury trial, "[a] trial court's factual findings and legal conclusions should not be disturbed unless the appellate court is convinced that they are unsupported, inconsistent, or contrary to the law." *J. Sourini Painting, Inc. v. Johnson Paints, Inc.*, 809 So. 2d 95, 98 (Fla. 2d DCA 2002).

In *Roberts v. State*, 995 So. 2d 186, 189 (Fla. 2008), this Court held in the context of a Rule 3.851 evidentiary hearing:

> The trial court's credibility determination is supported by competent, substantial evidence in the record. We affirm that finding. See Melendez v. State, 718 So.2d 746, 747-48 (Fla.1998); Blanco v. State, 702 So.2d 1250, 1251 (Fla.1997) ("As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court).' " (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla.1984)).

Current counsel for the State in an Answer Brief filed in *Hildwin v. State*, Case No. SC04-1264, on April 27, 2005, seemed to know, at least at that time, that the appropriate standard of review requires this Court's acceptance of a circuit court's factual determination if it "is supported by competent, substantial evidence, and should not be disturbed. *Melendez v. State*, 718 So. 2d 746, 747 (Fla. 1998)." Answer Brief in *Hildwin v. State*, Case No. SC04-1264, at 13.

Yet despite Florida's clear standard of review and the previous citation of that standard by counsel for the State, the Statement of the Facts in the Supplemental Answer Brief omits reference to the presiding judge's very clear factual findings.

The State completely ignores the fact that Judge Tombrink made credibility findings adverse to the State. As to the testimony of the State's only witness, Chris Carney, Judge Tombrink stated:

> Mr. Carney was the State's only witness, and, candidly, his testimony was weakened by the fact that he had so little personal knowledge of the specific facts of the Hildwin case and what facts he did have were largely hearsay and not subject to cross examination.

(ROA Vol. V pp. 727-28).

REPLY TO STATE'S ARGUMENT

In the Argument section of the Supplemental Answer Brief, the State also fails to acknowledge that Judge Tombrink's findings of fact were adverse to the State and cannot be disturbed by this Court unless they were unsupport by competent, substantial evidence. The State's argument is that:

> 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.

Supplemental Answer Brief at 15. This simply is not the proper standard of review.[3]

Judge Tombrink in his February 17, 2011 order wrote:

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[3] It is very odd, perhaps hypocritical even, for the State to argue that Judge Tombrink did not know how to weigh the evidence before him in February of 2011, when it also relies so heavily on his 2003 order finding that DNA results showing that Mr. Hildwin was not the source of the DNA found in the seminal fluid in the victim's panties nor the saliva on the washcloth found near the laundry bag in the victim's car when denying Mr. Hildwin's request for a new trial. Indeed, this Court heavily relied upon Judge Tombrink's order in that regard when affirming his denial of a new trial by the narrowest of margins, 4 to 3. *See Hildwin v. State*, 951 So. 2d 784 (Fla. 2006), the only case authority cited in the entirety of the State's Supplemental Answer Brief.

> The undersigned judge has been the presiding trial court judge in this case since the original post conviction relief motion from the original trial. As such, this court is aware of its order June 10, 2002, regarding the "Order on Defendant's Motion for Post Conviction DNA Testing" where this judge struck language that "there is a reasonable probability that the movant [Defendant] would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." The undersigned judge is also aware of his language quoted by the Florida Supreme Court 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), *rhrg denied* March 7, 2007.
>
> Nevertheless, while related, the issues previously decided by the trial court are different from the present issue before the trial court. The previous statements on the new trial issues by the trial court are not necessarily instructive as [to] whether a DNA sample from an unknown contributor should now be uplifted and compared. This unknown allele definitely has a forensic nexus related to the crime scene investigation. **The items on which it was found were admitted into evidence at the original trial. The significance of these items were argued during closing argument**. The semen and saliva have now been tested for DNA and found not to be the Defendant's DNA. These alleles should now be further compared to known DNA samples. This is especially true in this case where the Defendant has been convicted of 1st Degree Murder, twice sentenced to death, and is now awaiting his fate on Death Row. This trial court respectfully suggests that such DNA specimens should be further compared for possible DNA hits for whatever investigative lead it may give, if any. An objective reading of NDIS Procedure 6.4.2 – the State's only current basis for denial – does not prevent such testing.

(ROA Vol. V pp 730-31)(emphasis added).[4]

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[4] Judge Tombrink, on whose 3.851 findings this Court's 2006 decision were premised, rejected the State's argument that this Court's 2006 denial of Hildwin's Rule 3.851 petition controls of the CODIS-eligibility issue in this all-writs petition (State's Br. at 1, 18-19). In 2006, this Court affirmed Judge Tombrink's

Judge Tombrink's reference to the State's evidence and closing argument at the guilt phase of the original trial occurred after Mr. Hildwin's current counsel in his oral closing before Judge Tombrink on February 10, 2011, specifically relied upon the evidence introduced at trial and quoted from the trial prosecutor's argument to the jury regarding that evidence:

> [MR. MCCLAIN:] And in arguing the case to the jury, the prosecutor said he started off and it's on Page 971 of the transcript is where it starts, he starts talking about, "Inside that purse, and that's the purse that was the victim's purse that was found some distance from the car, buried and inside the purse - - inside that purse was a lady's brassiere."
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> THE COURT: What are you reading from now?
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> MR. MCCLAIN: It's the closing argument at trial.
>
> THE COURT: Okay.
>
> MR. MCCLAIN: And so this shows - - well, I think this is important in terms of the phrase "putative perpetrator" because in this closing argument the prosecutor is arguing that the seminal fluid and the saliva is from the perpetrator and the perpetrator is Mr. Hildwin.
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> MR. NUNNELLEY: This is the guilt stage, right?
>
> MR. MCCLAIN: Yeah, it's the guilt stage. "There's something very interesting about this and I want you folks to examine this item. Look at the condition of this item. This was not taken off. This was not taken off by anyone during a consensual sex act that involved choking. This is not a consensual act."

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finding that the **unidentified** male DNA profile on the victim's underwear and washrag, standing alone, did not meet the standard set for ordering a new trial. That is an entirely different question than whether (1) the DNA profile at issue can be searched in the CODIS database **for the purpose of identifying the source of the DNA**, and/or (2) whether a "hit" in the database to another convicted offender might yield **new**, previously-unavailable evidence that might entitle Mr. Hildwin to relief.

THE COURT: Who is the prosecutor?

MR. MCCLAIN: Tom Hogan.

THE COURT: I thought so. Go ahead.

MR. MCCLAIN: “Look at the brassiere. Look at the eyelet on that brassiere. This thing has been literally ripped off. There’s nothing consensual about this. This is in shreds. You can still see where one of the hooks is still in the eyelet and the other one is torn completely out and the other one is ripped off. This is not a consensual act.

“This is one of those arrows that Mr. Lewan, Mr. Lewan being the defense attorney, threw up in the air. Agent Reed testified about the blood test, the serology test, the secretor/nonsecretor evidence, and he told you that some people are what he calls secretors, meaning that they secrete ABO or ABH factors into their body fluids and other stuff.

“The other percent, only 11 percent of the white male population, are nonsecretors. Meaning 89 percent are not. Bill Haverty is a secretor. In other words, his semen and saliva would exhibit the ABH factors. The defendant, Paul Hildwin, is not a secretor. His saliva and semen would not exhibit the ABH factors.

“You’ll have the little chart that he made and you can look at it. What’s interesting about this is that on these panties that were found, these panties were found in the car on top of the laundry. Sergeant Haygood testified to not in the laundry, on top of the laundry.

“These panties contained semen that is consistent with a nonsecretor, 11 percent of the white male population. Consistent with the defendant in this case, not consistent with Bill Haverty. This washrag had saliva from a nonsecretor, consistent with Paul Hildwin, the defendant. Not consistent with Bill Haverty.

“And before we go any further, remember the statement that the defendant made to Investigator Phifer. That after - - after Vronzettie Cox was choked to death, the man that did it wiped his face on the wash rag. Now, these two pieces of evidence, ladies and gentlemen, I’m not asking you in any way, shape, or form to convict the defendant based on those panties and that washrag.

“What I’m telling you is it’s one more block. It’s one more piece of evidence that leads to Paul

> Hildwin and it's one more piece of evidence that eliminates Bill Haverty. **While the 11 percent of the population are nonsecretors, remember, it would have to be a nonsecretor like the defendant in the same place at the same time with the same opportunity to be the same because it makes those odds look high for someone other than the defendant**."
>
> Very much it's clear from the prosecutor's closing argument he's contending the source of the saliva, the source of the semen, is the perpetrator. So that's another question or another aspect of how to construe that provision because in all of the examples that we've provided there had been a conviction, or most of the examples, there's been a conviction.

(ROA Vol. VIII pp. 439-42 (emphasis added).

Mr. Hildwin's counsel at the February 10, 2011, hearing also relied upon the evidence introduced at the 1992 evidentiary hearing before Judge Tombrink in support of Mr. Hildwin's *Brady* and guilt phase ineffective assistance of counsel claims:

> MR. MCCLAIN: Okay. It's also important and what was not considered in the 2006 opinion but should be considered is the 1992 evidentiary hearing and the undisclosed *Brady* material because results from the DNA profile could cause a different analysis as to the *Brady* material when there's evidence that the victim's nephew saw her at a bar that Monday night 12 hours after supposedly Mr. Hildwin killer her and talked to her for two hours. That's also significant factor and that was not addressed by the Florida Supreme Court in the 2006 opinion.
>
> Also, Mr. Nunnelly argued that the clothes had been put neatly in the laundry bag. That's not in the evidence. If you actually look at the evidence, they were blue jean cutoffs, the panties were inside them, and it was clear that's how when clothes come off, they were all taken off at the same time. They weren't neat. They were just on top of the bag. Your Honor- -
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> THE COURT: When you say on top of the bag, do you mean on the outside of the bag on top or at the top right in the bag?
>
> MR. MCCLAIN: What the picture shows and the testimony, this is a Hefty garbage bag, it doesn't have

> a drawstring, it's got an open top and it's sitting in the backseat. And I believe if you look at the picture you can see there were clothes on top of the bag. And whether you call it in the or on top of the bag is kind of ambiguous because it's that kind of a situation, the bag is open. And my understanding is the washcloth was not right there, but right next to it.
>
> And the significance is we know it's the same profile, both on the panties and on the washcloth. And so I think that in context, that becomes very significant in addition to the bra inside the purse because that would - - and, again, there were no clothes - - she wasn't clothed. Where were the clothes that she was wearing?
>
> I submit, Your Honor, ignorance is not bliss. There's no cost to the state to know the answer what will CODIS show.

(ROA Vol. VIII p. 446-47).

Judge Tombrink relied upon the evidence from the 1986 trial, the prosecutor's guilt phase closing argument at that trial, the evidence introduced at the 1992 evidentiary hearing,[5] in addition

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[5] The exculpatory information presented in 1992 that had not been heard by Mr. Hildwin's jury included the fact the victim's nephew had seen the victim alive on the evening of September 10, 1985 (Exs. 18 and 21 from the 1992 hearing). The victim's nephew, Terry Moore, was "sure" he had seen the victim at a bar about 11:15 p.m. on September 9th (Ex. 18 from the 1992 hearing), more than 12 hours after the time the State claimed that she had been murdered by Mr. Hildwin. Moore told police that he had spoken with the victim for 3 or 4 hours. In his chat with her, Moore saw that her boyfriend "appeared not to be too happy" (Ex. 18 from the 1992 hearing). A few days earlier, the victim had asked Moore "to fix a unknown enemy's car so that it didn't run" (Ex. 18 from the 1992 hearing). Moore said the "unknown enemy" was the person who lived with the victim.

The jury also knew nothing about a police report noting Haverty's suspicious conduct (Exs. 16, 41). Haverty "did not appear upset, but tried to act important by demanding we check our tow log, the hospital, F.H.P., but said don't bother with city P.D. because she would not be in their area" (Ex. 16). When the victim's body was found Haverty acted "theatrical," "appeared to show no remorse or concern whatsoever" and acted "very nervous" and "as though his story had been rehearsed" (Ex. 41). Haverty had admitted writing a note found in the victim's trailer

to the evidence presented by Mr. Hildwin at the February 9-10, 2011, evidentiary hearing. And Judge Tombrink found the State's only witness' unfamiliarity with the trial evidence, the prosecutor's closing argument, and the 1992 evidence undercut his credibility (his testimony was "weakened by the fact that he had so little personal knowledge of the specific facts of the Hildwin case")(ROA Vol. V pp. 727-28). Judge Tombrink's factual findings and conclusions are supported by competent, substantial evidence, and cannot be disturbed under the controlling standard of review.

CONCLUSION

Based upon the record and the arguments presented herein and in the Supplemental Initial Brief, Mr. Hildwin urges the Court to grant the All Writs Petition and grant rule 3.851 relief.

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, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on April 18, 2011.

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that said "Fuck off and Die" and if the victim "didn't like it at the house [they] could leave" (Exs. 19, 2; PC-R. 3728, 3746).

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CERTIFICATE OF FONT

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

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