

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2037

JAMES HITCHCOCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the Circuit Court of Orange County's denial of James Hitchcock's Motion for Postconviction DNA Testing. The record on appeal is comprised of two volumes successively paginated beginning with page one. References to the record include a page number and are of the form, e.g., (Vol. 123 R. 123). All other references are to Mr. Hitchcock's 1977 trial and are of the form, e.g., (1977 Vol. 123 R. 123). References to Appellee's Answer Brief made throughout this reply are self explanatory.

REPLY TO APPELLEE'S RESPONSE TO "STATEMENT OF THE CASE"

Contrary to the Appellee's assertion, Mr. Hitchcock's statement of the case was neither incomplete nor misleading. Moreover, the issue of whether Richard Hitchcock was the real killer has never been directly decided by this Court.

This Court ruled on numerous claims in Hitchcock v. State, 755 So. 2d 638, 640-41 (Fla. 2000). None of these claims addressed whether Richard Hitchcock was the real killer. The fifth claim referred to on page five of the Appellee's Answer Brief was whether "resentencing [was] required because the judge in Hitchcock's new trial was removed from the bench during an investigation of bribery charges, and it was an error for a substitute judge to rule on Hitchcock's motion for resentencing." *Id.* at 641

fn1. This Court found “no basis to conclude that Judge Conrad was not qualified to hear and rule on this motion.” *Id.* at 643. This Court also found “no merit as to Hitchcock’s claim that he was prejudiced by the original trial judge’s removal from the case, as there is no showing of how any matters resulting from that removal prejudiced Hitchcock.” *Id.* at 643. This Court did not decide that Richard Hitchcock was not the true killer but rather determined an issue of whether the successor judge was qualified to hear Mr. Hitchcock’s post trial motion.

Claims fifteen and sixteen of the direct appeal from Mr. Hitchcock’s resentencing also did not determine that Richard Hitchcock was not the true killer. Claim fifteen was whether “the trial court erred in denying relief based on newly discovered evidence without considering corroborating evidence and circumstances.” *Id.* at 641 fn1. Claim sixteen was whether “the trial court (a substitute judge) erred in ruling on and denying Hitchcock’s motion for a new sentencing proceeding.” *Id.* at 641 fn1. This Court stated that these claims were

related to claim five, in which [Mr. Hitchcock] disputed the role of Judge Conrad, the successor judge who held an evidentiary hearing and denied Hitchcock’s motion for resentencing. Here, Hitchcock claims that Judge Conrad erred in excluding corroborative evidence. As in the fifth claim, this evidence was related only to the guilt phase of Hitchcock’s trial, which is not the subject of this appeal of his third resentencing. We reject these claims as being without merit. *Id.* at 645

This was not a ruling by this Court that Richard Hitchcock was not the true killer nor was it a bar to James Hitchcock availing himself of the grant of DNA testing by the legislature. Mr. Hitchcock submits that this Court's ruling on claims fifteen and sixteen was that these issues were not properly the subject of an appeal from Mr. Hitchcock's third resentencing, not that issues concerning whom committed the instant offense could not be raised in the proper postconviction forum.

It is important for this Court to consider the implications of the Appellee's reasoning. In any case where a convicted person seeks DNA testing there will have been an adverse finding on whom was the true perpetrator of the offense, to wit the guilty verdict returned by the jury. This does not preclude the convicted person from challenging that finding in postconviction proceedings and through DNA testing. False convictions of the innocent must not stand in a civilized and free society. Science has offered hope to the wrongfully convicted that the injustice of a wrongful conviction can be remedied. This was what Mr. Hitchcock sought through DNA testing and what this Court must now address.

The mere fact that there was a false confession that Mr. Hitchcock later recanted does not justify this Court affirming the lower court's denial of Mr. Hitchcock's DNA motion. Just as the recanted confession was direct evidence (See Appellee's Answer Brief pg. 10) so was James Hitchcock's recantation of the false confession at trial.

Positive DNA matches would corroborate James Hitchcock's trial testimony and what he submits was the true account of the murder.

Accordingly, this Court should reverse the lower Court's denial of DNA testing.

ARGUMENT I

MR. HITCHCOCK'S MOTION FOR POST CONVICTION DNA TESTING COMPLIED WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.853 AND SECTION 925.11, FLORIDA STATUTES THEREFORE THE LOWER COURT ERRED IN DENYING MR. HITCHCOCK'S MOTION

Mr. Hitchcock stands by the arguments made in his initial brief. Mr. Hitchcock submits that the Appellee's Response to "Statement of the Case" and arguments do not affect the propriety and necessity of this Court reversing the lower court's denial of DNA testing.

Mr. Hitchcock scrupulously followed the requirements of Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes. To the extent that science has now opened the window for the innocent to pass, this Court should not close that window. If evidence showing Mr. Hitchcock's proximity to the body was acceptable for the State to use to convict Mr. Hitchcock, evidence showing the proximity of Richard Hitchcock should be allowed to exonerate James Hitchcock.

The injustices that have resulted from false confessions are well known. The

fact that Mr. Hitchcock may have given a false confession no more justifies the lower court's denial of his DNA motion than it does his ongoing incarceration. Mr. Hitchcock was the victim of a bad laboratory and DNA may offer him the opportunity to right this wrong. Contrary to the Appellee's assertion, the failings of the Sanford Crime Lab were both properly part of the Rule 3.853 motion and the now pending Rule 3.851. The failings of the lab served as justification for the DNA testing and DNA testing would have served as a vital discovery tool for the now pending Rule 3.851 motion.

The mere fact that there was a false confession that Mr. Hitchcock later recanted does not justify this Court affirming the lower court's denial of Mr. Hitchcock's DNA motion. Just as the recanted confession was direct evidence, (See Appellee's Answer Brief pg. 10), so was his recantation. Positive DNA matches would corroborate James Hitchcock's trial testimony and what he submits was the true account of the murder.

Accordingly, this Court should reverse the lower Court's denial of DNA testing.

ARGUMENT II

THE TRIAL COURT'S DENIAL OF MR. HITCHCOCK'S MOTION FOR POSTCONVICTION DNA TESTING VIOLATED

**HIS RIGHT TO HABEAS CORPUS RELIEF
UNDER BOTH THE FLORIDA AND U.S.
CONSTITUTIONS**

It was the denial of the DNA motion that resulted in the violation of Mr. Hitchcock's right to habeas corpus under the United States and Florida Constitution. In the end, granting Mr. Hitchcock DNA testing would result in no harm to the State of Florida. Mr. Hitchcock filed his DNA motion in a timely manner and no harm would result to the State if Mr. Hitchcock were allowed to confront the evidence against him and to determine whether there was evidence favorable to his innocence. Accordingly, Mr. Hitchcock stands by the argument that he made in Argument Two of his initial brief.

CONCLUSION

Based on the arguments contained in Mr. Hitchcock's initial brief and this reply brief, this Court should reverse.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 17TH day of April 2003.

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CERTIFICATE OF COMPLIANCE

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