IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,
Appellant,

v. **CASE NO. SC02-2037**

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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The State is well aware of the importance of the issues **to the defendant/appellant**. However, the true issues are not nearly so complex as Hitchcock attempts to make them, nor is the "actual innocence" claim nearly so murky as Hitchcock would have this Court believe. When the facts that have been left out of Hitchcock's brief are considered, it is clear that the Circuit Court correctly denied the motion for DNA typing. There is no need for oral argument in this case.

PROCEDURAL HISTORY

On pages 2-4, Hitchcock has set out the procedural history of this case in a substantially correct fashion.

RESPONSE TO "STATEMENT OF THE CASE"

On pages 4-14 of his brief, Hitchcock has set out an incomplete and deliberately misleading version of the evidence in this case. Specifically, while Hitchcock is correct in his description of his trial testimony, his brief omits any reference to his pre-trial **confession**. Likewise, Hitchcock has failed to mention that "confessions" by the now-deceased Richard Hitchcock have already been litigated and decided adversely to him. The State relies on the following statement of the facts:

> Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p. m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.
>
> **According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.**
>
> **At trial Hitchcock repudiated his prior statement.** He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

Hitchcock v. State, 413 So. 2d 741, 743 (Fla. 1982). (emphasis added).

In his last appearance before this Court, the history of this case was summarized in the following way:

> Hitchcock was convicted and sentenced to death for the 1976 strangulation murder of his brother's

thirteen-year-old stepdaughter. The facts in this case are set forth in detail in *Hitchcock v. State*, 413 So. 2d 741 (Fla.) (*Hitchcock I*), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). This Court affirmed Hitchcock's conviction and sentence. *Id*. Thereafter, this Court affirmed the denial of Hitchcock's motion for postconviction relief. *Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983) (*Hitchcock II*). In later federal habeas corpus proceedings, the United States Supreme Court granted certiorari and vacated Hitchcock's death sentence because the advisory jury was instructed not to consider and the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). On remand, the jury again recommended the death penalty, which the trial judge subsequently imposed. This Court affirmed the sentence. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990) (*Hitchcock III*), *cert. denied*, 502 U.S. 912, 112 S.Ct. 311, 116 L.Ed.2d 254 (1991). On rehearing, the United States Supreme Court granted certiorari and remanded to this Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *See Hitchcock v. Florida*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). We vacated Hitchcock's death sentence and directed the trial court to empanel a jury and conduct a new penalty proceeding within ninety days. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993) (*Hitchcock IV*). In Hitchcock's second resentencing proceeding, the jury again recommended the death penalty, which the trial judge subsequently imposed. We again remanded for resentencing because evidence portraying Hitchcock as a pedophile was erroneously made a feature of his resentencing proceeding. *Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996) (*Hitchcock V*).

Hitchcock's third resentencing proceeding began on September 9, 1996, and concluded with the jury's recommendation of the death penalty by a 10-2 vote. The court sentenced Hitchcock to death, finding the following aggravating circumstances: (1) the crime was committed by a person under sentence of

> imprisonment (parole); (2) the crime was committed during commission of the felony of sexual battery; (3) the crime was committed for the purpose of avoiding arrest; and (4) the crime was especially heinous, atrocious, or cruel (HAC). The court found one statutory mitigating factor, Hitchcock's age (twenty). As to nonstatutory mitigation, the court in an amended sentencing order assigned "very little weight" to six circumstances surrounding the instant crime, "some weight" to nine circumstances concerning Hitchcock's background, and "some weight" to eight circumstances concerning Hitchcock's "positive character traits." Hitchcock appeals his third resentencing in this Court, asserting eighteen claims. [footnote omitted] We find all of Hitchcock's claims to be procedurally barred or without merit for the reasons expressed herein.

Hitchcock v. State, 755 So. 2d 638, 640-41 (Fla. 2000). One of the issues in that appeal concerned alleged “new evidence” that Richard Hitchcock was the “real killer.” That claim was presented to the Circuit Court in a *Florida Rule of Criminal Procedure* 3.800 motion, and that Court found the claim meritless. This Court discussed that issue in the following way:

> In his fifth claim, Hitchcock claims that it was error for a substitute judge to rule on Hitchcock's motion for a new penalty phase. This claim relates to the appointment of Judge Conrad to dispose of Hitchcock's motion for correction of sentence pursuant to *Florida Rule of Criminal Procedure* 3.800, seeking an evidentiary hearing on alleged newly discovered evidence that Hitchcock's late brother had confessed to the instant murder before he died. After ordering and conducting an evidentiary hearing, Judge Conrad found no merit in Hitchcock's newly discovered evidence claim and

denied his rule 3.800 motion. In pertinent part, Judge Conrad's order states:

> 9. In the defendant's Motion for Evidentiary Hearing on Newly Discovered Evidence, the defendant's counsel claims to have recently discovered that Richard Hitchcock confessed to Wandalene Green that he killed the victim in this case prior to Richard's death in 1994. The motion notes that the defendant has always contended that his brother Richard killed the victim and that the defendant so testified at his original trial and at his 1988 penalty phase. Finally, the motion states that "[t]his evidence is not proffered as lingering doubt about guilt; it shows actual innocence of the killing, as Mr. Hitchcock has always contended and has always sought to prove."
>
> 10. Since the alleged newly discovered evidence is related to the issue of the actual guilt or innocence of the defendant, this Court finds that after the scheduled rehearing it will be as qualified to rule on the validity of this claim as any other judge except the judge who presided over the case's original guilt phase. That judge is no longer sitting on the circuit court bench. Rehearing the proceedings related to the defendant's claim will allow this Court to itself evaluate the testimony and evidence presented upon it. A new penalty proceeding is unnecessary to this Court's decision as to whether the alleged newly discovered evidence qualifies as newly discovered and whether it would probably produce an acquittal on retrial. *Jones v. State*, 591 So. 2d 911 (Fla. 1991).

We find no basis to conclude that Judge Conrad was not qualified to hear and rule on this motion. We also find 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.

Hitchcock v. State, 755 So. 2d 638, 643-44 (Fla. 2000).[1] Despite the histrionics of Hitchcock's brief, the true facts are that he confessed to sexually battering and murdering the victim, and that the claims of certain evidence to support the theory that Richard Hitchcock was the "real killer" have already been rejected on the merits.

THE POST-CONVICTION PROCEEDINGS[2]

On or about December 19, 2001, Hitchcock filed a motion under *Florida Rule of Criminal Procedure* 3.853 in which he sought the release of certain evidence for DNA testing. (R23-59). The State filed its response to the Rule 3.853 motion on February 11, 2002. (R100-104). Following argument on March 28, 2002, the Circuit Court denied Hitchcock's Rule 3.853 motion on June 25, 2002, and Hitchcock appealed. (R115-16; 117-18).

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[1]A copy of the Circuit Court's order denying relief is attached for the convenience of the Court as Appendix A. It appears at R1162-69 of the Record on Appeal in Case Number SC92717, and the State respectfully requests that this Court judicially notice its own records with respect to that document.

[2]Hitchcock has a *Florida Rule of Criminal Procedure* 3.850 motion pending in the Orange County Circuit Court at this time. An evidentiary hearing is scheduled in that matter beginning on April 7, 2003.

Hitchcock's *Initial Brief* was filed on or about January 31, 2003.

SUMMARY OF THE ARGUMENT

The *Florida Rule of Criminal Procedure* 3.853 motion did not set out the evidentiary value of the requested DNA testing, and, moreover, failed to demonstrate how that testing would tend to exonerate Hitchcock. The motion was based completely upon speculation, and competent substantial evidence supports its denial. Because that is so, the motion for DNA testing was properly denied.

Hitchcock's claim that DNA testing is a constitutional "right" was not presented to the trial court, and, because the claim is raised for the first time on appeal, it is not properly before this Court under long-standing precedent. In any event, no rule of law has created a constitutional right to DNA testing. To the extent that Hitchcock makes reference to the use of DNA testing in **clemency** proceedings, such proceedings are a matter of executive grace, and are not the same as collateral attack litigation.

ARGUMENT

I. HITCHCOCK'S MOTION FOR POSTCONVICTION DNA TESTING FAILED TO SET OUT THE EVIDENTIARY VALUE OF THE REQUESTED TESTING AND FURTHER FAILED TO DEMONSTRATE HOW THE TESTING SOUGHT WOULD EXONERATE THE DEFENDANT.

On pages 15-24 of his brief, Hitchcock asserts that the trial court's denial of the Rule 3.853 motion was erroneous because the motion "complied with *Florida Rule of Criminal Procedure* 3.853 and section 925.11, *Florida Statutes*." However, contrary to Hitchcock's claim, the Circuit Court's denial of the motion is supported by competent substantial evidence, and should not be disturbed. *See, Blanco v. State,* 702 So. 2d 1250, 1252 (Fla. 1997); *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998).

In pertinent part, the Circuit Court's order reads as follows:

> Defendant was convicted of first-degree murder and sentenced to death. He argues he is innocent of the crime and DNA testing and hair analysis will exonerate him. He admits to having sexual intercourse with the victim, Cynthia Driggers, but asserts that it was his brother, Richard Hitchcock who strangled her. He alleges that the Sanford crime Laboratory, which analyzed the physical evidence obtained from the scene, was incompetent, and that Diana Bass, the analyst who conducted the hair comparisons, lacked the necessary training.
>
> However, the motion fails to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate Defendant or mitigate his sentence. Defendant alleges that DNA testing "*may* show that Richard Hitchcock strangled the victim, that his hair was present at the crime scene, that his blood was present at the crime scene, or that there was other forensic evidence." (Defendant's motion, page 6; emphasis added.) Such a speculative claim cannot support the granting of postconviction DNA testing. Moreover, Defendant, his

> brother, and the victim occupied the same house, and all three would have deposited hair, skin, bodily fluids, eyelashes, and nail clippings throughout the house.
>
> Defendant next alleges that the testing would tend to exonerate him and show that the hair analysis improperly excluded Richard Hitchcock as a suspect, but he does not explain why this is so. Finally, he alleges the testing would show that even if he was involved in the death of the victim, he was a minor participant, which would mitigate his death sentence. Again, however, he fails to explain why this is so.
>
> It is undisputed that Defendant confessed to having sexual intercourse with the victim, and Defendant fails to establish a reasonable probability that DNA testing would be able to exonerate him of the subsequent murder. The presence of physical evidence linked to Richard Hitchcock would not establish that Defendant was not at the scene or that he did not commit the murder. *See Galloway v. State,* 802 So. 2d (Fla. 1st DCA 2001).

(R115-16). The Circuit Court's determination that there was no explanation in the motion of how DNA typing would tend to exonerate him or show that he was a "minor participant" in the crime is supported by competent substantial evidence, and should not be disturbed.

In his brief, Hitchcock complains that the Circuit Court "made an issue of the use of the word 'may' in the [Rule 3.853] motion." However, as the Circuit Court correctly pointed out, the allegation that DNA testing "may show that Richard Hitchcock strangled the victim" is wholly speculative,

and does not support granting the Rule 3.853 motion, especially since the defendant, his brother, and the victim all lived in the same dwelling, and would obviously have deposited their DNA throughout that dwelling. Those findings are supported by competent substantial evidence, and do not supply a basis for reversal. Even assuming that the DNA testing sought by Hitchcock produced the "other forensic evidence" Hitchcock alleges **might** be present at the crime scene (which was not one location, but two), it would not create a reasonable probability of an acquittal or a lesser sentence -- Hitchcock has always admitted that he had sexual intercourse with the victim, while the Richard-Hitchcock-as-the-real-killer claim did not surface until trial, and, in fact, is contradicted by Hitchcock's own confession.

Despite the pretensions of Hitchcock's brief, the request for DNA typing is nothing more than a fishing expedition -- DNA will not exonerate Hitchcock because he has always admitted that he had sex with the victim, but only later added the claim that he was **not** the killer. Under these particular facts (which are the only ones that matter, anyway), DNA testing is of no value to Hitchcock except as a potential basis for delay.

To the extent that Hitchcock attempts to explain away the speculative nature of his motion through a creative explanation of his use of the word "may" in the context of what the testing "may show," he never attempted to make that argument in the Circuit Court, and cannot make it for the first time on appeal from the denial of his motion for DNA testing. In any event, that strained explanation does no more than demonstrate the completely speculative nature of Hitchcock's motion -- he cannot articulate how DNA testing will assist him, and he cannot articulate how DNA testing would undermine his confession (which is **direct** evidence) to the brutal strangulation murder of Cynthia Driggers. The motion for DNA testing is insufficient because Hitchcock cannot demonstrate a reasonable probability of an acquittal or a lesser sentence had the DNA "evidence" been available at the time of trial. *See, Galloway, supra.*[3]

[3]"Identity" is not an issue in this case in the same way that identity was at issue in ***Knighten v. State,*** 829 So. 2d 249 (Fla. 2nd DCA 2002) and ***Zollman v. State,*** 820 So. 2d 1059 (Fla. 2nd DCA 2002). In this case, the identification of Hitchcock was **not** a genuinely disputed issue of fact -- Hitchcock was identified based upon his **confession**, not, for example, through a line up. The facts of this case do not fit Rule 3.853 because DNA testing will not help Hitchcock, and his attempt to come under the rule with a speculative explanation to justify his request is an attempt to fit a square peg into a round hole.

To the extent that Hitchcock's brief makes reference to his criticisms of the work performed by the Sanford Crime Laboratory, those "claims" are not properly part of the Rule 3.853 motion, but rather belong in the now-pending Rule 3.851 proceeding. In any event, these claims (*see Initial Brief* at 5, 9-10, 21, and 23) relate to the **guilt** phase of Hitchcock's trial, which has been final since **1982**, when the United States Supreme Court denied Hitchcock's petition for writ of certiorari. *Hitchcock v. Florida,* 459 U.S. 960 (1982). These claims (which are foreclosed by multiple procedural bars) have no relevance to the Rule 3.853 appeal, and should not be considered.[4]

Despite the hyperbole of Hitchcock's brief, the fact remains that Hitchcock **confessed** to sexual battery and murder. In rejecting the direct appeal challenge to the sufficiency of the evidence, this Court stated:

> A judgment of conviction comes to this Court with a presumption of correctness, and a claim of insufficiency of the evidence cannot prevail if substantial competent evidence supports the verdict. *Spinkellink v. State*, 313 So. 2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49

[4]The State has not attempted to address the various procedural bars which apply to claims arising from the guilt phase of Hitchcock's trial. Those are Rule 3.850/3.851 matters which are pending in the Circuit Court at this time. The State waives no potential defense.

> L.Ed.2d 1221 (1976). Furthermore, when it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a difference of opinion as to what the evidence shows is required for this Court to reverse them. *Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). **At trial, Hitchcock testified that the girl consented to intercourse, that his brother Richard discovered them, and that Richard strangled the girl. The jury, however, also heard Hitchcock's prior statement that he choked the girl while still in her bedroom and then carried her outside where he again choked and beat her until she was quiet and finally hid her body in some bushes.**
>
> It is well settled that the credibility of witnesses and the weight to be given testimony is for the jury to decide. *Coco v. State*, 80 So. 2d 346 (Fla.), *cert. denied*, 349 U.S. 931, 75 S.Ct. 774, 99 L.Ed. 1261, *cert. denied*, 350 U.S. 828, 76 S.Ct. 57, 100 L.Ed. 739 (1955). Choking the girl, taking her outside, and then choking her again -- all to make her be quiet -- is substantial evidence to have supported a finding of premeditation. In addition, the total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent and could be a basis to find that the sexual battery was committed on the victim by force and against her will, thus warranting the instruction on felony murder. Under these circumstances, the jury could easily have considered Hitchcock's contention that the girl consented to have been unreasonable. *See Conner v. State*, 106 So. 2d 416 (Fla. 1958).

Hitchcock v. State, 413 So.2d at 745. (emphasis added). The sort of speculative DNA testing sought by Hitchcock does not create a reasonable probability of a different result, and the denial of that DNA testing should be affirmed.

II. THE CONSTITUTIONAL CLAIM OF A "RIGHT" TO ACCESS TO EVIDENCE FOR DNA TESTING WAS NOT RAISED IN THE CIRCUIT COURT AND IS NOT PROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

On pages 24-25 of his *Initial Brief,* Hitchcock asserts that "the Florida Constitution and U.S. Constitution provide a right to access evidence for the purposes of DNA testing if that DNA testing could be used to prove one's innocence or to appeal for executive clemency." This "claim" was not raised in the Circuit Court and, under long-settled Florida law, may not be raised for the first time on appeal. *Anderson v. State*, 28 Fla. L. Weekly S51 (Fla. Jan. 16, 2003); *Gudinas v. State*, 816 So. 2d 1095, 1101 (Fla. 2002); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000). In any event, this claim is spurious -- it makes no sense for Hitchcock to argue that the state or federal constitutions "provide a right to access evidence" when Rule 3.853 provides a clearly-established means for seeking the release of evidence for DNA testing. Hitchcock does not argue that the Rule 3.853 is unconstitutional, and is therefore left with a claim that he has an absolute (and standardless) right to the release of evidence for DNA testing on demand. In addition to being raised for the first time on appeal, Hitchcock's claim is meritless -- no Court has suggested that standards such as those contained in Rule 3.853

cannot be established to regulate postconviction DNA testing. This unpreserved claim is not a basis for relief, and should be disposed of on procedural grounds alone.

To the extent that Hitchcock cites to *Harvey v. Horan*, that decision was on denial of rehearing *en banc* in a 42 U.S.C. § 1983 proceeding, and is of no precedential value here. However, the Chief Judge of the Fourth Circuit made the following illustrative comments:

> To constitutionalize this area, as the separate opinion would, in the face of all this legislative activity and variation is to evince nothing less than a loss of faith in democracy. It is to believe that democratic processes are incapable of rising to the challenge, and that federal courts must do the governing for us. In the end, this will deaden the lifeforce of democracy. It will cause legislatures across our nation to simply surrender the impulse to innovate based on the assumption that the federal courts are prepared to step in at any time. It will encourage elected officials to sit on their hands and turn over their responsibilities to federal judges. To be sure, the displacement of elected officials by judicial authority always pleases some of the people some of the time. But with activism, what goes around comes around. Today's merriment becomes tomorrow's mourning.
>
> To constitutionalize a right to post-conviction DNA testing in federal court in the first instance would have unfortunate consequences for our federalism as well. To recognize a § 1983 claim here, we would effectively have to overrule this court's decision in *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981), and the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The lesson of *Hamlin* and *Preiser* is that

> the state courts should have the first chance to review challenges to a state judgment of conviction.

Harvey v. Horan, 285 F.3d 298, 303 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing and rehearing *en banc*). The separate opinion on denial of rehearing by Judge Luttig, which Hitchcock describes as a "concurrence," was described by its writer as follows: "I concur in the court's judgment to deny rehearing of this case en banc, but **I do so only because it appears that appellee Harvey will, pursuant to state court order entered after our panel's decision, be afforded the chance to subject the forensic evidence in question to further DNA tests** -- the same relief that he seeks from this court." *Harvey v. Horan,* 285 F.3d at 304. (emphasis added). A lengthy discussion of the "Constitutional right" to access to evidence followed. However, another Judge of the same Court described that approach in sharply critical terms:

> Harvey achieved the relief he sought through the state courts and the state legislatures. And our decision in his case respects the proper role of the federal courts within the federal system. The separate opinion does just the opposite. With little hesitation, my colleague disregards the roles of all the other actors in the American system. His approach overturns longstanding Supreme Court precedent, to which lower court judges and even the Justices themselves owe deference. His view makes the Congress of the United States a subordinate player on the very difficult questions involved in determining the entitlements of individuals to the fruits of scientific advances. **His approach treats**

> **both state legislatures and state court systems as junior partners with respect to their own trials and judgments**.
>
> With all respect, there is a better way.

Harvey v. Horan, 285 F.3d at 304. (emphasis added).[5]

Hitchcock also makes a passing reference to the use of DNA testing in an application for executive clemency. However, contrary to the implication of Hitchcock's brief, clemency proceedings are not the same as postconviction relief proceedings:

> In *Bundy v. State*, this Court rejected a similar argument:
>
> In the final claim raised under his 3.850 motion, appellant contends that he must be allowed time to prepare and present an application for executive clemency before sentence may be carried out in this case. In the death warrant authorizing appellant's

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[5]Hitchcock also relies on an out-of-context partial quotation from Chief Justice Anstead's opinion on the adoption of Rule 3.853. In context, that opinion states:

> Our rules of postconviction procedure were enacted to simplify and facilitate the fair and orderly processing of habeas corpus claims by any defendant, claims that are cognizable under that writ regardless of whether that defendant was convicted by contested trial or plea.
>
> **The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred.** The fact is that injustices, when they do occur, are simply not limited to contested trials.

Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853, 807 So. 2d 633, 636-37 (Fla. 2001). (emphasis added).

> execution, the governor attests to the fact that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), *Florida Constitution*, is not appropriate." It is not our prerogative to second-guess the application of this exclusive executive function. First, the principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted matter of executive grace. *Sullivan v. Askew*, 348 So. 2d 312 (Fla.), *cert. denied,* 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977). As noted in *In re Advisory Opinion of the Governor,* 334 So. 2d 561, 562-63 (Fla. 1976), "[t]his Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government." *See also Ex Parte White*, 131 Fla. 83, 178 So. 876 (1938).
>
> 497 So. 2d 1209, 1211 (Fla. 1986) *quoted in Provenzano v. State* 739 So. 2d 1150, 1155 (Fla. 1999).

Glock v. Moore, 776 So. 2d 243, 252-53 (Fla. 2001). There is no basis for relief.

CONCLUSION

Based upon the foregoing, the State of Florida submits that the Circuit Court's denial of Hitchcock's Rule 3.853 motion is supported by competent substantial evidence, and should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **James L. Driscoll, Jr.**, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this ____ day of _____, 2003.

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Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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