**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**

---

# INITIAL BRIEF OF APPELLANT


**James L. Driscoll, Jr.**
**Florida Bar No. 0078840**
**Assistant CCC**
**CAPITAL COLLATERAL**
**REGIONAL**
**COUNSEL-MIDDLE**
**3801 Corporex Park Drive, Suite 210**
**Tampa, Florida 33619**
**(813) 740-3544**
**COUNSEL FOR APPELLANT**

## TABLE OF CONTENTS

Page

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ii

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ii

PRELIMINARY STATEMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

REQUEST FOR ORAL ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

PROCEDURAL HISTORY . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF THE CASE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 13

STANDARD OF REVIEW . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

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 STATUES THEREFORE THE LOWER COURT ERRED IN DENYING MR. HITCHCOCK'S MOTION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

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 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24

CERTIFICATE OF FONT SIZE AND SERVICE . . . . . . . . . . . . . . . . . . . . . . 25

CERTIFICATE OF COMPLIANCE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 26

**CASE AUTHORITY**

Page

Galloway v. State, . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19
802 So. 2d 1173 (Fla. 1st DCA 2001)

Harvey v. Horan,
285 F.3d 298 (4th Cir. 2002) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 25

Hitchcock v. State,
413 So.2d 741 (Fla.1982); cert denied, 459 U.S. 960 (1982) . . . . . . . . . . . . 2

Hitchcock v. State,
432 So.2d 42 (Fla. 1983) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Hitchcock v. Dugger,
481 U.S.1168 (1987) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Hitchcock v. State,
578 So. 2d 685 (Fla. 1990) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Hitchcock v. Florida,
502 U.S. 912 (1991) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Hitchcock v. Florida,
505 U.S. 1215 (1992)

Hitchcock v. State,
614 So. 2d 483 (Fla. 1993)

Hitchcock v. State,
755 So. 2d 638 (Fla. 2000)

Hitchcock v. Florida,
121 S.Ct 633, 148 L.Ed. 542 (2000).

**OTHER AUTHORITY**

Florida Rule of Criminal Procedure 3.853
Section 925.11, Florida Statutes . . . . . . . . . . . . . . . . . . . . . . . . 4,9,10,11,14,15,18

Section 921.141(6)(d), Florida Statutes . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24

## 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).

## REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action may determine whether Mr. Hitchcock lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Hitchcock, through counsel, respectfully requests that this Court permit oral argument.

## PROCEDURAL HISTORY

Mr. Hitchcock was tried, convicted and sentenced to death in 1977. Hitchcock v. State, 413 So.2d 741 (Fla.1982); cert denied, 459 U.S. 960 (1982). During the pendency of a death warrant the circuit court denied postconviction relief which was affirmed by this Court. Hitchcock v. State, 432 So.2d 42 (Fla. 1983). Mr. Hitchcock

sought relief in federal court which, following appeals to the Eleventh Circuit Court of Appeals, culminated with the United States Supreme Court granting penalty phase relief in Hitchcock v. Dugger, 481 U.S.1168 (1987).

After a second penalty phase, Mr. Hitchcock was again sentenced to death. The Florida Supreme Court affirmed the lower court. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990). Certiorari was denied by the United States Supreme Court, Hitchcock v. Florida, 502 U.S. 912 (1991), which later granted rehearing and granted relief, Hitchcock v. Florida, 505 U.S. 1215 (1992).

After a third penalty phase, Mr. Hitchcock was again sentenced to death. The Florida Supreme Court, however, reversed the trial court and remanded the case for a new penalty phase. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

After a fourth penalty phase, Mr. Hitchcock was again sentenced to death, which this Court affirmed. Hitchcock v. State, 755 So. 2d 638 (Fla. 2000)cert denied Hitchcock v. Florida, 121 S.Ct 633, 148 L.Ed. 542 (2000).

Mr. Hitchcock filed a postconviction motion entitled Defendant's Second Amended Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend on November 30, 2001. (Vol 2 R. 02).

On December 19, 2001, Mr. Hitchcock filed a Motion for Post Conviction DNA Testing. (Vol. 2 R. 23). The State filed a response on February 8, 2002, (Vol. 2 R.

102). A hearing was held on March 28, 2002. (Vol. 2 R. 115). On June 24, 2002, the lower court denied Mr. Hitchcock's DNA motion by written order. (Vol. 2 R. 114-15) Pursuant to Florida Rule of Criminal Procedure 3.853 and Section 925.11, Florida Statutes, Mr. Hitchcock filed a notice of appeal within 30 days (Vol. 2 R. 118). This appeal follows.

Mr. Hitchcock's Rule 3.851 motion is still pending and set for an evidentiary hearing on April 7, 2003.

## STATEMENT OF THE CASE

Mr. Hitchcock has maintained, from the time of his trial, that he is innocent of the crime for which he has been repeatedly sentenced to death and for which he is incarcerated for on death row. Mr. Hitchcock seeks to right the injustice that began with his trial and conviction for a crime he did not commit and continues to this day as he remains on death row.

At the 1977 trial Mr. Hitchcock waived his right to remain silent and took the stand in his own defense. (1977 Vol. V R. 756). Mr. Hitchcock testified that while he did have sexual relations with the victim, it was his brother Richard Hitchcock who committed the murder of Cynthia Driggers. (1977 Vol. R. 765).

The 1977 trial court denied Mr. Hitchcock's attempt to present evidence to the jury that it was in fact Richard Hitchcock who committed the murder for which James

Hitchcock was accused. See(1977 Vol. V R. 737-38). Nevertheless, since the time of trial Mr. Hitchcock has continued to maintain his innocence.

Since the time of Mr. Hitchcock's trial numerous witnesses have come forward with statements that Richard Hitchcock made implicating himself and outright admitting to the murder of Cynthia Driggers. Mr. Hitchcock has raised claims in postconviction that point to Richard Hitchcock's guilt in the murder of the victim. These will be litigated at the evidentiary hearing set for April 7, 2003.

The State relied on the testimony of Diana Bass to obtain the conviction of Mr. Hitchcock in 1977. (1977 Vol. IV R. 597-670). Diana Bass was a microanalyst employed with the Sanford Crime Lab during the pendency of Mr. Hitchcock's case. As a microanalyst, Ms. Bass allegedly performed certain tests on various hairs and other evidence located at the crime scene and in comparison to the known hair samples of James Hitchcock, Richard Hitchcock and Cynthia Hitchcock. (See 1977 Vol. IV R. 638).

Mr. Hitchcock filed a DNA motion ancillary to his Rule 3.851 motion. While the possible exculpatory evidence that would have resulted from DNA testing may have produced evidence in support of Mr. Hitchcock's claims in his postconviction motion, neither Rule 3.853 nor Section 925.11 , Florida Statutes required that he file the DNA motion contemporaneously with his 3.851 motion for postconviction relief.

The DNA motion at issue in this appeal began by offering facts in support of the lower court granting DNA testing. The motion stated that:

> 1. James Hitchcock was charged with the murder of Cynthia Driggers. Cynthia Driggers was James Hitchcock's step niece. At the time of the offense James Hitchcock lived in the same house as the victim, his brother Richard Hitchcock, the victim's mother and other siblings. James Hitchcock was accused of strangling the victim.
>
> 2. At trial James Hitchcock testified that it was his brother Richard who killed the victim after finding the victim and James Hitchcock in a post-sexual situation.
>
> 3. James Hitchcock was convicted of first degree murder in 1977. After a fourth resentencing James Hitchcock was again sentenced to death in 1996 An appeal was taken and the Florida Supreme Court affirmed the death sentence. The United States Supreme Court denied James Hitchcock's petition for writ of certiorari on December 3, 2000.
>
> 4. James Hitchcock field a Second Amended Motion to vacate Judgment of Conviction and Sentence with Special request for leave to Amend on November 30, 2001 following [the lower court's] prior dismissal of two previous motions.

The DNA motion, tracking the statute and rule, stated specifically the whereabouts of the relevant evidence in this case in a section of the motion entitled LOCATION OF EVIDENCE TO BE TESTED. (Vol. 2 R. 24-25). Mr. Hitchcock also incorporated faxes received from the various agencies stating what evidence they were in possession into the motion. Each item was specifically listed in the appendixes

to the motion. (Vol. 2 R. 36-59).

In sum, the evidence that Mr. Hitchcock sought testing of was either in the possession of the Orange County Sheriff's Office or, if admitted into evidence, in the possession of the Orange County Criminal Clerk. (Vol. 2 R. 36-59). A summary of the evidence in the possession of the Orange County Sheriff's Office and the Orange County Clerk's Office was pled in this section.

In a section of the motion entitled PRIOR SCIENTIFIC TESTING ON THE EVIDENCE OF THIS CASE, pursuant to Florida Rule of Criminal Procedure 3.853(b)(2), Mr. Hitchcock stated that there had been no prior DNA testing that was known to Mr. Hitchcock or undersigned counsel. (Vol. 2 R 25). The motion then detailed the prior "scientific testing" of the evidence that occurred at trial. In sum, the motion pled that there were two types of scientific testing that took place in Mr. Hitchcock's case: hair analysis by Diana Bass of the Sanford Crime Lab and serology conducted by Steven Platt using blood typing on blood and semen evidence. (Vol 2. R. 25-26).

Pursuant to Florida Rule of Criminal Procedure 3.853(b)(3) James Hitchcock stated that he was actually and legally innocent of the murder for which he was sentenced to death and that he was innocent of the death penalty. (Vol. 2. R. 26). Mr. Hitchcock stated next that he "maintains that the true murderer of the victim

was his brother Richard Hitchcock. Specifically, James Hitchcock maintains that it was Richard Hitchcock who strangled the victim after Richard Hitchcock observed James Hitchcock and the victim in a post-sexual situation. While James Hitchcock admits to sexual intercourse with Cynthia Driggers, it was Richard Hitchcock who committed the murder." (Vol. 2 R. 26).

Mr. Hitchcock further pled that his "1977 trial was not an adversarial testing. James Hitchcock's attorney failed to effectively hold the State to its burden of proving beyond the exclusion of every reasonable doubt that James Hitchcock was guilty and failed to adequately put forth a defense that would have shown that Richard Hitchcock was the true perpetrator of this crime. Accordingly any determination of guilt is invalid, suspect and unconstitutional." (Vol. 2 R. 26).

Important to Mr. Hitchcock's STATEMENT OF INNOCENCE, Mr. Hitchcock next pled that:

> [t]he physical evidence in this case was analyzed by the Sanford Crime Laboratory. The Sanford Crime Laboratory was incompetent and operated under unacceptable management practices. There was likely no suitable review of any operational aspect and the chances for contamination were extreme as subsequently came to light in the Peek case. There were also quotas, multiple cases simultaneously worked up, reprioritizing work, questionable evidence custody issues, unsecured evidence, lack of training and disbursed evidence. Probably the most glaring deficiency was the failure to provide the analyst(s) an

> opportunity to develop and maintain reference collections because the entire foundation of subjective analysis (such as hair examination) lies in suitable reference material(i.e., on what basis is a comparison being made?)." (Vol 2. R. 26).

Finally, Mr. Hitchcock pled that:

Diana Bass was the micro analyst who conducted the hair comparisons in this case. Diana Bass lacked the training necessary to perform scientifically relevant hair analysis on the known and questioned hair samples in this case. Most troubling was Ms. Bass' evidence handling. This was detailed by Diana Bass' supervisor in an employee evaluation:

> Evidence handling is one of Ms. Bass's most problematical areas. She does not appear to have a proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repackaging them when not actually involved in an analysis leaves the very strong probability of extraneous contamination, cross contamination among items, and possible loss of trace evidence.
>
> Ms. Bass fails to realize that the integrity of the evidence must be maintained even after the laboratory examination is complete. In a recent case Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the

> laboratory in an unpackaged condition and in an unprotected area of the laboratory thereby subjecting them to the frequent rains occurring at this time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis supervisor.
>
> (Vol 2. R. 27).

As for the relevance of DNA testing Mr. Hitchcock followed Florida Rule of Criminal Procedure 3.853(b)(3) and (b)(4) and detailed the relevance of DNA testing in a section of the motion entitled Relevance of DNA Testing. (Vol. 2. R. 27). Mr. Hitchcock began this section of the motion by stating "that the identity of the true murderer was genuinely disputed now as it was during the trial."( Vol. 2. R. 27).

Pursuant to this rule, Mr. Hitchcock "state[d] that DNA testing and hair analysis requested in this motion will exonerate James Hitchcock. Due to the location of the evidence 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 scene, or that there was other forensic evidence." (Vol. 2. R. 27).

Next, in this section, Mr. Hitchcock pled that "[t]he DNA and micro analysis would also tend to exonerate James Hitchcock and show that the Diana Bass' hair analysis improperly excluded Richard Hitchcock and improperly inculpated James Hitchcock." (Vol. 2. R. 27-28).

Completing this section of the motion, Mr. Hitchcock pled that: "Lastly, the

evidence would also show that James Hitchcock was innocent of the death penalty by showing that even if he was involved in the death of the victim James Hitchcock was a minor participant. See Section 921.141(6)(d), Florida Statutes. Had James Hitchcock committed this offense this would mitigate his death sentence." ( Vol. 2. R. 28).

Because of the unique issues raised in Mr. Hitchcock's case by way of 3.851 motion and in the DNA motion Mr. Hitchcock requested an independent lab for any potential DNA testing in a section of the motion entitled "Request for an Independent Lab and Good Cause for the Same." (Vol. 2. R. 27). This was pursuant to Florida Rule of Criminal Procedure 3.853(c)(7).

Under this section of the motion Mr. Hitchcock stated that:

> 1. The Sanford Crime Lab is the predecessor to the Florida Department of Law Enforcement.
>
> 2. The Sanford Crime Lab performed the initial "scientific" testing of the evidence collected during the criminal investigation of this case.
>
> 3. As stated above, and in James Hitchcock's motion for post conviction relief, the Sanford Crime Lab was fraught with improper evidence handling, improper testing and invalid scientific analysis.
>
> 4. FDLE, as the successor to this lab, has a conflict of interest in undertaking the analysis of the evidence in this case: If FDLE finds that the evidence incorrectly implicated James Hitchcock and exculpated Richard Hitchcock, this would be proof of the Sanford Crime Lab's nonfeasance, misfeasance or malfeasance. Such a finding would damage

> the reputation of FDLE and could subject FDLE to legislative, judicial and public scrutiny. Accordingly, it is apparent that FDLE has an interest in avoiding any evidence of mistakes made by the Sanford Crime Lab.
>
> 5. As part of the "state" that seeks to execute James Hitchcock FDLE lacks the scientific neutrality of an independent lab. FDLE would have access to law enforcement information on this case and law enforcement would have access to FDLE.
>
> 6. A significant length of time that has passed from the collection of evidence and the methods used to collect evidence in this case. To perform the relevant tests a lab must have both the scientific ability to conduct the most advanced tests and the willingness to search for and analyze trace evidence that the Sanford Crime Lab did not originally test.
>
> 7. Ordering an independent lab avoids the suspicion that surrounded the original evidence testing in this case; that the Sanford Crime Lab knew who law enforcement suspected as the perpetrator and then conducting only enough analysis to inculpate that suspect.

Mr. Hitchcock concluded the motion by requesting certain procedures for the testing in a section entitled REQUESTED PROCEDURE FOR TESTING IN THIS CASE. (Vol. 2. R. 29-30). The motion stated that CCRC-M would pay the costs of such testing and detailed what exactly would be tested if the court granted Mr. Hitchcock DNA testing. Moreover, this section of the motion proposed an exact procedure for the testing. (Vol. 2 R. 29-33). Pages 36-59 contain the faxed copy of the location of the evidence in an appendix form.

The State filed a response with its arguments contained therein. (Vol. 2. R. 100-

02). The motion was set for hearing on March 28, 2002. At the hearing, the State argued for further discovery and that the motion filed was insufficient to allow for DNA testing. Mr. Hitchcock's counsel responded, in part, as follows:

> Judge, just in response, we don't know what the DNA is, but we know what types of fluids and things of that sort were found. At least some of it. Blood was found, semen was found. And while all these individuals lived in the same house, so did Mr. Hitchcock. Mr. Hitchcock, our client. What we're requesting is a specific type of DNA testing which would distinguish between brothers. I'm not fully versed in the different type, but there is one type where they would not be able to tell between Richard Hitchcock, who its our position is the true perpetrator of the crime, and James Hitchcock, who is in fact, our client. It's not a fishing expedition. We have no way of telling whether Richard Hitchcock's DNA is on the clothing or the body, or on the various items of which I listed in great detail in my motion, and I also stated where they could be found. We have no way of knowing whether there is DNA on that until we're - - its actually tested . Now I don't know, really, no harm would come to the state by this testing, and there is just no way of knowing... . (Vol 1. R. 19-20).

The lower court denied the motion by written order dated June 24, 2002. (Vol. 2 R. 115-16). The court's order stated that the motion failed 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 scene, or that there was other forensic evidence," (Vol. 2. R. 115 citing Defendant's motion, page 6; emphasis added by the court.)

The court went on to state that "[s]uch a speculative claim cannot support the granting of postconviction DNA testing. Moreover, Defendant, his brother, and the victim occupied the same house, and all would have deposited hair, skin, bodily fluids, eyelashes, and nail clippings throughout the house." (Vol. 2. R. 116). The entirety of the lower court's order is contained in the record, volume 2, on pages 115-16.

This appeal follows.

## SUMMARY OF ARGUMENT

Mr. Hitchcock pled his DNA motion in conformance with the Florida Rule of Criminal Procedure 3.853. All the requirements of the rule were met. Any error in the use of may was an error on the side of truthfulness. To the extent that the word "may" was used it referred only to the possibility that after a period of time, such as what occurred here, scientists may not have been able to extract DNA from the evidence. Mr. Hitchcock was also entitled to DNA testing as part of his right to habeas corpus which is specifically guaranteed by the United States and Florida Constitution.

Accordingly, this Court should reverse.

## STANDARD OF REVIEW

Because this case involves a mixed questions of law and fact this Court should apply a standard of de novo review.

## 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 STATUES THEREFORE THE LOWER COURT ERRED IN DENYING MR. HITCHCOCK'S MOTION**

Mr. Hitchcock complied with each and every requirement of Florida Rule of Criminal Procedure 3.853 in his Motion for Postconviction DNA testing.

Fla. R. Crim. P. Rule 3.853 Motion for Postconviction DNA Testing states in relevant part:

> (b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:
> (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
> (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
> (3) a statement that the movant is innocent and how the

> DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;
> (5) a statement of any other facts relevant to the motion; and
> (6) a certificate that a copy of the motion has been served on the prosecuting authority.

Mr. Hitchcock complied with paragraph (b) subparagraph (1) in the sections of the motion entitled "FACTS IN SUPPORT OF MOTION" (Vol. 2. R. 23-24) and "LOCATION OF EVIDENCE TO BE TESTED" (Vol. 2. R. 24-25). The section entitled "FACTS IN SUPPORT OF MOTION" detailed some of the history in Mr. Hitchcock's case and specifically pled that James Hitchcock testified at trial that it was his brother "Richard who killed the victim after finding the victim and James Hitchcock in a post-sexual situation." (Vol. 2. R. 23).

That Richard Hitchcock was the true perpetrator of the murder was the most important fact in support of the motion and the basis for Mr. Hitchcock's claim of innocence. The section entitled STATEMENT OF INNOCENCE reiterates that "James Hitchcock maintains that the true murderer of the victim was his brother Richard Hitchcock." (Vol. 2 R. 26).

The motion clearly met the requirements of paragraph (b) subparagraph (1) of "a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained." In the section of the motion entitled "LOCATION OF EVIDENCE TO BE TESTED" the motion pled that the evidence to be tested was in the possession of the Orange County Sheriff's Office or the Orange County Clerk's Office. (Vol. 2. R. 24-25).

For the evidence in possession of the Orange County Sheriff's Office, the evidence was originally obtained from "the crime scene, the victim's person, or from either James Hitchcock or Richard Hitchcock." (Vol. 2. R. 24). This evidence was "collected by crime scene technicians, the medical examiner, or from the persons of James Hitchcock or Richard Hitchcock." (Vol. 2. R. 24).

The motion also pled that the evidence in possession of the Orange County Criminal Clerk came from the same sources and was "collected by crime scene technicians, the medical examiner, or from the persons of James Hitchcock or Richard Hitchcock." (Vol. 2. R. 25). With the detailed list of the evidence in possession of the Orange County Sheriff, (Vol. R. 30-31), and evidence in possession of the Orange County Clerk of the Circuit Court,(Vol. 2. R. 31-33), the motion more than satisfied the location requirement of Florida Rule of Criminal Procedure 3.853(b)(1).

Mr. Hitchcock pled, as required by paragraph (b) subparagraph (2), that the DNA evidence had never been tested in his case in the section of the motion entitled "PRIOR SCIENTIFIC TESTING ON THE EVIDENCE OF THE CASE". (Vol. 2 R. 25-26). In this section, Mr. Hitchcock stated "that there has been no prior DNA testing that is known by James Hitchcock or undersigned counsel." (Vol. 2 R. 25). This was clearly sufficient to meet the requirements of paragraph (b)subparagraph 2). Mr. Hitchcock, however, detailed all the scientific evidence in this case.

In compliance with paragraph (b)and subparagraphs(3)and(4), Mr. Hitchcock pled two sections of his motion entitled "STATEMENT OF INNOCENCE", (Vol 2. R. 26-270, and "RELEVANCE OF DNA TESTING" (Vol. 2. R. 27-28). Apparently, it was based on these sections that the lower court denied Mr. Hitchcock's DNA motion. The lower court's order denying the motion stated the motion "failed to explain how the results would exonerate Defendant or mitigate his sentence". (Vol. 2. R. 115-16)

The lower court's order also made an issue of the use of the word "may" in the motion, specifically the pleading 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 scene, or that there was other forensic evidence." (Vol. 2. R. 115 citing Defendant's motion page 6; emphasis added in original order).

The lower court's order states that "[s]uch a speculative claim cannot support the granting of postconviction DNA testing. (Vol. 2. R. 115). "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." (Vol. 2. R. 115-16). In reference to the possible mistakes and false testimony of Diana Bass improperly excluding Richard Hitchcock, the lower court claims that Mr. Hitchcock did not "explain why this [was] so." (Vol. 2. R. 2). Lastly the lower court found that : "[t]he 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." (Vol. 2. R 116 citing Galloway v. State, 802 So. 2d 11734 (Fla. 1st DCA 2001)).

Regarding the use of the word "may", in the RELEVANCE OF DNA TESTING section of the motion and upon which the lower court based its denial, it is important for this Court to consider the timing and circumstances of Mr. Hitchcock's motion for DNA testing. Mr. Hitchcock's case is over 25 years old. Mr. Hitchcock had to swear to the motion and his attorneys had to file the motion in good faith. Without the ability to test the DNA in this case nobody could tell whether the proposed locations of DNA and the items to be tested would produce a DNA for comparison. Until the scientist actually attempted to extract DNA from the items to

be tested and were successful, it simply was truthful and fair to use the word may. Because neither Mr. Hitchcock nor his counsel could predict the future success of the scientist's attempts to extract DNA it would have been false for counsel to plead a motion that said the testing would show that Richard Hitchcock strangled the victim, that his hair was present at the crime scene, that his blood was present at the scene, or that there was other forensic evidence, when it was uncertain if the scientists would be able to extract samples from the items to be tested.

The uncertainty of whether the scientists who would have conducted the DNA testing could have extracted sufficient samples for testing should not be confused with a concession that if DNA was extracted it would not exonerate Mr. Hitchcock or corroborate his trial testimony that his brother Richard committed the offense. Clearly, any value of the evidence was contingent upon the scientists actually being able to extract DNA.

Mr. Hitchcock was, however, unequivocal in stating in the RELEVANCE OF DNA TESTING section that "[t]he identification of the true murderer of the is genuinely disputed now as it was during trial." Moreover, in full compliance with Florida Rule of Criminal Procedure 3.853(b)(3) and (b)(4), Mr. Hitchcock stated that "[d]ue to the location of the evidence 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 scene, or that there was other forensic evidence." (Vol. 2. R. 27-28).

Certainly, there could have been no other viable explanation for Richard Hitchcock's DNA to have been found in the blood evidence found at the scene or on the victim, or if Richard Hitchcock's DNA was found under the victim's fingernails. Moreover, it would tend to exonerate James Hitchcock and corroborate his trial testimony if, through DNA testing, hair or blood belonging to Richard Hitchcock was found on the nude or semi nude body of the victim.

The State was able to put on the testimony of Diana Bass who testified at James Hitchcock's trial that the hair recovered from the crime scene was that of James Hitchcock and James Hitchcock alone. The jury was allowed to consider that no hair evidence at all was found that was consistent with Richard Hitchcock. Accordingly, if the hair evidence was incorrectly analyzed by Diana Bass, then the jury never had the opportunity to consider the State's and the lower court's argument that the scientific evidence could have come from Richard Hitchcock and the victim living in the same house because the jury may have falsely concluded that there was no evidence that Richard Hitchcock was in contact with the body of the victim at all.

Lastly, the presence of Richard Hitchcock's DNA in inculpatory areas such as the nude body of the victim or in the blood evidence, would show at worst that James Hitchcock did not act alone or that Richard Hitchcock was the more dominant

participant in the homicide. In terms of mitigation this would show, along with James Hitchcock's testimony, that even if James Hitchcock was guilty of the crime under some state principal theory, he was a minor participant under Section 921.141(6)(d), Florida Statutes.

Because Florida Rule of Criminal Procedure 3.853,and Section 925.11, Florida Statutes, are both rather new there is limited case law interpreting or applying this statute and this rule. However, none of the case law in this State supported the lower court's denial of DNA testing in the instant case.

For instance, the lower Court cited Galloway v. State,802 So. 2d 1173 (Fla. 1st DCA 2001), in its Order Denying Postconviction DNA Testing. Galloway, however, differed greatly from Mr. Hitchcock's case. In Galloway, the appellate court affirmed the lower court's denial of DNA testing. Id. At 1175.

In Galloway, the appellant was actually convicted with two codefendants of two counts of robbery and one count of sexual battery. Id. at 1174. The appellate court found that DNA testing would not exonerate the appellant because "even if DNA testing" showed that his DNA would not match the DNA "found at the scene of the crimes and on the body of the victim of the sexual battery" this would not exonerate the appellant. Id. at 1175. As the court stated, "[t]he fact that only the appellant's codefendant's may have deposited DNA at the crime scene on the body of the victim

does not mean that appellant was not there. Id. (citations omitted).

What was at issue in Mr. Hitchcock's case was not his presence at the scene but the presence of his brother Richard at the scene and the presence of Richard's DNA on the body of the victim. James Hitchcock has maintained that his brother Richard committed the homicide upon the victim's nude or semi nude body. Certainly, the incrimination that would result if Richard Hitchcock's blood was found in the blood samples collected in this case would exonerate James Hitchcock. Moreover, the presence of Richard Hitchcock's DNA under the fingernails of the victim would be totally inconsistent with James Hitchcock being involved in a struggle with the victim and consistent with Richard Hitchcock committing the murder.

Moreover, the hair testimony lacked scientific validity and the jury heard Diana Bass's exclusion of Richard Hitchcock. This denied James Hitchcock a fair trial because it appeared to the jury that James Hitchcock was the only person present at the scene, to the exclusion of Richard Hitchcock. (See 1977 Vol. IV R. 638).

Finally, the lower court's order simply accepts the State's argument that because Richard Hitchcock lived in the same house as the victim, the presence of his DNA, regardless of where found lacks probative value. While this is an argument that the State could make if DNA was found, it would be in direct contradiction of the State's admission at trial of testimony excluding Richard Hitchcock from the scene

and showing the presence of other physical evidence besides the semen at the scene that was consistent with James Hitchcock. If the presence of evidence other than the semen was probative of James Hitchcock's guilt the question remains as to why this would not be probative of Richard Hitchcock's guilt.

Accordingly, the lower court erred in denying the motion and this Court should reverse.

## 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**

In addition, 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. See; Amendment To Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001), Anstead, J. (concurring in part and dissenting in part) (stating "At its core, access to DNA testing is simply a unique means of establishing a claim… under the constitutional writ of habeas corpus…. Entitlement to access to the courts for relief under the writ of habeas corpus is provided for expressly in Florida's Constitution….

The salient issue in such proceedings is whether there is a credible claim that a fundamental injustice has occurred." ) 807 So. 2d at 636-37. See also Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) Luttig, J. (concurring) (arguing that the U.S. Constitution provides a right to access evidence for the purposes of postconviction DNA testing if such testing could prove one's actual innocence.) When DNA testing could prove a man innocent, denying him such tests and executing him would violate both the Florida and United States Constitutions.

## CONCLUSION

No harm can come to the State if this Court reverses the lower court's denial of DNA testing. Mr. Hitchcock filed a properly pled motion following the law of this State. Accordingly he should be allowed to test the evidence against him.

## CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL 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 31st day of January 2003.

______________________________
**James L. Driscoll, Jr.**
**Florida Bar No. 0078840**
**Assistant CCC**
**CAPITAL COLLATERAL**
**REGIONAL**
**COUNSEL-MIDDLE**
**3801 Corporex Park Drive, Suite 210**
**TAMPA, FL 33609-1004**
**(813) 740-3544**

Copies furnished to:

Chris Lerner
Assistant State Attorney
Office of the State Attorney
Post Office Box 1673
Orlando, Florida 32802

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, Florida 32118

James E. Hitchcock
DOC# 058293; P1206S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026

## CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing INITIAL BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

______________________________
**James L. Driscoll, Jr.**
**Florida Bar No. 0078840**
**Assistant CCC**
**CAPITAL COLLATERAL**
**REGIONAL**
**COUNSEL-MIDDLE**
**3801 Corporex Park Drive, Suite 210**
**TAMPA, FL 33609-1004**
**(813) 740-3544**