IN THE SUPREME COURT OF FLORIDA

No. SC03-2203

JAMES HITCHCOCK,
Appellant

versus,

STATE OF FLORIDA,
Appellee.

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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S RESPONSE TO REQUEST FOR ORAL ARGUMENT

Mr. Hitchcock continues to ask this Court for oral argument. Contrary to the State's answer, the issues are indeed complex. This Court has granted oral argument in cases following relinquishment or remand.

REPLY TO STATEMENTS OF FACT

The State misstated some of the facts in this section. Trial counsel did not claim that he "had two very experienced investigators assist him with this case." (AB 16, allegedly citing RH 124). Trial counsel, at most, admitted that there were two investigators on staff and that these investigators were available to assist him. (RH 124). Counsel did not say whether this was for the whole felony division or the whole office. Counsel specifically could not recall whether those investigators were utilized. (RH 124).

This Court allowed supplemental briefing following relinquishment. Contrary to the State's argument in this section Mr. Hitchcock's previous arguments were incorporated, not by reference, but by the nature of these proceedings. Mr. Hitchcock also properly relied on previous arguments since this was supplemental briefing, albeit with some additional facts.

This Court's order gave Mr. Hitchcock 40 pages for his supplemental brief. Since it was a supplemental brief, and by this Court's order, discretionary, Mr. Hitchcock summarized the

procedural history. There was no rule of appellate procedure that required otherwise. Mr. Hitchcock properly chose to use most of his pages in the argument section. Mr. Hitchcock identified all his issues with specificity and showed that all of his claims require a new trial.

After complaining about "*ad hominem*" attacks in footnote 1 the State proceeded to make its own in footnote 2. Citing a case involving whether appellate counsel must raise all issues urged by the appellant, *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983),the State argued that Mr. Hitchcock "should not be heard to complain" about page limits. (AB 2 fn 2).

Mr. Hitchcock did not complain about anything in his supplemental brief except the ongoing violation of his constitutional rights. In doing so he emphasized the areas of the most severe violation. What he did not do is abandon claims so that the State could later claim that Mr. Hitchcock is procedurally barred. Unlike in *Jones*, *supra*, Mr. Hitchcock was the victim of multiple and severe violations of his rights. Since Mr. Hitchcock's initial supplemental brief showed that he was entitled to relief it is obvious that 40 pages is sufficient for this Court to grant Mr. Hitchcock the remedy he deserves.

REPLY ON "THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM"

Mr. Hitchcock was denied his constitutional right to the effective assistance of counsel. Under Claim III of Mr.

Hitchcock's postconviction motion Mr. Hitchcock alleged that counsel was ineffective in two ways: First, trial counsel inexplicably enabled the jury to hear information that was inadmissible, devastating, and all but assured that Mr. Hitchcock would be convicted of the crime he did not commit. Second, trial counsel failed to assure that the jury heard key testimony concerning Richard Hitchcock which was available through proper investigation and admissible under a proper legal theory.

On the first count, both the State and the lower court's order ignored the complete scope of counsel's ineffectiveness. *See* (AB 25 citing RH 507). More than an isolated incident, counsel's questioning allowed the State to enter a realm of evidence in which Mr. Hitchcock's right to a fair trial perished. The complete sequence of events was detailed in the Initial Brief at Argument III and closing argument. (RH 360-69).

This Court should not ignore the details of trial counsel's ineffectiveness in incriminating his own client. Moreover, while there was much discussion about trial counsel's interaction with Mr. Hitchcock, the lower court and the State have gone through great pains to consider Mr. Hitchcock's testimony out of context and draw adverse inferences stacked upon strained logic.

Mr. Hitchcock never said that there was no contact with

trial counsel. Mr. Hitchcock did not state that trial counsel did not get some of the names of witnesses from him, as indeed the contrary was true, trial counsel asked Mr. Hitchcock for the names of character type witnesses. (RH 76). This, however, was a far cry from the meaningful investigation and preparation required by defense counsel in a capital case. If in fact the State was correct that, "seven of the nine witnesses could only have been identified by" Mr. Hitchcock, it hardly proved "that there was no deficiency in the investigation." (AB 24-25 fn 20). To the contrary, if counsel's investigation in a capital case was based on short meetings with an organically brain damaged barely literate 20 year old, this was not the counsel of which the Sixth Amendment speaks.

Just as Mr. Hitchcock could not conduct a meaningful investigation from the Orange County Jail, especially about Richard Hitchcock, he also could not develop his own theory of admissibility and restrain his counsel from opening the door for the harmful and otherwise inadmissible bad acts and character evidence. More than merely showing why Mr. Hitchcock was dissatisfied with trial counsel, Mr. Hitchcock's relinquishment testimony showed why the ineffective assistance of counsel occurred - - trial counsel's lack of respect for Mr. Hitchcock's claim of innocence.

It was obvious what happened; after failing to spend

meaningful time with Mr. Hitchcock, trial counsel managed to obtain a plea offer to life for his 20 year old client. Counsel would have considered this a win, but a life sentence for an innocent man while the true perpetrator goes free was a win for no one. Counsel should not have had any ill will because Mr. Hitchcock chose to exercise his right to trial guaranteed by the United States Constitution.

To exercise the right to trial Mr. Hitchcock also needed counsel who obtained the similar fact evidence about Richard Hitchcock and presented it under a proper legal theory. The State argued that there was no "reverse-Williams Rule" in 1977. This was incorrect and undoubtedly the similar fact evidence about Richard Hitchcock's sexual possessiveness and rage-fueled choking would have been admissible at any point of history where there was respect for the right to a fair trial.

Section 90.404, Florida Statutes was derived in 1976. Laws 2001, c. 2001-221, § 1, rewrote subsection (2). This evidentiary Rule never limited the use of similar fact evidence to the State. There are no State-only evidentiary rules allowing admissibility or defense-only rules limiting admission. *Holmes v. South Carolina*, 126 S.Ct. 1727, 1731 (2006). (Finding that like Mr. Hitchcock, a criminal defendant has a right to present a meaningful and complete defense).

Additionally, *Williams v. State*, does not limit the use

of similar fact evidence to the State. 110 So. 2d 654 (Fla. 1959). Indeed, after a long discussion of the historical dilemma in this area, the only question the Court answered concerned the admission of such evidence against the accused, not by the accused. As a function of relevancy the Court decided such evidence was admissible over concerns of prejudice to the accused. *Id*. 659. Therefore, "similar fact evidence regarding a party whose conduct 'is in question is not competent to prove the commission of a particular act charged against him, *unless* connected in such a way as *to indicate a relevancy* beyond mere similarity in certain particulars.'" *Id*. In other words, similar fact evidence is admissible if not offered to show "propensity," the very theory that trial counsel sought the admission of the information he knew about Richard. Accordingly, trial counsel did not have to foresee any development of the law, he only had to read the rules of evidence and consult the case law.

REPLY ON "THE 'NEWLY DISCOVERED EVIDENCE' CLAIM"

There was no competent and substantial evidence to support the denial of Mr. Hitchcock's newly discovered evidence claims. The lower court and the State improperly relied on the 1997 and 1998 void evidentiary hearings. The State and the lower court also improperly attributed the delay in the witnesses disclosing the truth about Richard to these witnesses when Mr. Hitchcock

did not even enter postconviction until 2000. There was nothing in the postconviction record that showed a lack of credibility on the part of Mr. Hitchcock's witnesses. This Court specifically asked the lower court to decide two matters regarding the newly discovered evidence of Richard Hitchcock's confession: admissibility and whether a new trial was warranted under the *Jones* standard.

Carpenter v. State, stands for the clear proposition that a court in determining admissibility under the declarant unavailable exception does not consider credibility of the in-court witness testifying about the out-of-court declaration. 785 So. 2d 1182, 1203 (Fla. 2001). The court does not even consider the credibility of the out-of-court statement itself, only the circumstances under which the statement was made. The sentence which the State claims Mr. Hitchcock omitted, merely recognizes that following admission the jury assess the credibility of the in-court witness who is testifying about the out-of-court statement. *Id.*; cited in AB at 28. This principle is central to any trial but is not a requirement for admission. Had this Court remanded for a non-jury trial, the lower court having determined admissibility could consider the credibility in determining whether the State proved its case beyond a reasonable doubt. As a preliminary matter of admissibility it was wholly improper in the light of *Carpenter*.

Following admissibility, the next question this Court asked the lower court to answer was whether Richard's confessions, and by implication, the newly discovered similar fact evidence, "was of such a nature it would probably produce an acquittal upon retrial." *Jones v. State*, 591 So. 2d 911 (Fla. 1992). Omitted from the State and the lower court's consideration was that whether a jury acquits is determined by whether a jury finds a reasonable doubt. Evidence of a confession is of such a nature that this Court has repeatedly upheld death sentences based on confessions.

Accordingly, if a confession is of such a nature that it supports a conviction, and often a death sentence, it clearly is of the nature that a jury would probably find, when considering the other evidence in favor of Mr. Hitchcock, and with the assistance of effective counsel, a reasonable doubt.

REPLY ON "BRADY CLAIM"

The State's answer brief mistakenly titled its answer section as "the Brady Claim" and then proceeded to divide this multifaceted claim. This was no mere *Brady* claim, but rather, a multifaceted argument in favor of a new trial and the capstone on the pyramid of reasons Mr. Hitchcock's conviction and death sentence should not stand.

On *Brady*, it was not Diana Bass' performance evaluation but her skills in performing micro-analysis that requires relief.

Diana Bass was the State and no other person needed to be involved in the suppression of evidence for a *Brady* violation. Indeed, Diana Bass was in the best position to know that her skills were deficient at the time of trial because she sought and was denied further training. (VOL. VI PCR. 261).

There was nothing "disingenuous" or outside the scope of relinquishment in proving the State's lack of candor with the 1988 resentencing court. While the standards differ for *Brady*, *Giglio* and *Strickland*, all require a showing of materiality of varying degrees. The State's misinforming the Court on the unavailability of Diana Bass proves materiality under any standard. The unimpeached testimony of Diana Bass was of such great importance to the State's attempt to obtain a death sentence the State was willing to misinform the court. Likewise it was material to the State's efforts to convict Mr. Hitchcock.

Diana Bass' testimony created a false sense of scientific certainty. It falsely excluded Richard Hitchcock and falsely included James Hitchcock. It had no place in a fair trial and, once removed, Mr. Hitchcock is clearly entitled to a new trial.

The State moved on to discuss what it called the "Secondary Issues." (AB 30). Substantive violations of the United States Constitution are not secondary. They are of the highest concerns of any court and involve the primary law under which we have all lived since the founding of this country. A constant refrain

throughout the remainder of the State's argument was that Mr. Hitchcock did not "present any evidence at all" that hair analysis was not scientifically accepted or that there was no proof of deficiency in Ms. Bass' actual testing. Mr. Hitchcock needed to prove no such element. The State also incorrectly argued Mr. Hitchcock did not present the ***Giglio*** claim below.

Hair analysis may have been generally accepted but only if the analyst had the skills to conduct such testing. Mr. Platt and Diana Bass' own testimony proved that she did not. Mr. Hitchcock was denied the opportunity for DNA testing and even to have a micro-analyst look at the hair. He cannot show that the results of Diana Bass' analysis were false if no court allowed Mr. Hitchcock to test the evidence. What is clear, whether improper under *Brady*/Giglio and *Frye*, or as newly discovered evidence, the testimony should not have been allowed and the imprimatur of scientific certainty Diana Bass testified under was indeed false. The State, through Diana Bass, and trial counsel because of ineffectiveness denied Mr. Hitchcock a fair trial.

CONCLUSION

Based on the forgoing and Initial Supplemental Brief, this Court should grant Mr. Hitchcock a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL REPLY BRIEF OF THE APPELLANT has been furnished by Federal Express to all counsel of record on this 1st day of September, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing SUPPLEMENTAL REPLY BRIEF OF THE APPELLANT was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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