

IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,
Appellant,

v.

CASE NO. SC09-839

****DEATH WARRANT****

STATE OF FLORIDA,
Appellee.

_____ /

RESPONSE TO MOTION FOR CLARIFICATION

COMES NOW the State of Florida, and responds as follows to Johnston's "motion for clarification" of this Court's order relinquishing jurisdiction to allow certain DNA testing to be conducted. For the reasons set out below, the additional testing sought in the "motion for clarification" should be denied.

1. Rule 3.853 of the *Florida Rules of Criminal Procedure* requires a statement of "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." *Fla. R. Crim. P.* 3.853(b)(3) (2009). Johnston has never provided such a statement with respect to the "hair and debris samples" that are the subject of the motion now before this Court.

2. Because Johnston has never explained the significance of the hair and debris samples at issue (and did not do so in the trial court, either), he has shown no basis upon which this

Court should modify its relinquishment order. In *King v. State*, 808 So. 2d 1237, 1249 (Fla. 2002), this Court affirmed the denial of DNA testing on similar "hair and debris" evidence which was arguably pled with greater specificity -- in Johnston's case, he has not even identified where the items in evidence were found, and has not articulated any relevance of those items at all.

3. Post-conviction DNA testing is not intended to be a fishing expedition, but rather is governed by specific pleading requirements which Johnston has not attempted to meet with respect to the hair and debris samples. This Court has stated, with unmistakable clarity, that:

The applicable law is set forth in section 925.11(2), *Florida Statutes* (2006), and *Florida Rule of Criminal Procedure* 3.853, as well as *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004). Section 925.11(2) states:

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

. . . .

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime

See also *Fla. R. Crim. P.* 3.853. Further, in *Hitchcock*, 866 So. 2d at 27, this Court stated:

The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Willacy v. State, 967 So. 2d 131, 145 (Fla. 2007).

4. The "hair and debris samples" suffer from the same lack of specificity of pleading that was found in *Hitchcock*, where this Court upheld denial of testing, stating:

With respect to the items listed in *Hitchcock's* motion, only a general reference and identification of the type of item was given, without any other relevant information. [FN2] Rule 3.853 is not intended to be a fishing expedition. Rather, it is intended to provide a defendant with an opportunity for DNA testing of material not previously tested or of previously tested material when the results of previous DNA testing were inconclusive and subsequent developments in DNA testing techniques would likely provide a definitive result, and **when a motion for such testing provides a basis upon which a trial court can make the findings expressly set forth in subdivision (c)(5) of rule 3.853. It was *Hitchcock's* burden to explain, with reference to specific facts about the crime and the items he wished to have tested, "how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or . . . will mitigate the sentence received by the movant for that crime."** He has not met that burden. Therefore, we find no error in the circuit court ruling that "the motion fail[ed] to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate Defendant or mitigate his sentence." [footnote omitted]

[FN2] For example, Hitchcock has listed a number of items of clothing, but has not indicated whether those clothes belonged to the victim, the defendant, or Richard Hitchcock, whether the items were found near the scene of the crime or worn by someone the night of the crime, or whether there is any indication from evidence logs, crime lab reports, or trial testimony that any bodily fluids may exist on these items.

Hitchcock v. State, 866 So. 2d 23, 28 (Fla. 2004). (emphasis added). Johnston is not entitled to the speculative testing requested in the motion to clarify -- he has not met his pleading burden, and should not be allowed to benefit from that lack of diligence. The time for pleading with specificity has long passed, and the motion should be denied in all respects.

5. To the extent that further discussion is necessary, the fact that the trial court "accepted and acknowledged" the amendment at the case management conference in no way relieves Johnston from compliance with the pleading requirements of Rule 3.853. Likewise, the fact that the State did not object to the amendment itself in no way waived any objection to Johnston's failure to comply with the pleading requirements of the Rule. Johnston's insinuation to the contrary has no legal basis. Further, Johnston's claim that the circuit court was "willing" to include the "hair and debris samples" in the materials to be tested means nothing, assuming that Johnston has accurately

interpreted what transpired at the status conference. Those items are outside the scope of this Court's order, and it would have been error to include them. *Duckett v. State*, 918 So. 2d 224, 238 (Fla. 2005).

WHEREFORE, this Court should not expand the scope of its relinquishment order, which is clear on its face. The items that Johnston attempts to include in the DNA testing have never been the subject of a sufficiently pled Rule 3.853 motion, whether written, or oral, assuming that such is allowed. Johnston has **never** complied with the pleading requirements of Rule 3.853 -- instead, he has ignored the clear requirements of that rule and has asked this Court to ignore not only the Rule itself, but the cases interpreting it. This Court has never deviated from the pleading requirements of the Rule, and has made that clear in decisions such as *Hitchcock* and *Willacy*. This Court should follow those decisions in this case. The motion to clarify should be denied.

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 **e-mail**, and **U.S. Mail** to: **Todd D. Doss**, 725 S.E. Baya Dr., Suite 102, Lake City, Florida 32025-6092 on this _____ day of May, 2009.

Of Counsel