No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**IN RE JAMES E. HITCHCOCK, PETITIONER,**

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**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**APPENDIX**

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**Appendix A:** Opinion of the United States Court of Appeals for the Eleventh Circuit. Reported at *Hitchcock v. Sec'y*, *Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014).

745 F.3d 476
United States Court of Appeals,
Eleventh Circuit.

James HITCHCOCK, Petitioner–Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al., Respondents–Appellees.

No. 12–16158.
|
March 12, 2014.

**Synopsis**

**Background:** Following affirmance of state court conviction of murder in the first degree and death sentence, 413 So.2d 741, petitioner sought federal habeas relief. The United States District Court for the Middle District of Florida, Gregory A. Presnell, District Judge, 2012 WL 4339573, entered order denying petition, and petitioner appealed.

**Holdings:** The Court of Appeals, Carnes, Chief Judge, held that:

Eighth Amendment did not mandate admission of rejected plea offer as relevant mitigating evidence at sentencing, and

Florida Supreme Court did not unreasonably apply *Strickland* when it held that murder defendant was not prejudiced by counsel's failure at resentencing hearing to specifically ask defense expert, a clinical and forensic psychologist, about the applicability of two statutory mental health mitigating factors; and

Florida Supreme Court did not unreasonably apply *Strickland* when it held that murder defendant was not prejudiced by counsel's failure to have defendant examined by a neuropsychologist for indications of brain damage.

Affirmed.

Wilson, Circuit Judge, filed separate concurring opinion.

**Attorneys and Law Firms**

***477** James L. Driscoll, Jr., Capital Collateral Regional Counsel, Tampa, FL, for Petitioner–Appellant.

***478** Mitchell David Bishop, Kenneth Sloan Nunnelley, Attorney General's Office, Daytona Beach, FL, for Respondent–Appellee.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:08–cv–01719–GAP–KRS.

Before CARNES, Chief Judge, HULL and WILSON, Circuit Judges.

**Opinion**

CARNES, Chief Judge:

James Hitchcock, a Florida inmate sentenced to death for the strangulation murder of a thirteen-year-old girl, appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He contends that his Eighth and Fourteenth Amendment rights were violated

  

at his latest resentencing proceeding when the state trial court refused to admit and consider, as relevant mitigating evidence, the prosecution's offer to recommend a life sentence in exchange for a guilty plea to first-degree murder, an offer that Hitchcock rejected. He also contends that counsel at the resentencing hearing was ineffective for failing to elicit testimony from the defense's mental health expert about the applicability of two statutory mitigating factors and for failing to seek a neuropsychological evaluation for the presence of possible brain damage.

I.

The lengthy and complicated history of this case dates back thirty-seven years. In the summer of 1976, Hitchcock raped his brother's thirteen-year-old stepdaughter and then strangled her to death after she threatened to report the sexual assault. He was indicted on a single count of first-degree murder and, after rejecting the prosecution's offer to recommend a life sentence in exchange for a guilty plea, was convicted at trial and sentenced to death. The Florida Supreme Court affirmed his conviction and capital sentence on direct appeal, *see Hitchcock v. State,* 413 So.2d 741 (Fla.1982), and the state courts rejected his initial attempts to obtain post-conviction relief, *see Hitchcock v. State,* 432 So.2d 42 (Fla.1983).

In May of 1983, Hitchcock filed a federal habeas petition under § 2254, which the district court denied and that denial was affirmed on appeal. *See Hitchcock v. Wainwright,* 770 F.2d 1514 (11th Cir.1985) (en banc). The Supreme Court, however, granted his petition for a writ of certiorari and vacated his death sentence because the penalty phase jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances. *See Hitchcock v. Dugger,* 481 U.S. 393, 399, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987). Following his first resentencing proceeding, which again resulted in a sentence of death, Hitchcock challenged the state trial court's refusal to admit the prosecution's plea offer as relevant mitigating evidence at sentencing. The Florida Supreme Court rejected that challenge on appeal, concluding that the offer was not relevant mitigating evidence under the constitutional rule announced in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), because it had no bearing on Hitchcock's character, record, or the circumstances of his crime. *Hitchcock v. State,* 578 So.2d 685, 689–91 (Fla.1990), *vacated on other grounds by Hitchcock v. Florida,* 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992).

Hitchcock nevertheless managed to obtain two more penalty phase proceedings, each in its turn resulting in death sentences. After the third death sentence was vacated, *see Hitchcock v. State,* 673 So.2d 859, 860 (Fla.1996), the fourth and (so far) last sentencing hearing was conducted ***479** in September 1996. At that sentencing hearing, the defense called Dr. Jethro Toomer, a clinical and forensic psychologist, who testified that Hitchcock suffered from borderline personality disorder resulting in lifelong "personality difficulties," which would have affected him at the time of the murder by causing him to act impulsively. Dr. Toomer did not, however,

  

diagnose Hitchcock with any major psychiatric disorder, nor was he specifically asked by defense counsel about the presence of two statutory mitigating circumstances—whether the crime was committed while Hitchcock was under the influence of extreme mental or emotional disturbance, and whether his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired. *See* Fla. Stat. § 921.141(6)(b), (f) (1996). Defense counsel did argue during closing arguments that Hitchcock was under the influence of extreme mental or emotional disturbance at the time of the offense.

In the 1996 resentencing proceeding, the jury recommended the death penalty by a vote of ten to two and the trial court followed that recommendation, finding that the aggravating circumstances of Hitchcock's crime outweighed the mitigating ones. The court found four statutory aggravating circumstances: (1) the crime was committed while Hitchcock was under a sentence of imprisonment; (2) he committed the crime while engaged in 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. The trial court found only one statutory mitigating circumstance, that Hitchcock was 20 years old at the time of the murder, and several non-statutory mitigating circumstances, which it gave comparatively little weight. The non-statutory mitigating circumstances found by the trial court included that Hitchcock was under the influence of lifelong personality difficulties at the time of the offense, that he suffered from borderline personality disorder, and that the offense resulted from an unplanned, impulsive act. The Florida Supreme Court affirmed the death sentence on appeal and, in doing so, again rejected Hitchcock's contention that the sentencing judge erred in excluding evidence of the prosecution's rejected plea offer. *See Hitchcock v. State,* 755 So.2d 638, 645 (Fla.2000). The court explained that the claim was barred because it had been considered and rejected on the merits during Hitchcock's appeal from his first resentencing proceeding. *Id.*

In 2001 Hitchcock filed a state motion for post-conviction relief from his latest death sentence, contending, among other things, that counsel at his sentencing proceeding was ineffective for failing to (1) specifically elicit testimony from Dr. Toomer about the presence of the two statutory mental health mitigators and (2) have him evaluated by a neuropsychologist for indications of organic brain damage. After holding an evidentiary hearing, which was marked by conflicting expert testimony about the presence, extent, and influence of possible brain damage, the state trial court rejected the claims of ineffective assistance of counsel on the merits.

The Florida Supreme Court affirmed the denial of post-conviction relief, concluding that Hitchcock was not prejudiced by his counsel's failure to ask Dr. Toomer for his ultimate opinion about the applicability of the statutory mental health mitigators in light of “the extensive mitigation that was presented” at resentencing, including Dr. Toomer's testimony that Hitchcock was experiencing the effects of borderline personality disorder at the time of the offense, and “the extremely weighty

  

***480** aggravators proven in this case." *Hitchcock v. State,* 991 So.2d 337, 356–58 (Fla.2008). The Florida Supreme Court further found that counsel's failure to seek a neuropsychological evaluation was neither deficient nor prejudicial given the "conflicting expert testimony presented" during the post-conviction hearing, the speculative nature of Hitchcock's contention that he suffered from brain damage at the time of the murder, and the "extremely weighty" aggravating factors in the case. *Id.* at 360. The court also noted that several mental health experts had testified about "Hitchcock's normal intelligence, lack of mental illness, and positive adaptation to prison life." *Id.* at 360–61.

Hitchcock filed his current federal habeas petition in October 2008, reiterating his claims challenging his 1996 death sentence. The district court denied the § 2254 petition but granted Hitchcock a certificate of appealability (COA) on his claim that evidence of the prosecution's plea offer was improperly excluded during his last resentencing proceeding. We later expanded the COA to include Hitchcock's two claims of ineffective assistance of resentencing counsel.

II.

We review *de novo* the denial of a federal habeas petition. *Jamerson v. Sec'y for Dep't of Corr.,* 410 F.3d 682, 687 (11th Cir.2005). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts may not grant habeas relief on a claim adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" refers only to the legal principles embodied in the holdings of the United States Supreme Court. *See Thaler v. Haynes,* 559 U.S. 43, 47, 130 S.Ct. 1171, 1173, 175 L.Ed.2d 1003 (2010); *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir.2001). And a state court's application of clearly established federal law cannot be deemed unreasonable unless "no 'fairminded jurist' could agree" with the state court's conclusion. *Holsey v. Warden, Ga. Diagnostic Prison,* 694 F.3d 1230, 1257 (11th Cir.2012) (quoting *Harrington v. Richter,* —— U.S. ——, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011)).

A.

Hitchcock contends that he was deprived of his constitutional right to present relevant mitigating evidence at his 1996 resentencing when the state trial court excluded from evidence and refused to consider the State's pretrial offer to recommend a life sentence in return for a guilty plea. Hitchcock insists that the plea offer, which he rejected, is relevant because it shows that the prosecution believed that a death sentence was not warranted in his case.

The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

  

proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964–65 (plurality opinion); *see also Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (adopting the rule announced by the plurality in *Lockett* ). The Court has emphasized, however, that this rule does not "limit[ ] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the ***481** circumstances of his offense." *Lockett*, 438 U.S. at 604 n. 12, 98 S.Ct. at 2965 n. 12.

This constitutional rule, and its associated limitation, reflects "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). While the circumstances of a defendant's crime are related to his culpability, his "background and character [are also] relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Id.* (quotation marks omitted). As framed by the Supreme Court, the question of constitutional relevance turns on whether the proffered mitigating evidence has "any tendency to mitigate the defendant's culpability" or might otherwise serve as a reasonable basis for imposing a sentence less than death. *Tennard v. Dretke,* 542 U.S. 274, 284–87, 124 S.Ct. 2562, 2570–71, 159 L.Ed.2d 384 (2004).

Although the mitigating circumstances standard is a broad one, it is not without boundaries. As Justice O'Connor pointed out in *Franklin v. Lynaugh,* "[n]othing in *Lockett* or *Eddings* requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense." 487 U.S. 164, 185–86, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring in the judgment). The decision in *Franklin* underscores that point. It held that the Constitution "in no way mandates reconsideration by capital juries, in the sentencing phase, of their residual doubts over a defendant's guilt," because "[s]uch lingering doubts are not over any aspect of petitioner's character, record, or a circumstance of the offense." *Id.* at 174, 108 S.Ct. at 2327 (plurality opinion) (quotation marks omitted). Likewise, a plea offer from the prosecutor is not evidence about "any aspect of petitioner's character, record, or a circumstance of the offense." *Id.*

The Sixth Circuit's recent en banc decision in *United States v. Gabrion* provides a helpful analogy. *See* 719 F.3d 511 (6th Cir.2013) (en banc). In that case the capital murder was committed inside the State of Michigan, which has no death penalty, but it was also committed 227 feet inside a National Forest, which subjected the defendant to the territorial jurisdiction of the United States and the federal death penalty. *Id.* at 515–18. The Sixth Circuit rejected the contention that the location of the murder was a mitigating circumstance, either because Gabrion committed it in a state that has no death penalty or because

  

if he had committed it 228 feet away from where he did he would not have faced a death sentence. *Id.* at 520–24. The Court pointed out that the focus of the mitigating circumstances standard on the defendant's character, background, and the circumstances of his offense, particularly as they relate to the question of culpability, is reflected in the types of evidence that the Supreme Court has held to be mitigating: evidence of a defendant's youth, abusive upbringing, and emotional disturbance, *see Eddings,* 455 U.S. at 115, 102 S.Ct. at 877; evidence of a defendant's low IQ or impaired intellectual functioning, *see Tennard,* 542 U.S. at 287–88, 124 S.Ct. at 2571–72; evidence of a defendant's post-crime rehabilitation or good behavior in prison, *see Skipper v. South Carolina,* 476 U.S. 1, 4–5, 106 S.Ct. 1669, 1670–71, 90 L.Ed.2d 1 (1986); evidence of a defendant's ***482** military service and hardships suffered during it, *see Porter v. McCollum,* 558 U.S. 30, 39–40, 130 S.Ct. 447, 453, 175 L.Ed.2d 398 (2009); evidence of a defendant's religious conversion while in prison, *see Wong v. Belmontes,* 558 U.S. 15, 21, 130 S.Ct. 383, 387, 175 L.Ed.2d 328 (2009); evidence that a defendant was intoxicated at the time of the crime, *see Parker v. Dugger,* 498 U.S. 308, 314, 111 S.Ct. 731, 736, 112 L.Ed.2d 812 (1991); and evidence that the defendant played a minor role in the offense, *see Enmund v. Florida,* 458 U.S. 782, 797–98, 102 S.Ct. 3368, 3376–77, 73 L.Ed.2d 1140 (1982). *See Gabrion,* 719 F.3d at 521. The facts those types of evidence show are relevant mitigating circumstances because they allow a sentencing judge or jury to express "a reasoned *moral* response to the defendant's background, character, and crime" in deciding whether to impose the ultimate punishment of death. *See Penry,* 492 U.S. at 319, 109 S.Ct. at 2947 (quotation marks omitted).

By contrast, the Supreme Court has held that a defendant has no constitutional right to present evidence of his innocence at sentencing because it sheds no light on his character, record, or the "*manner* in which he committed the crime for which he has been convicted." *Oregon v. Guzek,* 546 U.S. 517, 523, 126 S.Ct. 1226, 1230–31, 163 L.Ed.2d 1112 (2006). For similar reasons, some of our sister circuits have held that evidence of the impact that a defendant's execution will have on his family or friends, as well as evidence about his family's love for him, is not mitigating circumstance evidence because it does not reflect on the defendant's background or character or the circumstances of the crime. *See United States v. Hager,* 721 F.3d 167, 194–97 (4th Cir.2013); *United States v. Snarr,* 704 F.3d 368, 401–02 (5th Cir.2013); *Stenson v. Lambert,* 504 F.3d 873, 891–92 (9th Cir.2007); *Coleman v. Saffle,* 869 F.2d 1377, 1393 (10th Cir.1989).

The fact that Hitchcock would not have received a death sentence if only he had accepted the plea offer has as little or nothing to do with his character, record, or the circumstances of the offense, and is as devoid of any moral significance as the fact that Gabrion would not have faced a death sentence if only he had murdered the victim in a different location. Just as "mitigation under the Eighth Amendment is not a matter of geographic coordinates," *Gabrion,* 719 F.3d at 522, neither is it a matter of a particular prosecutor's willingness to bargain.

  

The Supreme Court has never held that a prosecutor's offer to take the death penalty off the table in return for a guilty plea is a mitigating circumstance. And all but one of the courts to have decided the issue have held that failed plea negotiations and rejected plea offers are not mitigating circumstances because they have no bearing on a defendant's character or record or the circumstances of the offense. *See Owens v. Guida,* 549 F.3d 399, 419–20 (6th Cir.2008) (holding that evidence of failed plea negotiations is not relevant to mitigation because it has no bearing on the defendant's character, record, or the circumstances of his offense); *Bennett v. State,* 933 So.2d 930, 953 (Miss.2006) (holding that a capital defendant was not entitled to present evidence of a plea offer for a life sentence because it was "neither mitigation evidence of his character nor part of the circumstances of the crime for which [he] was convicted"); *Howard v. State,* 367 Ark. 18, 238 S.W.3d 24, 47 (2006) (same); *Neal v. Commonwealth,* 95 S.W.3d 843, 852–53 (Ky.2003) (holding that a plea offer does not constitute relevant mitigating evidence because it "is not an aspect of the character of the defendant, nor is it a circumstance of the offense, or a mitigating ***483** aspect of the record of the defendant"); *Wisehart v. State,* 693 N.E.2d 23, 64 (Ind.1998) (same); *Wiggins v. State,* 324 Md. 551, 597 A.2d 1359, 1370 (1991) (same), *reversed on other grounds by Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Ross v. State,* 717 P.2d 117, 122 (Okla.Cr.App.1986) (holding that a capital defendant had no right to present, as mitigating circumstance evidence, a negotiated plea agreement that was later withdrawn). *But see Scott v. Schriro,* 567 F.3d 573, 584 (9th Cir.2009) ( "The plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case.").

We agree with the seven courts (we make it eight) on the majority side of this issue and not with the Ninth Circuit, which is a minority of one. Evidence of a rejected plea offer for a lesser sentence, like evidence of innocence or evidence of the geographical location of the crime, is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of his crime. Such a plea offer does not by itself show that the prosecutor believed the defendant did not deserve the death penalty.[1] A plea offer of a non-capital sentence in a capital case may simply reflect a desire to conserve prosecutorial resources, to spare the victim's family from a lengthy and emotionally draining trial, to spare them the possibility of protracted appeal and post-conviction proceedings (spanning in this case more than three decades), or to avoid any possibility, however slight, of an acquittal at trial.

Even if one could somehow infer from a plea offer that a particular prosecutor's personal views were that the defendant did not deserve a death sentence as much as other murderers did, or even at all, that personal belief would not be admissible or relevant evidence. We have held that it is misconduct for a prosecutor to tell the jury that he personally believes the defendant deserves a death sentence. *See Brooks v. Kemp,* 762 F.2d 1383, 1410 (11th Cir.1985) (en banc) (holding it improper to even imply "to the jury that the prosecutor's office had already made the careful judgment that this case, above most other murder cases, warranted the death penalty"), *vacated on other grounds,*

  

478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated,* 809 F.2d 700 (11th Cir.1987) (en banc); *Tucker v. Kemp,* 762 F.2d 1496, 1505 (11th Cir.1985) (en banc) (holding that a prosecutor's "statement [to the capital sentencing jury], invoking the expertise of the prosecutor to suggest the special seriousness of the crime, was improper"); ***484** *see also Drake v. Kemp,* 762 F.2d 1449, 1459–60 (11th Cir.1985) ("An attorney's personal opinion is irrelevant to the task of a sentencing jury."). By the same token, a single prosecutor's personal belief that the defendant may not deserve the death penalty as much as some other murderers, or at all, should not be put before the jury. It is just as irrelevant as a prosecutor's personal opinion running the other way.

To the extent Hitchcock's argument is that his rejection of the plea offer is relevant to the question of whether he is innocent of the crime because it shows that he was willing to face death rather than admit guilt, the Supreme Court has expressly rejected the notion that evidence of a defendant's innocence, or of residual doubt about his guilt, is constitutionally relevant at sentencing. *See Guzek,* 546 U.S. at 523, 126 S.Ct. at 1230–31; *Franklin,* 487 U.S. at 174, 108 S.Ct. at 2327 (plurality opinion).

For what it is worth, we also note that a constitutional rule requiring the admission of rejected plea offers as mitigating evidence in capital cases could have the pernicious effect of discouraging prosecutors from extending plea offers in the first place, lest those offers come back to haunt them at sentencing. *See Wright v. Bell,* 619 F.3d 586, 600 (6th Cir.2010) ("Allowing a defendant to use plea negotiations in mitigation would clearly discourage plea negotiations in capital cases as prosecutors would correctly fear that during the second stage proceedings, they would be arguing against themselves.") (quotation omitted). That would be in no one's best interest.[2]

For these reasons, we hold that the Constitution does not mandate the admission of rejected plea offers as relevant mitigating evidence at sentencing. As a result, whether the issue is reviewed *de novo* or under AEDPA's deferential standards, Hitchcock is not entitled to federal habeas relief on his Eighth Amendment claim. This is the same type of dual holding that the Supreme Court reached in *Knowles v. Mirzayance,* 556 U.S. 111, 114, 129 S.Ct. 1411, 1415, 173 L.Ed.2d 251 (2009) ("Whether reviewed under the standard of review set forth in § 2254(d)(1) or *de novo,* [the petitioner] failed to establish that his counsel's performance was ineffective."). *See also Berghuis v. Thompkins,* 560 U.S. 370, 390, 130 S.Ct. 2250, 2265, 176 L.Ed.2d 1098 (2010) ("[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review."); *Reese v. Sec'y, Fla. Dep't of Corr.,* 675 F.3d 1277, 1291 (11th Cir.2012) (explaining that, even when it is clear that AEDPA deference applies, we may affirm the denial of federal habeas relief based solely on *de novo* review); *Allen v. Sec'y, Fla. Dep't of Corr.,* 611 F.3d 740, 753 (11th Cir.2010) ("Alternatively, even if no deference were due the state collateral trial court's decision on the performance element, we would conclude on *de novo* review that [the petitioner] had failed to establish it."). These are our two alternative holdings on this issue.[3]

  

***485** B.

Hitchcock also contends that his lawyer during his latest resentencing proceeding was ineffective for failing to elicit testimony from defense expert Dr. Toomer about the applicability of the two statutory mental health mitigating factors, and for failing to seek a neuropsychological evaluation and present evidence of possible brain damage. A petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice—that counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984). Where, as here, a defendant challenges a death sentence, the prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069.

The Florida Supreme Court held that, even assuming deficient performance in counsel's failure to specifically ask Dr. Toomer whether either of the two statutory mental health mitigators applied, Hitchcock was not prejudiced "in light of the extensive mitigation that was presented [at resentencing] and the extremely weighty aggravators proven in this case." *Hitchcock,* 991 So.2d at 356–58. That conclusion is neither contrary to, nor an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). Counsel did have Dr. Toomer testify at the resentencing hearing that Hitchcock suffered ***486** from borderline personality disorder and that it would have affected him at the time of the crime by causing him to act impulsively. Based on Dr. Toomer's testimony, defense counsel argued in closing that Hitchcock was under the influence of extreme mental or emotional disturbance at the time of the offense, one of the statutory mitigating circumstances. The trial court found as non-statutory mitigating circumstances that Hitchcock was under the influence of lifelong personality difficulties at the time of the murder and that the murder was the result of an unplanned, impulsive act. There were four statutory aggravating circumstances, and Hitchcock was convicted of raping and murdering his brother's thirteen-year-old stepdaughter. Given those facts and circumstances, it was not unreasonable for the Florida Supreme Court to conclude there is no reasonable probability of a different result had counsel asked Dr. Toomer to state his ultimate opinion about whether the two statutory mitigating circumstances fit. We cannot say that no fairminded jurist could agree with that conclusion. *See Holsey,* 694 F.3d at 1257.

As to the second of Hitchcock's ineffective assistance claims, the Florida Supreme Court found that he had failed to establish either deficient performance or prejudice in regard to counsel's failure to have Hitchcock examined by a neuropsychologist for indications of brain damage. *Hitchcock,* 991 So.2d at 360. Because

  

the Florida Supreme Court's finding of no prejudice was not unreasonable, we need not address the question of deficient performance. *See Windom v. Sec'y, Dep't of Corr.,* 578 F.3d 1227, 1248 (11th Cir.2009) ("Because the failure to demonstrate either deficient performance or prejudice is dispositive ..., there is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one.") (quotation marks and ellipsis omitted). We agree with the Florida Supreme Court, as well as the district court, that Hitchcock's evidence that he suffered from brain damage at the time of the murder was speculative at best and significantly undermined by the testimony that he was of normal intelligence, did not suffer from a major mental illness, and during the decades he had been in prison had not manifested behavior indicative of brain damage. Given the significant aggravating circumstances involved in his offense and found by the trial court, we cannot say that no fairminded jurist could agree with the Florida Supreme Court's determination that there is no reasonable likelihood of a lesser sentence had counsel obtained and presented the available evidence of brain damage.

III.

For these reasons, we affirm the district court's denial of Hitchcock's § 2254 petition for a writ of habeas corpus.

**AFFIRMED.**

WILSON, Circuit Judge, concurring in judgment:

With respect to Hitchcock's Eighth Amendment claim, I agree that the trial court did not violate clearly established federal law when it rejected this evidence as irrelevant to mitigation in these circumstances. However, I write separately to emphasize that under current Supreme Court precedent, contrary to the Majority's implication, such evidence is not per se irrelevant, and the Florida Supreme Court would not necessarily have erred had it found the evidence relevant under that precedent. Our holding today should not be taken to suggest that state courts may forego either a standard state-law relevance analysis or an analysis under *Lockett* ***487** simply because the evidence relates to plea negotiations. Further, the Majority's de novo review of the relevance of the evidence in this case is unnecessary to our holding.

Hitchcock's strongest argument is that the plea negotiations are relevant mitigation evidence because the fact that an offer was made implies that the prosecutor did not initially believe Hitchcock deserved to die, from which a jury could draw a variety of inferences about Hitchcock, the circumstances of his offense, and whether he deserves a penalty less than death. Hitchcock insists that the state cannot bar relevant mitigating evidence from being considered during the penalty phase as a matter of federal law. The Supreme Court has emphasized, including in precedent from this case, the need to admit relevant mitigating evidence into penalty proceedings in capital cases. *See Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978) (holding that the Eighth and Fourteenth

  

Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis omitted)); *Eddings v. Oklahoma,* 455 U.S. 104, 113–14, 102 S.Ct. 869, 876–77, 71 L.Ed.2d 1 (1982) (finding that the trial judge's refusal to consider evidence about the defendant's troubled childhood, particularly because he committed the crime at age sixteen, violated the rule articulated in *Lockett* because a sentencer cannot refuse to consider relevant mitigating evidence); *Dugger,* 481 U.S. at 399, 107 S.Ct. at 1824 (holding that failure to consider nonstatutory mitigating circumstances was reversible error because a sentencer cannot be precluded from considering relevant mitigating evidence). Indeed, the Supreme Court has demonstrated willingness to reverse a circuit court for unnecessarily limiting mitigation evidence in a capital case. *See Tennard v. Dretke,* 542 U.S. 274, 287, 124 S.Ct. 2562, 2571, 159 L.Ed.2d 384 (2004) (finding the Fifth Circuit's relevance test was too restrictive because "the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death" (citation omitted)).

The Supreme Court's emphasis on considering all relevant evidence as a matter of federal, constitutional law is an additional protection requiring states to be at least as generous in admitting mitigation evidence relating to a defendant's character, the record, and any of the circumstances of the offense as they would be in admitting mitigation evidence under their own rules. A rule that something is per se irrelevant—based in part on the fact that we have never deemed it relevant before—risks sending a signal to state courts that consideration of the evidence is prohibited.[1] We clearly have no authority to make such a prohibition under state law, and we ***488** also lack that authority under federal law, as the rule is unsupported by Supreme Court precedent. Moreover, it turns the traditional concepts of relevance and admissibility on their heads by assuming that if we have not deemed a specific type of evidence relevant and admissible, it is not. The assumption should be that, as with any piece of evidence, the bar for relevance is low, and in mitigation in a capital sentence, it is lower still. *See Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

Therefore, while prior plea negotiations may not bear directly on a defendant's character, criminal record, or the circumstances of his offense, they may support inferences about one or more of those factors. Indeed, the Ninth Circuit held, in a capital case, that a "plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." *Scott v. Schriro,* 567 F.3d 573, 584 (9th Cir.2009) (per curiam) (finding that evidence of a prosecutor's plea offer could be introduced during sentencing as mitigation).[2] Further, even if the Majority is correct about the irrelevance of plea negotiations in this case, such negotiations may be relevant for a host of other reasons that should be evaluated as they arise.[3] Contrary to the Majority's assertion, such evidence is not analogous either to

  

evidence that, had a defendant's crime occurred a few hundred feet away, he would not have been charged with a capital offense, *see United States v. Gabrion,* 719 F.3d 511, 521 (6th Cir.2013) (en banc), or to evidence of the impact that a defendant's execution will have on his family members or friends, *see United States v. Hager,* 721 F.3d 167, 194–97 (4th Cir.2013). The former is merely a jurisdictional fact, and the latter does not relate to any party involved in the capital proceeding. By contrast, plea negotiations, at the very least, have the potential to be highly correlated to the nature of the crime or the defendant.

Further, the Majority's concern that allowing evidence of plea bargain offers at sentencing would discourage plea offers is outside the scope of our analysis. Given that a negotiated plea bargain saves a state from preparing for and trying a case entirely, it stretches logic to worry that prosecutors would stop offering plea bargains because, when such offers are denied, they may be admissible evidence in a subsequent sentencing. At worst, the evidence ***489** will cause the jury to recommend the very sentence that the prosecutor initially offered. In any event, it is unclear what authority permits us to factor such policy concerns into our evaluation of whether a piece of evidence is relevant.[4] As the Majority concedes, it is not suggesting that the potentially "pernicious effect of discouraging prosecutors from extending plea offers" can justify excluding otherwise relevant mitigation evidence. Further, the Majority's insistence that a prior plea offer could simply reflect the desire to conserve prosecutorial resources or avoid the possibility of acquittal does not support its conclusion that such evidence is irrelevant. Instead, these are merely the points the government would likely offer to rebut a defendant's claim that the plea negotiations support an inference that the defendant deserves a sentence less than death. As with any evidence, the fact that competing inferences can be drawn does not render the evidence irrelevant.

Our decision is necessarily limited to whether or not the Florida Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[5] 28 U.S.C. § 2254(d)(1). We agree that it was not, and that conclusion alone resolves this case. Accordingly, I disagree with the Majority that this case calls for a "dual holding" regarding how this evidence would be treated under de novo review, and to the extent we decide this case on a de novo basis, we are adding dicta.

The Majority suggests that we have the authority to announce a dual holding—one under the applicable standard of review, and one under a clearly inapplicable standard of review. As a logical matter, it is of course true that "a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review." *Berghuis v. Thompkins,* 560 U.S. 370, 390, 130 S.Ct. 2250, 2265, 176 L.Ed.2d 1098 (2010). This fact makes it more efficient and convenient in some cases to decide a case under both AEDPA's deferential standard and a de novo standard to avoid the potentially more difficult question of which standard of review is proper. In these cases, a dual holding makes it unnecessary to resolve an otherwise essential issue in the case. This was the situation in *Knowles v.*

  

*Mirzayance,* where the Court articulated that habeas relief would be denied under either a de novo or deferential standard of review. 556 U.S. 111, 121 n. 2, 129 S.Ct. 1411, 1418 n. 2, 173 L.Ed.2d 251 (noting that the applicable standard of review was disputed); *see also Berghuis,* 560 U.S. at 390, 130 S.Ct. at 2265 ("[W]e need not determine whether AEDPA's deferential standard of review ... applies in this situation." (citation omitted)).

Where a dual holding does not obviate the need to answer an otherwise essential question to the case, however, the de novo ***490** aspect is entirely unnecessary to the resolution of the case, and is therefore by definition dicta. *See* Black's Law Dictionary (9th ed.2009) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"). Here, there is no doubt that AEDPA's deferential standard of review resolves this case, so there is no need to resort to speculation about what we might do under a different standard of review. Hence, the invitation in *Berghuis* to "engag[e] in de novo review when it is *unclear* whether AEDPA deference applies." 560 U.S. at 390, 130 S.Ct. at 2265 (emphasis added). Further, the Supreme Court emphasizes the role of judicial restraint in deciding AEDPA cases. *See, e.g., Tyler v. Cain,* 533 U.S. 656, 668, 121 S.Ct. 2478, 2485, 150 L.Ed.2d 632 (2001) (stating that the Supreme Court "cannot" decide a question of retroactivity where, in light of AEDPA's statutory constraints on habeas review, the decision would not help the defendant and declining to address the question because any statement would be "dictum").[6]

Of course, even where it is clear that AEDPA deference applies, we may add dicta suggesting how we would decide the case were we to address it de novo. So, the fact that "we have employed this approach even when it was clear that the deference afforded by [AEDPA] applied," *Reese v. Sec'y, Fla. Dep't of Corr.,* 675 F.3d 1277, 1291 (11th Cir.2012), should not be surprising. In doing so, however, we merely speculate on how we might decide future cases; we do not set precedent. To the extent *Reese* could be read to suggest that both aspects of a court's dual holding set binding precedent, that suggestion is itself dicta. In *Reese,* just as in this case, the only necessary holding was that "the Supreme Court of Florida did not unreasonably apply any clearly established federal rule when it rejected" the defendant's claim. *Id.* at 1287; *see also id.* at 1293–94 (Martin, J., concurring) ("This is not a case where it is unclear whether AEDPA deference applies.... Thus, de novo review is not called for by AEDPA, and it is not necessary for us to affirm...." (internal quotation marks omitted)).

Accordingly, the Majority's elaboration about how it would have treated this evidence were it to have de novo review is dicta, to which I would add that plea negotiations may be relevant under clearly established precedent in two ways—either if state rules deem them relevant or if, in a different situation, such evidence bears more clearly on a relevant mitigation factor. *See, e.g., Guida,* 549 F.3d at 403 (Merritt, J., dissenting).

**All Citations**

745 F.3d 476, 24 Fla. L. Weekly Fed. C 1102

  

## Footnotes

1 The concurring opinion cautions against adopting a per se rule that prior plea negotiations are irrelevant for sentencing purposes for fear of "sending a signal to state courts that consideration of the evidence is prohibited." We wholeheartedly agree that we have no authority to decree what evidence state courts may or may not consider at the sentencing phase of a capital trial. But, contrary to the concurrence's suggestion, we neither hold nor imply that the Constitution forbids states from allowing defendants to introduce evidence of plea offers at sentencing. We hold only that the Constitution does not require states to do so.

The concurrence also proclaims that our holding "turns the traditional concepts of relevance and admissibility on their heads by assuming that if we have not deemed a specific type of evidence relevant and admissible, it is not." Our conclusion that the Eighth Amendment does not mandate the admission and consideration of rejected plea offers as relevant mitigating circumstances is not based on the fact that neither we nor the Supreme Court has ever deemed them relevant and admissible. It is based on the fact that rejected plea offers have no bearing on a defendant's character, background, or the circumstances of the offense, which means that the Constitution does not compel their admission at sentencing.

2 We are not, as the concurrence implies, deciding the question of constitutional relevance based on the potentially adverse consequences of permitting evidence of rejected plea offers in the penalty phase of a capital trial. Instead, having concluded that rejected plea offers are not constitutionally relevant under the standards crafted by the Supreme Court, we are simply noting (as we say "For what it is worth ...") that the admission of rejected plea offers could discourage prosecutors from extending plea offers in the first place.

3 The concurring opinion insists that our holding on the merits of this issue is dicta insofar as it goes beyond the question of what the result should be applying AEDPA deference. That opinion's theory, with which we disagree, is that because we reach the same result with deference that we have reached without deference, one of our conclusions should not count, and the one that should not count is the one the author of the concurring opinion prefers not to count. But those who disagree with a majority opinion's alternative holdings do not get to pick the one that counts. It could be said with as much logical force that if one of our two conclusions on this issue is dicta, it is the one that deference applies and the result to be reached when deference is applied. The concurring opinion fails to explain why under its theory of necessity our decision on the merits without deference does not, instead, make the fallback holding on the result applying AEDPA deference unnecessary and therefore dicta.

The concurring opinion is wrong for another reason. It ignores well-established law that an alternative holding is not dicta but instead is binding precedent. *See, e.g., Massachusetts v. United States,* 333 U.S. 611, 623, 68 S.Ct. 747, 754, 92 L.Ed. 968 (1948) (explaining that where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both"); *Richmond Screw Anchor Co. v. United States,* 275 U.S. 331, 340, 48 S.Ct. 194, 196, 72 L.Ed. 303 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."); *United States v. Title Ins. & Trust Co.,* 265 U.S. 472, 486, 44 S.Ct. 621, 623, 68 L.Ed. 1110 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.") (quotation marks omitted); *Bravo v. United States,* 532 F.3d 1154, 1162 (11th Cir.2008) (explaining that an "alternative holding counts because in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings"); *Johnson v. DeSoto Cnty. Bd. of Comm'rs,* 72 F.3d 1556, 1562 (11th Cir.1996) ("[W]e are bound by alternative holdings."); *McLellan v. Miss. Power & Light Co.,* 545 F.2d 919, 925 n. 21 (5th Cir.1977) (en banc) ("It has long been settled that all alternative rationales for a given result have precedential value."). The concurring opinion flies in the face of all of that precedent.

1 In analyzing Hitchcock's claim the second time, the Florida Supreme Court concluded that testimony about the plea offer was irrelevant because it had no bearing on Hitchcock's "character or prior record or to the circumstances of the crime." *Hitchcock v. State,* 578 So.2d 685, 690 (Fla.1990) (per curiam). While we have to assume the Florida Supreme Court found this irrelevant under Florida law before turning to an analysis of *Lockett,* we note that the court cites only the three factors enumerated in *Lockett* which are designed to provide additional, federal protection. *See Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964–65. The fact that the Florida Supreme Court relied on *Lockett* demonstrates how dangerous it could be

  

to announce a new rule holding this category of evidence per se irrelevant because states look to federal law in death sentencing as a guide.

2 While the Majority emphasizes that it is "on the majority side of this issue and not with the Ninth Circuit," we have not avoided deciding cases contrary to the majority of our sister circuits that have decided an issue. *See, e.g., Powell v. Barrett,* 541 F.3d 1298, 1309–10 (11th Cir.2008) (en banc) (Carnes, J.) (noting that in evaluating the constitutionality of strip searches, several other circuits distinguish between whether the defendant is arrested on a felony or a misdemeanor charge, but concluding that "[t]hose decisions are wrong"). Moreover, while the Majority would like to create a hard and fast rule that plea negotiation evidence is per se inadmissible, I am merely unwilling to foreclose the possibility that such evidence could be relevant in some cases.

3 For example, the district court noted the case of *Owens v. Guida,* 549 F.3d 399, 402, 419 (6th Cir.2008). In *Guida,* the prosecutor offered Owens and the hitman she hired to kill her husband a life sentence in return for a guilty plea. Owens accepted, but the hitman refused, and thus the two defendants were tried jointly for first degree murder. 549 F.3d at 403. In closing, the prosecutor argued that Owens deserved the death penalty because she did not acknowledge or repent her crime. *Id.* at 430 (Merritt, J., dissenting). The dissent argued strenuously that, in this case, the plea negotiations were relevant mitigating evidence. *Id.* at 431 (Merritt, J., dissenting).

4 In *Wright v. Bell,* cited by the Majority, the Sixth Circuit reaffirmed its holding in *Owens* that the United States Constitution does not require the admission of failed plea negotiations as relevant mitigation evidence. 619 F.3d 586, 600 (6th Cir.2010). It posits that consideration of the strong policies in favor of plea bargains have motivated such decisions.

5 It appears that the first time the Florida Supreme Court was presented with Hitchcock's claim, it construed it as a vindictive prosecution claim and concluded that there was no evidence that the judge imposed the death penalty because Hitchcock did not agree to take a guilty plea. *Hitchcock,* 413 So.2d at 746. The second time it concluded that the testimony about the plea offer was irrelevant because it had no bearing on Hitchcock's character or circumstances of the crime. *Hitchcock,* 578 So.2d at 690–91.

6 The Majority claims that calling its alternative holding dicta ignores well-established law that an alternative holding is binding precedent. But, we have said that "judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced." *Pretka v. Kolter City Plaza II, Inc.,* 608 F.3d 744, 762 (11th Cir.2010) (Carnes, J.) (internal quotation marks omitted).

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**IN RE JAMES E. HITCHCOCK, PETITIONER**,

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**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix B:** Order of the United States Court of Appeals for the Eleventh Circuit, denying Application for Leave to File a Second or Successive Habeas Corpus Petition 28 U.S.C. §2244(b) by a Prisoner in State Custody.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 08-15867-P

IN RE: JAMES E. HITCHCOCK,

Petitioner.

Application for Leave to File a Second or Successive
Habeas Corpus Petition, 28 U.S.C. § 2244(b)

Before CARNES, HULL and WILSON, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), James E. Hitchcock has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application

satisfies the requirements of this subsection." Id. § 2244(b)(3)(C).

Because he previously filed a federal habeas petition attacking both his sentence and conviction, Hitchcock must receive our permission prior to filing a § 2254 petition challenging his conviction.[1] See 28 U.S.C. § 2244(b)(3)(A); see also In re Medina, 109 F.3d 1556, 1561-63 (11th Cir. 1997) (holding that the Antiterrorism and Effective Death Penalty Act applies to all petitions filed after April 24, 1996); In re Green, 215 F.3d 1195, 1996 (11th Cir. 2000) (holding "[b]ecause [the defendant] attacks the constitutionality of his re-sentencing proceeding only, and not the validity of his conviction, . . . [the] § 2255 motion is not 'second or successive'").

Hitchcock seeks our permission to file a second or successive § 2254 petition to challenge his conviction on the four following grounds.

First, Hitchcock argues that his counsel was ineffective by failing to adequately investigate, prepare and question witnesses under the standard announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Hitchcock states that this claim does not rely on a new rule of law, and therefore, he proceeds on newly discovered evidence grounds.

Second, Hitchcock contends that Florida violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by denying DNA testing and other forensic testing of evidence in 2004. He forwards this claim on the theory that the development of DNA testing constitutes newly discovered evidence.

Third, Hitchcock maintains that, in light of newly discovered confessions of the actual perpetrator of the murder, Florida violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by convicting him when he is actually innocent. He argues that the confession

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[1] This order does not address the timeliness of any of Hitchcock's proposed claims, whether he may be entitled to equitable tolling of AEDPA's one-year grace period for defendants convicted prior to its enactment where extraordinary circumstances precluded filing, or whether any other claims, not raised in the present application, could be deemed successive.

constitute newly discovered evidence.

Lastly, Hitchcock argues that Florida violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by convicting him based on the inaccurate and false testimony of an expert in hair analysis. He contends that the recent revelation of the expert's deficiencies constitutes newly discovered evidence.

Hitchcock's first claim is without merit because his trial counsel's performance was known at the trial of trial and, thus, it cannot constitute newly discovered evidence. Moreover, we previously judged trial counsel's performance under the Strickland standard as part of our review of Hitchcock's first § 2254 petition. See Hitchcock v. Wainwright, 745 F.2d 1332, 1338 (11th Cir. 1984), superceded in part by, 770 F.2d 1514, 1518 (11th Cir. 1985) (en banc), vacated on other grounds, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (relating to sentencing issues only).

With respect to the availability of DNA testing, Hitchcock's second claim is also without merit. The results of DNA testing would not constitute newly discovered evidence of Hitchcock's innocence because: (1) Hitchcock admits to sexual intercourse with the victim immediately prior to her death, which means that DNA testing of the semen would match his DNA and would not exclude him as the perpetrator; and (2) DNA matching of hair samples to the alleged perpetrator would not exclude Hitchcock as the murderer in light of Hitchcock's presence and confession and the alleged perpetrator's shared residence with the victim. Therefore, his second claim fails to establish a prima facie case of clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense based on newly discovered evidence. See 28 U.S.C. § 2244(b)(2)(B), (3)(C). Moreover, we have held that in circumstances like these a defendant does not have a constitutional due process right to DNA testing of evidence which becomes available after conviction. Grayson v. King, 460 F.3d 1328,

1339 (11th Cir. 2006), cert. denied, 127 S.Ct. 1005 (2007).

With regard to the confessions to others by the alleged true perpetrator, Hitchcock did not submit statements or affidavits from the two people in support of his application. Further, at trial, Hitchcock testified to the alleged perpetrator's commission of the crime. In light of the other evidence of Hitchcock's guilt that was presented at trial and the jury's rejection of evidence that the alleged perpetrator committed the murder, Hitchcock's third claim fails to establish a prima facie case of clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offense in light of the newly discovered evidence. See 28 U.S.C. § 2244(b)(2)(B), (3)(C); see also In re Diaz, 471 F.3d 1252, 1263-64 (11th Cir. 2006) (rejecting as newly discovered evidence affidavits that were consistent with testimony presented at trial)

Hitchcock's claim related to the hair analysis expert also fails. Because the hair sample evidence and testimony appears to have been cumulative, as opposed to determinative of the outcome of his case, Hitchcock's fourth claim fails to establish a prima facie case of showing, by clear and convincing evidence, that, but for the constitutional error, no reasonable factfinder would have found him guilty of the underlying offense in light of this evidence, either. See 28 U.S.C. § 2244(b)(2)(B), (3)(C).

In summary, to the extent Hitchcock requests leave to file a successive habeas petition based upon a new rule of constitutional law, he cannot succeed because his cited cases are not new, as they pre-date his original habeas petition, or because we has previously considered the predicate facts under the standards announced in the Supreme Court cases. See 28 U.S.C. § 2244(b)(2)(A). To the extent Hitchcock bases his grounds on newly discovered evidence, he fails to identify new evidence – evidence that was not presented at his trial or known at the time of his trial – that would preclude a reasonable factfinder from convicting him, and, thus, he has failed to meet his burden to show that

"clear and convincing evidence" precludes his conviction. 28 U.S.C. § 2244(b)(2)(B). Accordingly, we deny Hitchcock's application for leave to file a second or successive petition.

**APPLICATION DENIED.**

A True Copy - Attested:
Clerk, U.S. Court of Appeals,
Eleventh Circuit
By: _____
Deputy Clerk
Atlanta, Georgia

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**IN RE JAMES E. HITCHCOCK, PETITIONER,**

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**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix C:** Order denying Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-15867-P



IN RE:

JAMES E. HITCHCOCK,

Petitioner.

Application for Leave to File a Second or Successive
Habeas Corpus Petition, 28 U.S.C. § 2244(b)

BEFORE: CARNES, HULL and WILSON, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of this Court's denial of the application for leave to file a second or successive habeas corpus petition is DENIED.

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

**IN RE JAMES E. HITCHCOCK, PETITIONER**,

---

**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix D:** Denial of Application for a Certificate of Appealability filed in the United States District Court, Middle District of Florida (expanded).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES HITCHCOCK,

Petitioner,

v. CASE NO. 6:08-cv-1719-Orl-31KRS

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

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**ORDER**

This case is before the Court on Petitioner's Application for Certificate of Appealability and Memorandum of Law (Doc. No. 33). This Court granted Petitioner a certificate of appealability as to a portion of ground three (Doc. No. 27). Petitioner seeks a certificate of appealability on the remaining grounds of his amended habeas petition and his guilt phase claims that were dismissed by this Court as successive.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability will be granted only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) or, that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). While issuance of a certificate of appealability does not require a showing that the

appeal will succeed, more than the absence of frivolity or the presence of good faith is required for Petitioner to clear this hurdle. *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

After careful consideration, this Court finds that Petitioner has not made the requisite showing regarding the claims set forth in his application. Accordingly, the application for a certificate of appealability (Doc. No. 33) is **DENIED**.

**DONE AND ORDERED** in Orlando, Florida this 3rd day of December, 2012.

**GREGORY A. PRESNELL**
**UNITED STATES DISTRICT JUDGE**

Copies to:
OrlP-3 12/3
Counsel of Record

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**IN RE JAMES E. HITCHCOCK, PETITIONER**,

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**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix E:** Denial, in part, and grant, in part, Application for a Certificate of Appealability filed in the United States Court of Appeals for the Eleventh Circuit (expanded).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 12-16158-P

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JAMES HITCHCOCK,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents - Appellees.

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Appeal from the United States District Court
for the Middle District of Florida

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ORDER:

Appellant James Hitchcock's Motion to Expand Certificate of Appealability is hereby GRANTED in part and DENIED in part. The court GRANTS a certificate of appealability (COA) on the following issue:

> Whether trial counsel rendered ineffective assistance of counsel at Hitchcock's 1996 penalty/resentencing phase by failing to: (1) present evidence of statutory mental health mitigation; and (2) investigate, seek neurological testing for, and present evidence of brain damage.

This court will issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); *see Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

First, Hitchcock seeks an expansion of the district court's COA to address whether the guilt phase claims raised in his unamended habeas petition, filed on October 6, 2008, were properly dismissed as second and successive. Phrased another way, Hitchcock questions whether he needed permission from this court in order to proceed on his guilt phase claims, which he contends were not final until he was resentenced to death in 1996. But we specifically addressed the second or successive nature of Hitchcock's guilt phase claims—identical to the ones raised here—when we denied his Application for Leave to File a Second or Successive Habeas Petition on November 5, 2008. Accordingly, his motion is denied as to these claims.

Second, Hitchcock seeks an expansion of the COA to include all of the penalty phase claims raised in his amended habeas petition.[1] We conclude that reasonable jurists could disagree as to the proper resolution of Hitchcock's claim that trial counsel at his 1996 penalty/resentencing phase failed to present evidence of statutory mental health mitigation, as well as investigate, seek neurological testing for, and present evidence of brain damage. *See Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515 (2000) (explaining counsel's "obligation to conduct a thorough investigation of the defendant's background"); *see also Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 1052, 2066 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

Hitchcock's Motion for Certificate of Appealability is therefore GRANTED as to the issue referenced above, and in all other respects DENIED.

UNITED STATES CIRCUIT JUDGE

[1] We note that the district court correctly concluded that the portion of Hitchcock's habeas petition asserting claims arising from his 1996 penalty phase was not second or successive. *See Magwood v. Patterson*, — U.S. —, 130 S. Ct. 2788, 2792 (2010). The *Magwood* Court held that when a "habeas application challenges a new judgment for the first time, it is not 'second or successive' under § 2244(b)." *Id.* (footnote omitted). The Supreme Court concluded that "the phrase 'second or successive' must be interpreted with respect to the judgment challenged," such that when "there is a 'new judgment intervening between two habeas petitions,' [a petition] challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 2797, 2802 (citation omitted)

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**IN RE JAMES E. HITCHCOCK, PETITIONER**,

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**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix F:** Transcript of State Evidentiary Hearing April 8, 2003 Volume VI.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 48-1976-CF-001942-O
SUPREME COURT NO: SC03-2203

INFORMATION FOR:
FIRST DEGREE MURDER

STATE OF FLORIDA,

PLAINTIFF

-vs-

JAMES E. HITCHCOCK,

DEFENDANT
/

# TRANSCRIPT OF RECORD
VOLUME 6

HONORABLE JUDGE WHITEHEAD

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT

CRIMINAL JUSTICE DIVISION,
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

PLAINTIFF,

VS. CASE NO: 48-76-CF-1942-0/A

JAMES ERNEST HITCHCOCK,

DEFENDANT. /



DAY 2 VOL II

EVIDENTIARY HEARING PROCEEDINGS

BEFORE THE HONORABLE

REGINALD K. WHITEHEAD

APRIL 8, 2003

ORANGE COUNTY COURTHOUSE
ORLANDO, FLORIDA 32801

A P P E A R A N C E S:

CHRISTOPHER LERNER, ATTORNEY-AT-LAW

KENNETH NUNNELLEY, ATTORNEY-AT-LAW
415 NORTH ORANGE AVENUE
ORLANDO, FLORIDA
APPEARING ON BEHALF OF THE PLAINTIFF

JAMES DRISCOLL, ATTORNEY-AT-LAW

ERIC PICKARD, ATTORNEY-AT-LAW
COLLATERAL CRIMINAL DEFENSE
TAMPA, FLORIDA
APPEARING ON BEHALF OF THE DEFENDANT

LINDA A. TOMPKINS,
OFFICIAL COURT REPORTER
NINTH JUDICIAL CIRCUIT

(AT THIS TIME THE JUDGE ENTERS THE COURTROOM)

**THE CLERK:** SEVENTY SIX, CF, ONE NINE FOUR TWO, JAMES ERNEST HITCHCOCK.

**MR. DRISCOLL:** GOOD MORNING, YOUR HONOR.

**THE COURT:** YOU MAY PROCEED.

**MR. DRISCOLL:** DEFENSE WOULD CALL MARTHA GALLOWAY.

**THE COURT:** THESE WITNESSES WEREN'T HERE YESTERDAY?

**MR. DRISCOLL:** NO, THEY WEREN'T.

**THE COURT:** HAVE THEY BEEN INFORMED ABOUT THE RULE OF SEQUESTRATION?

**MR. DRISCOLL:** I BELIEVE I HAD MY INVESTIGATOR DO THAT. I CAN BRING THEM ALL IN.

**THE COURT:** I WANT TO MAKE SURE YOU DO IT SINCE YOUR AN OFFICER OF THE COURT. GO BACK AND EXPLAIN IT TO THEM. MAKE SURE THEY UNDERSTAND.

**MR. DRISCOLL:** I CALL MARTHA GALLOWAY.

AND FOR THE RECORD, I STEPPED OUT. ALL THE FAMILY MEMBERS WERE THERE AND I INSTRUCTED THEM ON THE RULE OF SEQUESTRATION AND THAT IT WOULD APPLY UNTIL ALL THE FAMILY IS RELEASED

AND UP UNTIL -- WELL, THIS WOULD BE THE LAST DAY WE COULD CALL ANY FAMILY MEMBERS.

MY INVESTIGATOR'S TAKING THEM BACK TOMORROW MORNING ANY WAY.

**THE COURT:** OKAY.

MARTHA GALLOWAY, SWORN

DIRECT EXAMINATION

BY MR. DRISCOLL:

**MR. LERNER:** SO I DON'T HAVE TO KEEP JUMPING UP, SLOWING THINGS DOWN, COULD I HAVE A CONTINUING OBJECTION TO ANY TESTIMONY FROM ANY OF THESE WITNESSES THAT RELATES TO THE BAD CONDUCT OF RICHARD HITCHCOCK OR TO THE ISSUE OF LINGERING REASONABLE DOUBT?

**THE COURT:** I NOTE YOUR STANDING OBJECTION.

**MR. LERNER:** THANK YOU, YOUR HONOR.

BY MR. DRISCOLL:

Q COULD YOU PLEASE STATE YOUR NAME FOR THE RECORD?

A MARTHA GALLOWAY.

Q AND MISS GALLOWAY, HOW ARE YOU RELATED TO JAMES HITCHCOCK?

A HIS SISTER.

Q AND COULD YOU TELL US WHO ELSE IS IN THE

FAMILY?

A THERE'S JAMES, MYSELF, ONE SISTER YOUNGER, BRENDA, ONE -- TWO OLDER. WANDA AND BETTY, RICHARD AND JAMES.

Q IS RICHARD DECEASED?

A YES.

Q AND WOULD YOU HAVE BEEN YOUNGER THAN RICHARD?

A YES.

Q AND HOW DID RICHARD VIEW THE YOUNGER FEMALE MEMBERS OF YOUR FAMILY?

A HE DOMINATED THEM.

Q DID HE ACT UPON THAT?

A YES, SIR, HE DID.

Q COULD YOU TELL US DURING THAT PERIOD OF TIME THIS TOOK PLACE?

A FROM THE TIME I WAS ABOUT EIGHT YEARS OLD UNTIL I WAS SEVENTEEN MY BROTHER WAS THE FIRST ONE TO TOUCH ME SEXUALLY.

Q WOULD THIS HAVE BEEN BEFORE -- BEFORE JAMES -- YOU CALL JAMES, CALL HIM ERNEY. IS THAT CORRECT?

A YES.

Q WOULD HAVE BEEN BEFORE ERNEY'S NINETEEN SEVENTY SEVEN TRIAL?

A YES. WAY BEFORE.

Q AND HOW OLD WAS HE WHEN HE STARTED MOLESTING YOU?

A I WAS EIGHT AND I CAN'T EXACTLY TELL YOU RICHARD'S AGE. I TRY TO FORGET HIM.

Q AND HOLD HOW LONG DID IT CONTINUE?

A UNTIL I WAS SEVENTEEN. THEN HE DIDN'T CARE ABOUT ME.

Q WOULD THESE, THE MOLESTATION, WAS IT EVER ACCOMPANIED BY VIOLENCE?

A WELL, I CARRIED BRUISES AROUND MY THROAT, ALL OVER MY BODY.

Q COULD YOU TELL US HOW -- EXAMPLE OF HOW THAT WAS CONNECTED?

A RICHARD WAS VERY BAD. I DON'T KNOW WHY IT WAS BUT I WAS ONE OF THE WORSE THAT HE PICKED ON. DIDN'T MATTER WHERE I WAS AT. IF NOBODY WAS AROUND RICHARD WOULD ATTACK ME. MY SISTER CAME IN ONE TIME AND HE THREW HER PLUMB THROUGH A WINDOW. SHE WAS TRYING TO GET HIM AWAY FROM ME.

Q WAS THIS AFTER RICHARD HAD BEGAN TO SEXUALLY MOLEST YOU?

A YES. IT WAS WHEN HE WAS TRYING TO DO IT THEN AND SHE WOULDN'T ALLOW IT.

Q OKAY. AND DID YOU EVER TRY TO RESIST

RICHARD?

A YES, SIR. THE REASON I ENDED UP WITH BRUISES AROUND MY THROAT AND ALL OVER MY BODY.

Q AND WHEN IT APPEARED -- WHEN IT WOULD HAVE APPEARED THAT THERE WOULD BE SOME DIFFICULTY WITH RICHARD HAVING SEX WITH YOU, HOW WOULD RICHARD REACT?

A HE ENJOINED IT.

Q WOULD HE BECOME VIOLENT?

A IT WOULDN'T PHASE RICHARD A BIT TO TAKE, JUST KNOCK ONE OF US PLUMB ACROSS THE ROOM. RICHARD WAS SO OBSESSED WITH SEX. HE HAD TWO LITTLE BLACK KIDS THAT LIVED ACROSS THE ROAD FROM US THAT ME AND BRENDA HAD TO STAND AND WATCH WHILE HE TRIED TO MAKE THEM HAVE SEX. AND THEY WERE LITTLE.

Q IF YOU DIDN'T WANT TO WATCH WHAT WOULD RICHARD DO?

A WE GOT A WHIPPING.

Q DID RICHARD EVER CHOKE YOU?

A YES.

Q WHAT WOULD BRING ABOUT THE CHOKING?

A THE ANSWER NO OR GET AWAY FROM ME.

Q OKAY. DID -- WHEN YOU WERE A YOUNG LADY PARTICULARLY WHEN YOU WERE SEVENTEEN, DID IT EVER APPEAR TO -- OR WOULD HAVE APPEARED TO RICHARD THAT

YOU MAY HAVE BEEN INTERESTED IN BOYS?

A THAT WASN'T ALLOWED. THAT MADE HIM REAL VIOLENT IF YOU MESSED WITH ANYBODY ELSE.

Q DID THERE EVER COME A POINT WHEN RICHARD WOULD HAVE BECOME JEALOUS OR BECOME ENRAGED OVER YOU BEING INTERESTED IN ANOTHER BOY OR ANOTHER BOY BEING INTERESTED, A BOY BEING INTERESTED IN YOU?

A YES, SIR, THERE WAS.

Q CAN YOU TELL US ABOUT THAT?

A I GOT A SWITCH USED ON MY THAT BROUGHT BLOOD TO MY LEGS.

Q WHAT BROUGHT THAT ABOUT?

A BECAUSE I WAS GOING TO DATE SOMEBODY.

Q OKAY. WOULD IT BE FAIR TO SAY THAT RICHARD WAS SEXUALLY POSSESSIVE OF YOU DURING YOUR FORMATIVE YEARS?

A WELL, WHEN YOU CAN SAY YOUR BROTHER'S FIRST ONE EVER TOUCHED YOU, I WOULD SAY THAT.

Q AT SOME POINT DID YOU LEAVE THE HOUSE AND BECOME MARRIED?

A YES.

Q CAN YOU TELL US WHO YOU MARRIED?

A CARROLL GALLOWAY.

Q HOW DID RICHARD REACT ABOUT THAT?

A HE DIDN'T LIKE IT.

Q AND DO YOU RECALL WHEN ERNEY WENT TO TRIAL IN NINETEEN SEVENTY SIX?

A YES.

Q AND DID YOU EVER HAVE ANY DISCUSSIONS WITH MR. CHARLES TABSCOTT CONCERNING ERNEY'S CASE?

A YES, I DID.

Q DID YOU TELL HIM, DID YOU TELL -- DID HE ASK YOU ABOUT THE DETAILS THAT WE GONE INTO TODAY?

A YES, HE DID AND I TOLD HIM.

Q DID YOU JUST TELL HIM THAT RICHARD SIMPLY HAD SEXUALLY ABUSED YOU OR DID YOU GO INTO WHY?

A I TOLD HIM THAT RICHARD WAS VERY VIOLENT. HE HAD ABUSED ME EVER SINCE I WAS A CHILD.

Q OKAY. DID YOU TELL ABOUT THE STUFF INVOLVING YOU, BEING RICHARD BECOMING JEALOUS OVER YOU WITH ANOTHER BOY OR ANYTHING SPECIFIC LIKE THAT?

A NO. I MAY NOT HAVE TOLD HIM THAT IN THAT MANNER.

Q WHEN YOU WENT TO TRIAL ON ERNEY'S CASE DO YOU THINK YOU WOULD HAVE BEEN ABLE TO TELL WHAT YOU KNEW ABOUT RICHARD?

**MR. LERNER:** I'M GOING TO IMPOSE AN OBJECTION JUST SIMPLY BECAUSE THERE'S BEEN SO MANY TRIALS THAT IT'S VAGUE AS TO WHICH TRIAL HE'S TALKING ABOUT.

**THE COURT:** I'LL SUSTAIN THE OBJECTION.

RECLARIFY IT.

BY MR. DRISCOLL:

Q BACK IN NINETEEN SEVENTY SIX, THE SEVENTY SEVEN TRIAL, WHAT DID MR. TABSCOTT TELL TO YOU ABOUT YOU PRESENTING TESTIMONY ABOUT RICHARD?

A HE SAID RICHARD WASN'T ON TRIAL THAT ERNEY WAS. WE DIDN'T NEED TO HEAR NOTHING ABOUT RICHARD. WE NEED TO KNOW ABOUT ERNEY THERE.

Q AND DID HE ASK ANY FURTHER QUESTIONS OR GO INTO ANY DETAIL ABOUT WHAT HAD HAPPENED TO YOU FROM RICHARD?

A NO, SIR. NO. HE DIDN'T CARE ABOUT THAT.

Q AT SOME POINT IN NINETEEN EIGHTY EIGHT DO YOU RECALL BEING CALLED BEFORE THE COURT AND OUTSIDE THE PRESENCE OF THE JURY TO GIVE A PROFFER?

A YES, I DO.

Q WERE YOU JUST ASKED SIMPLY WHAT HAD HAPPENED OR WERE YOU ALLOWED TO GO INTO ANY DETAIL ABOUT THAT?

A I WENT INTO A LITTLE BIT OF DETAIL. I EXPLAINED TO HIM HOW RICHARD HAD ABUSED ME, NOT TO THE EXTENT THEY REALLY NEEDED TO KNOW FOR THIS TRIAL.

Q WOULD IT BE FAIR TO SAY THIS WAS -- THAT

THE VIOLENCE AND THE SEXUAL ABUSE WAS CONNECTED WITH RICHARD'S JEALOUSY?

A PROBABLY.

Q WHAT ABOUT HIS POSSESSIVENESS?

A RICHARD WAS POSSESSIVE OVER KIDS, YOUNG GIRLS.

Q AND IF SOMETHING SEEMED TO AFFECT THAT POSSESSIVENESS HOW WOULD RICHARD REACT?

A VIOLENT.

**MR. DRISCOLL:** IF I COULD HAVE JUST A MOMENT?

NOTHING FURTHER AT THIS TIME.

CROSS EXAMINATION.

**THE COURT:** CROSS EXAMINATION?

CROSS EXAMINATION

BY MR. LERNER:

Q MISS GALLOWAY.

A YES.

Q GOOD MORNING.

A GOOD MORNING.

Q LET ME ASK YOU THIS: I BELIEVE YOU SAID THAT THIS ABUSE IN YOUR FAMILY OF YOU BY RICHARD EXTENDED FROM THE TIME YOU WERE EIGHT TO THE TIME YOU WERE SEVENTEEN?

A BASICALLY THEN.

Q WHAT YEAR WERE YOU SEVENTEEN?

A SIR, I WOULD HAVE TO COUNT BACK. I'M NOT GOOD WITH DATES. I TOLD YOU DOWN IN ARKANSAS I'M NOT GOOD WITH DATES.

Q WELL, REASON I'M ASKING, I'M NOT -- REASON -- I GUESS REASON --

A I WAS BORN IN FIFTY FOUR. COUNT IT UP FROM THERE. YOU WILL HAVE WHAT YEAR IT WAS.

Q FIFTY FOUR PLUS SEVENTEEN.

A YES.

Q WE'LL DO THE MATH LATER.

YOU DIDN'T HAVE MUCH CONTACT WITH RICHARD AFTER THAT, DID YOU?

A NO. NOT A LOT.

Q NOW, HAS ANYONE GIVEN YOU THE OPPORTUNITY TO ACTUALLY REVIEW A TRANSCRIPT OF YOUR TESTIMONY IN NINETEEN SEVENTY SEVEN?

A I'VE GOT A TRANSCRIPT OF IT.

Q OKAY.

A I KEPT MINE.

**MR. LERNER:** IF I CAN APPROACH THE WITNESS, YOUR HONOR.

Q COULD YOU JUST, WHEN IT SAYS IN THE TRANSCRIPT MARTHA HITCHCOCK OF THE NINETEEN SEVENTY SEVEN, THAT'S YOU, RIGHT?

A YES.

Q COULD YOU JUST REVIEW THE NEXT FEW PAGES?

A YES, I WILL.

Q JUST TAKE WHATEVER TIME YOU NEED TO DO THAT.

A ( WITNESS READING) YOU READ THIS TRANSCRIPT HERE YOU WILL KNOW I NEVER GOT TO SAY VERY MUCH. EVERYTHING WAS, OBJECTED TO.(WITNESS READING)

Q ARE YOU FINISHED READING?

A YES.

Q IT'S TRUE MR. TABSCOTT ASKED YOU ABOUT RICHARD BEING VIOLENT TOWARD YOU, DIDN'T HE?

A HE SURE DID.

Q HE ALSO ASKED QUESTIONS THAT YOU WOULD HAVE ANSWERED AND TOLD THE LISTENER ABOUT HIM HAVING THE SEXUAL ABUSE OF RICHARD OF YOU, DIDN'T HE?

A SAY IT AGAIN.

Q MR. TABSCOTT ASKED YOU ABOUT THAT, DIDN'T HE, ABOUT THE SEXUAL ABUSE?

**MR. DRISCOLL:** I WOULD JUST ASK --

A I DON'T SEE THAT IN HERE.

**MR. DRISCOLL:** I WOULD ASK IT BE MARKED, PAGE NUMBERS OF THE TRANSCRIPT.

**THE COURT:** YOU ASKING THAT HE INDICATE

WHICH PAGE HE'S ON?

**MR. DRISCOLL:** WHICH PAGE HE'S ON.

**MR. LERNER:** OKAY. YOUR HONOR, WHAT I DID WAS. I DO APOLOGIZE.

MISS -- MRS. GALLOWAY'S TESTIMONY, BACK THEN SHE WAS CALLED AS MARTHA HITCHCOCK. SHE SAID HE'S THE SAME PERSON. BEGINS ON PAGE SEVEN THIRTY FOUR AND CONTINUES ON THROUGH THE REST OF HER TESTIMONY. THOSE NEXT FEW PAGES.

AND FOR THE RECORD THIS IS THE SAME PASSAGE THAT I WAS ASKING MR. TABSCOTT TO LOOK AT YESTERDAY.

Q LET ME POINT THAT OUT TO YOU, IF I CAN, MRS. GALLOWAY. QUESTION ON PAGE SEVEN THIRTY SEVEN. LET ME DRAW YOUR ATTENTION TO THE LINE ON LINE TWENTY ONE ON THAT PAGE.

**QUESTION:** HAS RICHARD HITCHCOCK EVER MADE ANY TYPE OF ADVANCES TOWARD YOU PERSONALLY?

A AND MY ANSWER WAS, YES.

Q AND IF YOU HAD BEEN ALLOWED TO GO FORWARD YOU WOULD HAVE TOLD HIM ALL ABOUT THE SEXUAL ABUSE, CORRECT?

A YES.

Q SO IT'S CLEAR FROM THE RECORD, ISN'T IT, THAT MR. TABSCOTT DID ASK YOU QUESTIONS THAT WOULD

HAVE LED TO THAT IF YOU HAD BEEN ALLOWED TO ANSWER BY THE COURT?

A YES.

Q OKAY.

A BUT AS YOU SEE IT WAS OBJECTED TO.

Q OKAY. AND IF MY MATH IS CORRECT, IF YOU WERE BORN IN NINETEEN FIFTY FOUR AND YOU LEFT WHEN YOU WERE SEVENTEEN --

A I DIDN'T LEAVE WHEN I WAS SEVENTEEN.

Q PARDON?

A THAT'S WHEN CARL QUIT WHEN I WENT TO SCHOOL. I LEFT AT THIRTEEN TO GO TO REFORM SCHOOL TO GET AWAY FROM HIM.

Q WHEN ALL THIS STOPPED AT AGE SEVENTEEN THAT WOULD HAVE BEEN IN NINETEEN SEVENTY ONE?

A RIGHT.

Q THAT WOULD HAVE BEEN A FULL FIVE YEARS BEFORE THE EVENTS THAT LED TO THE TRIAL, CORRECT?

A TRUE.

Q OKAY. ONE LAST THING. YOU HAVE ALWAYS BEEN MOTIVATED BY YOUR FEELINGS AS A SISTER FOR THE DEFENDANT, CORRECT?

A NOT AS JUST SISTER. IT'S OUT OF FAIRNESS TO JAMES.

Q BUT YOU DO LOVE HIM AS YOUR BROTHER.

A YEAH, I LOVE HIM.

Q AND GREW UP IN THE SAME HOUSEHOLD WITH HIM?

A TILL I WAS THIRTEEN.

Q AND HE WAS ALWAYS A GOOD BROTHER TO YOU?

A YEAH.

Q LET ME JUST ASK YOU ONE MORE QUESTION. HOW LONG WERE YOU OUT OF THE HOUSEHOLD WHEN YOU WERE IN REFORM SCHOOL?

A SIX MONTHS.

Q AND I WENT UP TOOK ALL THOSE DEPOSITIONS IN A ROW, I MAY BE MIXING YOU UP WITH SOMEONE ELSE. WERE THE ANY OTHER SIGNIFICANT TIMES YOU WERE OUT OF THE HOUSEHOLD SUCH AS WHEN YOU WERE STAYING WITH YOUR GRANDMOTHER? ANYTHING OF THAT SORT?

A I NEVER STAYED WITH MY GRANDMOTHER.

Q OKAY. PROBABLY OTHER SISTER.

SO FROM THE TIME YOU WERE EIGHT UNTIL THE TIME YOU WERE SEVENTEEN YOU WERE PRETTY MUCH CONTINUOUSLY IN THE HOUSEHOLD EXCEPT WHEN YOU WENT TO REFORM SCHOOL?

A NO. I LEFT WHEN I WAS THIRTEEN, I WENT TO REFORM SCHOOL. I LEFT BECAUSE RICHARD RAPED ME.

Q OKAY?

A I WENT TO BLAUVILLE. I WENT TO WORK AT A

BAR TO GET OUT OF THE HOUSE. HIM AND MY MOTHER CAME OVER TO SEND ME TO REFORM SCHOOL OR COME BACK HOME. I CHOSE TO GO TO REFORM SCHOOL.

Q THE QUESTION I HAVE IS HOW LONG WERE YOU OUT OF THE HOUSEHOLD ALL TOGETHER INCLUDING LEAVING REFORM SCHOOL OR ANYTHING ELSE?

A WHEN I CAME BACK FROM REFORM SCHOOL I DIDN'T GO BACK HOME.

Q YOU BASICALLY WERE OUT OF THE HOUSEHOLD FROM AGE THIRTEEN ON?

A YES, SIR.

Q YOU WOULDN'T HAVE WENT BACK HOME.

I'M NOT MAKING ANY JUDGMENT CALL, MA'AM. I'M JUST TRYING TO GET THE FACTS.

WHERE DID YOU LIVE AFTER REFORM SCHOOL FINISHED?

A ANYWHERE I COULD TO STAY AWAY FROM HIM.

Q SO WOULD IT BE FAIR TO SAY THAT AFTER AGE THIRTEEN YOU HAD VERY LIMITED CONTACT WITH YOUR BROTHER RICHARD?

A IF I EVER HAD CONTACT WITH HIM IT WAS A MISTAKE.

Q OKAY. LET ME ASK YOU THIS: WHY DID YOU USE THE AGE SEVENTEEN BEFORE? WHAT'S SIGNIFICANT ABOUT SEVENTEEN?

A AGE SEVENTEEN HE PICKED ME UP WALKING ON THE ROAD. IT HAPPENED AGAIN.

Q BETWEEN AGE THIRTEEN AND AGE SEVENTEEN THERE WAS ONLY ONE MORE INCIDENT?

A YEAH, BECAUSE I STAYED AWAY FROM HIM.

Q OKAY.

**MR. LERNER:** NO FURTHER QUESTIONS.

THANK YOU.

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q CAN YOU TELL US WHEN AT SEVENTEEN THE LAST INCIDENT WAS?

A I WAS WALKING ON THE ROAD HOME GOING OUT TO ME SEE MY MAMA. HE STOPPED. I THOUGHT HELL, IT'S BEEN THIS LONG, MAYBE HE'S CHANGED. BUT HE HADN'T.

Q DID HE REACT ANY WORSE SINCE YOU HAD LEFT?

A THAT WAS ONE OF THE WORSE TIMES. I WAS ALMOST CHOKED TO DEATH.

Q THIS WAS AFTER YOU HAD BEEN AWAY FROM HIM FOR A WHILE. IS THAT CORRECT?

A YES.

Q AND WOULD THIS HAVE BEEN AFTER YOU HAD MET A MAN, GOTTEN MARRIED?

A YES.

Q AND WOULD THAT -- WOULD IT BE FAIR TO SAY THIS WAS THAT, THAT LAST ONE, RAPE AND VIOLENCE AT SEVENTEEN WAS THE WORSE?

A IT WAS THE WORSE.

**MR. DRISCOLL:** NOTHING FURTHER.

**THE COURT:** YOU HAVE ANY QUESTIONS?

RECROSS-EXAMINATION

BY MR. LERNER:

Q JUST THAT THIS DISCUSSION ABOUT HOW RICHARD REACTED TO YOU GOING OUT WITH BOYS OR ANY OF YOUR INTERESTS IN OTHER MALES, YOUR EXPERIENCE OF THAT WOULD BASICALLY HAVE ENDED AT AGE THIRTEEN, WOULDN'T IT.

A WELL IT DIDN'T CAUSE AT AGE SEVENTEEN HE STILL WAS MAD AT ME FOR MARRYING MY HUSBAND.

Q BECAUSE OF THIS OTHER, THIS ONE INCIDENT?

A WHAT ONE INCIDENT? WHICH ONE?

Q MET YOU ON THE ROAD AND --

A RIGHT.

Q -- RAPED YOU?

A YEAH.

Q BUT OTHER THAN THAT WHICH -- IT APPEARS YOU CAME IN CONTACT WITH HIM ACCIDENTALLY ON YOUR PART AT LEAST. YOU DIDN'T INTEND TO COME IN CONTACT WITH HIM, CORRECT?

A YES. I DID NOT INTEND TO COME IN CONTACT WITH HIM.

Q YOU STAYED AWAY FROM HIM. HAD NO CONTACT WITH HIM AFTER AGE THIRTEEN?

A ONE TIME I HAD CONTACT WITH HIM WHEN ME AND MY HUSBAND WENT TO FLORIDA. I WENT TO HIS AND JUDY'S HOME. I WAS IN THERE IN THEIR KITCHEN AND I CAN'T TELL YOU WHAT YEAR THIS IS. I'M NO GOOD WITH DATES. I WENT IN THEIR KITCHEN AND RICHARD COME IN THERE. I WAS COOKING SOMETHING ON JUDY'S STOVE. HE MADE A PASS TOWARD ME THEN AND I WENT BACK CARROLL AND WE LEFT.

Q THIS WOULD HAVE BEEN YEARS AFTER YOU WERE SEVENTEEN?

A YES. BUT NOTHING HAPPENED BECAUSE I LEFT.

**MR. LERNER:** NO FURTHER QUESTIONS.

**MR. DRISCOLL:** NO FURTHER QUESTIONS.

**THE COURT:** THANK YOU, MA'AM, YOU MAY STEP DOWN.

CALL YOUR NEXT WITNESS, PLEASE.

**MR. DRISCOLL:** ROSSIE MEACHAM.

ROSSIE MEACHAM, SWORN

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q GOOD MORNING. CAN YOU PLEASE INTRODUCE YOURSELF TO US?

A ROSSIE MEACHAM.

Q WHERE DO YOU LIVE?

A MANILLA, ARKANSAS.

Q HAVE YOU EVER MET JAMES HITCHCOCK?

A NO.

Q DO YOU KNOW MEMBERS OF THE HITCHCOCK FAMILY?

A YES, I DO.

Q COULD YOU TELL US WHO YOU KNOW?

A I KNOW WANDA AND MARTHA AND WINSTON AND BRENDA.

Q AND DID YOU ALSO KNOW AN INDIVIDUAL BY THE NAME OF RICHARD CARL HITCHCOCK?

A YES, I DID.

Q DO YOU RECALL WHEN YOU MET HIM?

A IT WAS AROUND CHRISTMAS TIME IN ABOUT EARLY NIGHTIES.

Q AND CAN YOU TELL US HOW YOU CAME TO MEET HIM.

A I WAS AT HIS MOTHER'S HOUSE WHEN HE COME

IN. SHE HAS YARD SALES A LOT. I USE TO FREQUENT HER YARD SALES AND STUFF. ALWAYS USE TO STOP AT HER YARD SALE. AND ONE DAY I WAS THERE AND HE COME IN FROM FLORIDA AND SHE SAID THIS IS MY SON RICHARD.

Q DID RICHARD COME INTO FLORIDA PERIODICALLY AFTER THAT?

A YES.

Q WOULD YOU SEE RICHARD CARL HITCHCOCK WHEN YOU WERE OVER THE MOTHER'S HOUSE?

A YES, I WOULD.

Q DID THERE COME A POINT IN TIME WHEN RICHARD HITCHCOCK DISCUSSED A MURDER?

A YES, HE DID.

**MR. LERNER:** YOUR HONOR, AGAIN, I'M GOING TO POSSESS AN OBJECTION. THIS IS APPARENTLY -- WELL, THIS IS -- I TAKEN THIS WITNESSES DEPOSITION IN AN ATTEMPT TO INTRODUCE EVIDENCE OF LINGERING REASONABLE DOUBT WHICH IS BEEN CLEARLY ADDRESSED BY THIS COURT AND FOUND TO BE PROCEDURALLY BARRED. IT'S ALSO BEEN REVIEWED BY THE FLORIDA SUPREME COURT AND FOUND TO BE PROCEDURALLY BARRED AND I OBJECT TO THE QUESTION ON THAT BASIS.

**MR. DRISCOLL:** YOUR HONOR, JUST -- THIS IS NEWLY DISCOVERED EVIDENCE.

**THE COURT:** OVERRULE THE OBJECTION AT THIS TIME.

BY MR. DRISCOLL:

Q SO, CAN YOU TELL US THE CIRCUMSTANCES OF HOW RICHARD CAME TO TALK TO YOU ABOUT THAT?

A YES, SIR. WE WAS ALL SITTING AROUND THE KITCHEN TABLE, ME AND HIM AND HIS MOTHER WHO WAS IN AND OUT. IT WAS AFTER THE YARD SALE. I STAYED AROUND TO TALK TO HIM A FEW MINUTES AND HE WAS GETTING -- HE WAS DRINKING A LITTLE. HE WAS GETTING A LITTLE BELLIGERENT. HE SAID YEAH, YOU WOULDN'T KNOW THINGS ABOUT ME THAT I CAN TELL YOU. AND I SAID LIKE WHAT THINGS. AND HE SAID I MURDERED THAT GIRL IN FLORIDA AND BLAMED IT ON MY BROTHER ERNEY BECAUSE HE SAID HIS REASON BEING WAS HE WAS CRIPPLED AND ERNEY WAS A YOUNG PERSON. HE CAN SERVE THE TIME BETTER. BUT HE BLAMED IT ON ERNEY.

Q DID YOU SAY ANYTHING TO HIM ABOUT THAT?

A YES. I SAID HOW IN THE WORLD CAN YOU DO SUCH A THING. HE SAID BECAUSE I CAN DO IT AND I GOT BY WITH IT. HE MOST CERTAINLY TOLD ME THAT HE MURDERED THIS GIRL AND BRAGGED ABOUT IT.

Q DID YOU EVER HAVE ANOTHER DISCUSSION WITH HIM ABOUT THAT?

A WELL, AFTER THAT, LIKE I SAID IN MY

DEPOSITION, LIKE I SAID, I KIND OF QUIT GOING OVER THERE AS MUCH AS I USE TO THEN. HE WAS SCARRY TOWARDS ME. HE WANTED ME TO BE SCARED OF HIM.

**MR. DRISCOLL:** NOTHING FURTHER AT THIS TIME.

ACTUALLY, IF I CAN HAVE A MOMENT.

Q THIS WOULD HAVE HAPPENED LONG AFTER NINETEEN SEVENTY SEVEN?

A YES.

**MR. DRISCOLL:** NOTHING FURTHER AT THIS TIME.

**THE COURT:** CROSS EXAMINATION.

CROSS EXAMINATION

BY MR. LERNER:

Q ONE MOMENT YOUR HONOR.

NOW WHAT WAS YOUR RELATIONSHIP WITH RICHARD?

A AT FIRST WE WERE FRIENDS.

Q ISN'T IT TRUE YOU EVENTUALLY DEVELOPED BOYFRIEND GIRLFRIEND RELATIONSHIP?

A NO, NO, NO. THERE WAS NOTHING LIKE THAT EVER, EVER HAPPENED.

Q SO IF RICHARD'S MOTHER SAID IN HER DEPOSITION THAT IT SEEMED LIKE YOU AND RICHARD WERE BOYFRIEND GIRLFRIEND THAT WOULD BE MISTAKEN?

**MR. DRISCOLL:** OBJECTION. IMPROPER IMPEACHMENT.

A THAT'S NOT TRUE.

**THE COURT:** WHAT'S YOUR OBJECTION?

**MR. DRISCOLL:** IMPROPER IMPEACHMENT.

**THE COURT:** OVERRULE THE OBJECTION AT THIS POINT.

**MR. DRISCOLL:** ASSUMES FACTS NOT IN EVIDENCE AS WELL.

BY MR. LERNER:

Q OF OTHER FAMILY MEMBERS SAID SAME THING THAT WOULDN'T BE TRUE?

A THAT DEFINITELY WOULDN'T BE TRUE. ALL THE OTHER FAMILY MEMBERS DIDN'T SAY THE SAME THING.

Q ISN'T IT TRUE THAT YOU HAD DIFFICULTIES WITH RICHARD, DISPUTES OVER SALES ITEMS.

A HE WANTED TO BUY A V C R. TOLD HIM -- I TOLD HIM ABSOLUTELY POSITIVELY NOT. AND SOMEHOW OR ANOTHER THOUGH BECAUSE I LIVE IN THE SMALL TOWN HE FOUND OUT WHERE I LIVED AND CAME TO MY HOUSE. HE DID NOT COME IN THE HOUSE. HE SIT IN THE DRIVEWAY AND HE BEEPED THE HORN UNTIL I COME OUT. AND HE SAID THAT HE WANTED THAT V C R. HE WANTED TO GIVE IT TO HIS, AT THE TIME LITTLE TEN YEAR OLD GRANDSON. I TOLD HIM V C R I HAVE IS NOT FOR SALE SO.

YOU'RE LOOKING AT ME SHAKING YOUR HEAD. YOU WANT ME TO CONTINUE OR WHAT?

**THE COURT:** MA'AM, ALL I WANT YOU TO DO IS ANSWER THE QUESTION HE ASKING YOU. YOU CAN'T REACT. JUST ANSWER THE QUESTION.

A APOLOGIZE, YOUR HONOR.

BY MR. LERNER:

Q SO, NOW, LET'S GET BACK TO THE TIME HE TOLD YOU THIS ABOUT KILLING THE GIRL. DID HE SAY WHAT GIRL?

A HE SAID FOURTEEN YEAR OLD GIRL IS ALL I KNOW.

Q DID HE SAY WHEN IT HAPPENED?

A HE SAID IT HAPPENED BACK IN THE SEVENTIES.

Q DID HE SAY AT THAT POINT IN TIME HE HAD BEEN DRINKING. CORRECT.

A SOMETIMES HE HAD BEEN DRINKING SOMETIMES HE HADN'T BEEN.

Q SO HE TOLD YOU THIS MORE THAN ONCE?

A UM HUM.

Q AND THIS WAS A PERSON YOU DIDN'T KNOW WELL?

A I HAD KNOWN HIM ABOUT THREE MONTHS WHEN HE STARTED TALKING, TELLING ME STUFF LIKE THAT.

Q AND YOU SAY YOU ONLY CASUALLY KNEW HIM

BECAUSE YOU WENT OVER TO BERTHA GALLOWAY'S HOUSE?

A I WOULD SEE HIM ONCE A MONTH WHEN HE CAME IN FROM FLORIDA.

Q AND THIS WOULD ALWAYS -- YOU WOULD ALWAYS SEE HIM AT BERTHA GALLOWAY'S HOUSE?

A HIS MOTHER'S, YES. IF I WASN'T DOWN THERE FOR THAT YARD SALE THAT PARTICULAR MONTH I DIDN'T SEE HIM.

Q THESE WERE ONLY CASUAL CONTACTS OR WHEN YOU HAPPENED TO SEE HIM WHEN YOU WERE OVER TO ONE OF BERTHA'S YARD SALES?

A RIGHT. AND WHY HE TOLD ME THIS STUFF I DON'T KNOW. BUT HE DEFINITELY DID. AND THERE WAS NOTHING GOING ON AT ALL WHATSOEVER. I THOUGHT HE WAS EVIL. I WAS SCARED OF HIM AND THERE WAS DEFINITELY NO SEXUAL CONTACT. NONE. NO WAY. NUN, NUN. NO WAY.

Q THESE COMMENTS WERE MADE WHILE BERTHA WAS THERE AT THE HOUSE?

A SHE WAS IN THE HOUSE BUT SHE WASN'T ALWAYS IN THE ROOM. SHE WAS ALWAYS EITHER IN THE FRONT ROOM OR THE KITCHEN.

Q HE WOULD JUST SAY THESE THINGS WHILE --

A HE DIDN'T CARE IF SHE HEARD THEM OR NOT.

Q HE DIDN'T?

A NO.

Q HE WAS SAYING THEM IN A WAY AND MANNER SHE COULD HAVE OVERHEARD?

A SHE COULD HAVE OVERHEARD. EVIDENTIALLY SHE DIDN'T BECAUSE SHE NEVER SAID ANYTHING.

Q AND AFTER YOU SAY -- AFTER HE TOLD YOU THIS, YOU DIDN'T WANT TO HAVE ANYTHING MORE TO DO WITH HIM?

A RIGHT. I WAS SCARED OF HIM AFTER THAT.

Q BUT YOU TOLD -- YOU THIS MORE THAN ONCE?

A YES, SIR. THE DAY I TOLD YOU ON MY DEPOSITION. THE DAY THAT HE CAME AFTER THE V C R HE WANTED -- HE KNEW I HAD TWO. HE HEARD ME OVERTELL MARTHA I HAD TWO. SO HE SAID HE WANTED ONE OF THEM AND I SAID THEY'RE NOT FOR SALE. AND SO THEREFORE HE FOUND OUT WHERE I LIVED SOMEHOW BECAUSE MANILLA IS SMALL TOWN. HE WINDED UP AT MY HOUSE. HE HONKED THE HORN AND HE SAID I WANT ONE OF THOSE BLANK BLANK V C R AND I SAID YOU'RE NOT GETTING IT. AND THEN HE PULLED THAT GUN ON THE DASH. HE ALWAYS CARRIED A GUN AROUND WITH HIM HE SAID I'M GOING TO GET IT OR I'LL USE THIS ON YOU. I SWEAR HE SAID IT. HE SAID I DONE IT BEFORE. I WOULDN'T BE SCARED TO DO IT AGAIN.

CAN I HAVE SOMETHING TO DRINK PLEASE?

**THE COURT:** WE NEED TO TAKE A BREAK. I'LL TAKE A SHORT RECESS. GET SOME WATER. MAY NOT HAVE A CUP OR SOMETHING.

TAKE A SHORT RECESS SO YOU CAN GET SOMETHING TO DRINK.

(AT THIS TIME THE WITNESS LEAVES THE COURTROOM TO GET A DRINK)

(UPON RETURN OF THE WITNESS TO THE WITNESS STAND THE HEARING CONTINUES AS FOLLOWS:)

CONTINUED CROSS EXAMINATION

BY MR. LERNER:

Q SO ON THAT OCCASION WHEN HE TALKED ABOUT KILLING SOMEBODY HE REFERRED TO HIS GUN?

A NO. HE SAID I HAVE USED THIS. HE SAID I HAVE KILLED BEFORE. I'M NOT ASHAMED TO DO IT AGAIN.

Q HE HAD HIS GUN?

A YES. HE HAD HIS GUN ON THE DASH OF HIS TRUCK.

Q AND YOU JUST USED THE TERM USED THIS, CORRECT?

A WELL I THOUGHT YOU WERE REFERRING TO THAT HE USED THE GUN WHEN HE KILLED, WHEN HE SUPPOSEDLY WHEN HE TOLD ME HE KILLED THE GIRL. BUT HE DIDN'T -- HE USED THE GUN.

Q WELL, DIDN'T YOU SAY THE SECOND TIME HE SAID I'VE USED THIS. I KILLED BEFORE?

A HE SAID HE HAD KILLED BEFORE BUT NOT REFERRING AS USING THE GUN. FIRST TIME HE WAS SUPPOSE TO HAVE KILLED HE USED HIS HANDS TO STRANGLE HER.

Q THIS COULD HAVE BEEN -- THIS COULD HAVE BEEN REFERENCE TO SOME OTHER MURDER THAT HE SUPPOSEDLY COMMITTED?

A HE MEANT THE SAME MURDER I WAS TELLING YOU ABOUT BECAUSE THAT'S THE ONLY ONE HE EVER TOLD ME ABOUT.

Q DIDN'T YOU JUST SAY THAT HE SAID HE USED THIS REFERRING TO THE GUN?

A YOU TRYING TO CONFUSE ME. I KNOW -- OKAY. NO. HE SAID I HAD HAVE KILLED BEFORE. I'M NOT ASHAMED TO DO IT AGAIN AND HE HELD THAT GUN OUT.

Q NOW ON BOTH THESE OCCASIONS WAS HE DRUNK?

A HE HAD BEEN DRINKING, YES.

Q AND ON BOTH THESE OCCASIONS WAS THERE SOMETHING HE WANTED FROM YOU?

A HE WANTED THE C V C R. AND THE FIRST TIME HE JUST WANTED TO TELL ME THAT HE WAS CAPABLE OF ANYTHING.

Q DO YOU KNOW WHY HE WANTED YOU TO THINK

THAT?

A NO. I DON'T KNOW WHY.

Q ISN'T IT POSSIBLE HE WANTED SOMETHING FROM YOU OR EXPECTED TO WANT SOMETHING FROM YOU IN THE FUTURE?

**MR. DRISCOLL:** I OBJECT. CALLS FOR SPECULATION AS TO WHAT ANOTHER PERSON WAS THINKING.

**THE COURT:** SUSTAIN THE OBJECTION.

BY MR. LERNER:

Q ON THE SECOND OCCASION HE DEFINITELY WANTED SOMETHING FROM YOU AND WAS USING THIS TO TRY AND SCARE YOU INTO GIVING HIM SOMETHING, CORRECT?

A RIGHT. HE WANTED MY V C R.

Q HE WAS A BRAGGADOCIOUS TYPE PERSON BY NATURE, WASN'T HE?

A YES, HE WAS.

Q HE WOULD ALWAYS BRAG ABOUT THE THINGS HE WOULD DO?

A YES, HE DID.

Q AND THE THINGS HE HAD DONE?

A YES, HE DID.

Q AND HE WOULD BRAG TO YOU ABOUT OTHER THINGS HE HAD DONE?

A BRAGGED TO ME MAINLY ABOUT KILLING THE

GIRL.

Q DID YOU BELIEVE EVERYTHING HE SAID HE HAD DONE WHEN HE BRAGGED TO YOU ABOUT OTHER THINGS?

A JUST ABOUT BECAUSE HE HAD ME TERRIFIED. I WAS SCARED TO DEATH OF HIM.

Q DID IT EVER OCCUR TO YOU THAT MAY BE THE EFFECT HE WANTED TO PRODUCE IN YOU?

A NO. BECAUSE HE WAS JUST AN EVIL PERSON. HE WAS EVIL AND HE WANTED EVERYBODY TO KNOW IT. MOST OF THE HIS BRAGS WEREN'T BRAGS. PROBABLY WERE THE TRUTH.

Q WHEN IS THE FIRST TIME YOU EVER TOLD ANYBODY ABOUT RICHARD?

A WHAT HE TOLD ME?

Q WHAT YOU HE TOLD YOU.

A I TOLD YOU THIS ALSO. WHEN I FIRST MET UP WITH MARTHA AGAIN AFTER PROBABLY THIS WHOLE THING GOING ON ABOUT MAYBE EIGHT -- ALMOST A YEAR NOW. SHE -- I DIDN'T KNOW KNOW SHE OWNED RICHARD'S IN LYNCHVILLE. I HAD A FRIEND DAUGHTER WORKS OVER THEIR SAID ROBBIE PLAYS OVER THERE WITH ME. I WENT TO TALK TO MY DAUGHTER. I DID. AND LO AND BEHOLD THERE WAS MARTHA HITCHCOCK. I HADN'T SEEN MARTHA IN YEARS AND WE STARTED TALKING ABOUT IT AND I SAID DO YOU MEAN TO TELL ME ERNEY IS STILL IN PRISON? I

NEVER DID KNOW WHO HE WAS OR ANYTHING BUT I DID KNOW HIS NAME WAS ERNEY. I KNOW HE WENT TO JAIL FOR RICHARD. AND YES, WE'RE TRYING TO GET HIM OUT AND EVERYTHING.

Q AND AT THAT TIME WHEN YOU FIRST TALKED TO MARTHA YOU KNEW ALL ABOUT RICHARD AND ERNEY, DIDN'T YOU?

A YES.

Q BEFORE YOU TALKED TO MARTHA?

A BUT I DIDN'T -- I THOUGHT ALL THAT WAS LONG GONE. I DIDN'T KNOW WHO TO GO TO FOR -- I DIDN'T KNOW WHO TO TELL. I DIDN'T HAVE A CLUE TO CALL AUTHORITIES OR WHATEVER BECAUSE MAN HAD DONE BEEN IN PRISON UMPTEEN YEARS. I DIDN'T KNOW WHAT TO DO UNTIL THIS CAME UP AND SHE ASKED ME IF I WOULD TALK TO THE INVESTIGATORS AND I SAID I WOULD BE MORE THAN GLAD TO. I HAD BEEN TRYING -- I BEEN WANTING TO DO SOMETHING BUT I DIDN'T KNOW WHERE TO GO TO DO IT.

Q NOW, BERTHA GALLOWAY WAS THE FORMER BERTHA HITCHCOCK, CORRECT?

A HIS MOTHER.

Q HIS MOTHER. AND ALSO LIVED IN MANILA?

A RIGHT.

Q AND YOU'VE LIVED IN MANILLA?

A YES.

Q IT'S A SMALL TOWN?

A YES.

Q AND MRS. GALLOWAY, BERTHA GALLOWAY, STILL LIVES IN MANILLA, DOESN'T SHE?

A YES.

Q AND HAS CONTINUOUSLY LIVED THERE ALL THESE YEARS?

A YES.

Q AND MANILLA HAS A POLICE DEPARTMENT, DOESN'T IT?

A YES, THEY DO.

Q AND YOU KNEW THIS ENTIRE STORY BACK THEN WHEN RICHARD -- WHEN YOU WERE GOING OVER TO BERTHA GALLOWAY'S HOUSE AND SEEING RICHARD, DIDN'T YOU?

A YES, SIR.

Q WHEN HE TOLD YOU THIS YOU DID WHAT?

A I DID NOTHING. I DIDN'T WANT HIM COMING TO MY HOUSE AND BURNING IT DOWN. I DIDN'T DO ANYTHING UNTIL MARTHA SHOWED ME THE DEATH CERTIFICATE SHOWING ME THE MAN WAS DEAD. AND THEN I TOLD MY STORY. AND IT IS A TRUE STORY. IF YOU DON'T WANT TO BELIEVE IT OR NOT, I'M SORRY.

Q BUT YOU DIDN'T TELL ANYBODY BACK AT THE TIME?

A NO. I DIDN'T TELL A SOUL, LIVING, BREATHING SOUL UNTIL I FOUND OUT RICHARD WAS DEAD.

Q OKAY. NOW, THIS MEETING WITH MARTHA, WHEN THIS CAME UP AGAIN WAS WHEN?

A LIKE I SAID, IT WAS BACK IN THE SUMMER. IT'S PROBABLY BEEN FIVE MONTHS AGO.

Q FIVE MONTHS AGO?

A NO MORE THAN SIX.

Q AND RICHARD TELLING YOU THIS WAS BEFORE HIS DEATH IN NINETEEN NINETY-FOUR, CORRECT?

A YES.

Q HOW MANY YEARS BEFORE HIS DEATH IN NINETEEN NINETY-FOUR?

A PROBABLY ABOUT THE SAME YEAR. NINETY THREE TOPS.

Q SO WE'RE HAVING A PASSAGE OF ALMOST A DECADE, CORRECT?

A YES. BUT LIKE I SAID WHO WAS I GOING TO TELL?

Q NOW, DID YOU MAKE ANY NOTES --

A OF COURSE NOT.

Q -- USED TO REFRESH YOUR RECOLLECTION CLOSE IN TIME TO THE POINT IN TIME WHEN RICHARD SAID THIS TO YOU?

A NO. I DIDN'T HAVE TO MAKE NOTES. I

REMEMBERED EVERYTHING HE SAID.

Q AND THIS IS FROM TEN YEARS AGO?

A YES, SIR.

Q NOW FROM THE POINT RICHARD DIED YOU REALLY HAD NO REASON TO THINK ABOUT THIS, DID YOU?

A NO. AFTER THAT IT WENT OUT OF MY MIND. NEVER THOUGHT ABOUT IT AGAIN. AND THEN FOR THAT I'M TOTALLY ASHAMED BECAUSE THEN IS WHEN I SHOULD HAVE WENT TOLD SOMEBODY BUT I DID NOT KNOW WHERE TO GO. I KNEW TO TELL HIS MOTHER. SHE WOULD JUST PROBABLY FREAKED. THROUGH HER HANDS UP IN THE AIR. SO I DON'T KNOW WHAT TO DO. I DON'T KNOW WHAT TO DO EITHER. WHEN I DID MEET UP WITH MARTHA I DID TELL HER.

Q NOW, YOU COULD HAVE TOLD -- ASKED HIS MOTHER WHEN YOU GREW UP IN MANILLA, RIGHT?

A YES.

Q YOU KNEW HOW MANY CHILDREN BERTHA HAD, DIDN'T YOU?

A YES. BUT THEY ALL GOT SCATTERED.

Q AND YOU COULD HAVE ASKED BERTHA IF THERE WERE ANY KIN STILL LIVING IN THAT AREA, COULDN'T YOU HAVE?

A I PROBABLY COULD HAVE BUT THEN AGAIN I DIDN'T KNOW WHAT TO DO OR WHAT TO TELL THEM WHEN I

DID.

Q AND SOMETIMES WHEN YOU WENT OVER TO BERTHA'S YOU SAW OTHER KIDS OF HER CHILDREN, DIDN'T YOU?

A YES. I SPOKEN TO BRENDA OVER THERE. THIS WAS AFTER THE FACT AND IT WAS NEVER BROUGHT UP.

Q AND YOU NEVER BROUGHT IT UP?

A NO, I DIDN'T. NOT UNTIL I WAS ASKED ABOUT IT.

Q SO YOU HAVEN'T EVEN THOUGHT ABOUT IT FOR AT LEAST NINE YEARS OR HADN'T EVEN THOUGHT ABOUT IT UP TO THE POINT THAT YOU TALKED TO MARTHA?

A NO. RICHARD BEEN -- NINETY-FOUR -- HOWEVER LONG THAT'S BEEN.

**MR. LERNER:** NO FURTHER QUESTIONS.

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q HAS ANYONE ELSE EVER CONFESSED A MURDER TO YOU?

A NO.

Q DOES THAT STICK OUT BECAUSE OF THAT?

A WELL, OF COURSE IT DOES BECAUSE I WAS TRAUMATIZED. I DIDN'T KNOW WHAT TO DO.

Q OKAY. CAN YOU TELL ME ABOUT WHAT KIND OF -- DOES MRS. GALLOWAY, ERNEY HITCHCOCK'S MOTHER,

SHE HAVE ALZHEIMER'S NOW?

A YEAH. SHE IS -- I DON'T KNOW IF IT'S REALLY WHAT YOU CALL "OLD TIMERS". SHE'S VERY FORGETFUL NOW AND I DON'T KNOW.

Q DOES SHE STILL HAVE HER SAME FACULTIES AS YEARS AGO?

A NO.

Q AND HOW OLD WOULD SHE BE ABOUT?

A OH LORD, SHE'S IN HER LATE SEVENTIES IF NOT EARLY EIGHTIES.

Q AND DID YOU -- WHEN DID YOU FIND OUT RICHARD CARL HITCHCOCK WAS DECEASED?

A I READ ABOUT IT IN THE PAPER.

Q UNTIL THAT TIME DID YOU FEEL THAT IF YOU SAID ANYTHING -- YOU RECALL WHAT YEAR IT WAS YOU READ ABOUT IT IN THE PAPER?

A IT WAS PROBABLY -- IT WAS NINETY-FOUR. IN OCTOBER NINETY-FOUR, I THINK. AND THEN I CALLED HER AFTER I READ IT. I CALLED HER AND SHE SAID YES, HE'S HAD A CAR WRECK COMING DOWN HERE AND I SAID WELL, I HATE TO HEAR THAT.

Q PRIOR TO THAT TIME WOULD YOU HAVE BEEN AFRAID TO TELL THE POLICE ABOUT THIS?

A YES, I WOULD HAVE BEEN.

Q AND EVEN AFTER THAT?

A EVEN AFTER THAT. I DIDN'T BELIEVE HE WAS DEAD UNTIL I SEEN THE DEATH CERTIFICATE.

Q WHEN WAS THAT WHEN YOU SAW THAT?

A MARTHA SHOWED IT TO ME BACK WHEN WE STARTED TALKING ABOUT SIX MONTHS AGO AT THE RESTAURANT AND SHE SAID IF YOU'RE SCARED OVER THAT I GOT IT RIGHT HERE TO PROVE THAT HE'S DEAD. BECAUSE I STILL WASN'T GOING TO OPEN MY MOUTH. I LIKE TO LIVE IN MY HOUSE. HE'S CAPABLE OF ANYTHING. I FIRMLY BELIEVE THE MAN WAS CAPABLE OF ANYTHING.

Q AND YOU WERE LOCKED UP BECAUSE OF YOUR FEAR OF THE MAN TO SAY ANYTHING UNTIL YOU SAW THE DEATH CERTIFICATE?

A YES.

**MR. DRISCOLL:** NOTHING FURTHER.

**THE COURT:** MR. LERNER.

**MR. LERNER:** NOTHING FURTHER.

**THE COURT:** YOU CAN STEP DOWN, MA'AM

DEFENSE CALL YOUR NEXT WITNESS.

**MR. DRISCOLL:** YOUR HONOR, DEFENSE WOULD CALL BRENDA REED.

BRENDA REED SWORN

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q CAN YOU PLEASE STATE YOUR NAME FOR THE RECORD?

A BRENDA REED.

Q MISS REED, HOW ARE YOU RELATED TO JAMES ERNEST HITCHCOCK?

A I'M HIS SISTER.

Q AND CAN YOU TELL ME WHO ELSE WAS IN YOUR FAMILY?

A THERE WAS JAMES AND BETTY AND MARTHA AND WANDA AND RICHARD, ERNEY AND ME. SEVEN OF US.

Q OKAY. DID YOU LIVE IN THE SAME RESIDENCE AS A YOUNG WOMAN WITH RICHARD HITCHCOCK?

A YEAH.

Q HOW LONG DID YOU LIVE WITH HIM.

A UNTIL I WAS FIFTEEN OR -- YOU MEAN AT HOME?

Q AT HOME.

A TILL I WAS FIFTEEN.

Q DID THERE COME A POINT UP LIVED -- YOU TRIED TO LIVE WITH HIS FAMILY IN FLORIDA?

A YES.
Q DID RICHARD EVER VIOLATE YOU SEXUALLY?
A YES.
Q CAN YOU TELL US WHEN THAT STARTED?
A WHEN I WAS FIVE YEARS OLD.
Q AND HOW LONG DID THAT CONTINUE?
A UNTIL I WAS FOURTEEN.
Q DID YOU TRY TO RESIST THAT?
A YEAH.
Q WHAT WOULD HAPPEN WHEN YOU TRIED TO RESIST THAT?
A I COULDN'T GET AWAY FROM HIM HE'S TOO STRONG.
Q OKAY. DID HE EVER REACT BY CHOKING YOU?
A NO. HE JUST WOULD HOLD ME DOWN AND STUFF.
Q OKAY. DID -- WAS RICHARD EVERY VIOLENT TOWARD YOU?
A HE HAD SLAPPED ME BEFORE BUT.
Q DO YOU RECALL WHAT THAT MIGHT HAVE BEEN OVER?
A WHEN HE'S TRYING TO SEXUALLY ABUSE ME.
Q WOULD THAT BE BECAUSE HE COULDN'T? YOU WERE GIVING HIM RESISTANCE OVER THAT?
A YES.
Q HOW DID RICHARD VIEW THE YOUNGER WOMEN IN

YOUR FAMILY?

A HE TREATED MOST OF US ALL THE SAME, YOU KNOW. TRIED -- WELL, SOMETIMES HE'S GOOD TO YOU. SOMETIMES HE'S LIKE I SAID, TRIED TO SEXUALLY ABUSE YOU.

Q WOULD IT BE FAIR TO SAY THAT HE WAS LIKE POSSESSIVE OF THE YOUNGER WOMEN IN HIS FAMILY?

A NOT SO MUCH POSSESSIVE.

Q BUT IF HE THOUGHT -- WOULD HE BECOME JEALOUS IF YOU WERE TALKING TO ANOTHER BOY OR SOMETHING?

A I NEVER REALLY PAID NO ATTENTION TO THAT.

**MR. DRISCOLL:** NOTHING FURTHER AT THIS TIME.

**THE COURT:** STATE, CROSS EXAMINATION.

CROSS EXAMINATION

BY MR. LERNER:

Q GOOD MORNING. HOW YOU DOING?

A ALL RIGHT.

Q I'M AN ATTORNEY. DO YOU REMEMBER WE DID THE TELEPHONE DEPOSITION ABOUT A WEEK AGO?

A YEAH.

Q DO YOU RECALL AT THAT TIME WE WENT OVER YOUR TESTIMONY THAT YOU GAVE IN NINETEEN EIGHTY EIGHT?

A YEAH.

Q AND YOU REMEMBER YOU CAME IN AND YOU BASICALLY TOLD THE SAME STORY?

A YEAH.

Q AND YOU TOLD THE JUDGE WHAT YOU TOLD THEN WHAT YOU TOLD THE JUDGE TODAY, DIDN'T YOU?

A YEAH.

**MR. LERNER:** NO FURTHER QUESTIONS.

**THE COURT:** ANYTHING ELSE?

**MR. DRISCOLL:** BRIEFLY.

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q DID YOU EVER TALK TO ERNEY HITCHCOCK'S ATTORNEY IN NINETEEN SEVENTY SIX OR NINETEEN SEVENTY SEVEN?

A WHICH ONE WAS THAT?

Q MR. CHARLES TABSCOTT?

A I CAN'T REMEMBER. I TALKED TO RICHARD GREEN AND SEVERAL MORE.

Q BUT WHEN HE ORIGINALLY, WHEN JAMES HITCHCOCK ORIGINALLY WENT TO TRIAL DID YOU EVER --

A YEAH. I DID TALK TO ATTORNEY THEN.

Q OKAY.

**MR. DRISCOLL:** NOTHING FURTHER.

**MR. LERNER:** NOTHING FURTHER, YOUR HONOR.

**THE COURT:** OKAY. THANK YOU, MA'AM, YOU CAN STEP DOWN.

CALL YOUR NEXT WITNESS.

**MR. DRISCOLL:** I'VE BEEN FAILING TO ASK. THESE WITNESSES ARE GOING BACK TO ARKANSAS. IS THERE ANY OBJECTION THEY BEING RELEASED?

**MR. LERNER:** NOT SO FAR, YOUR HONOR.

**MR. DRISCOLL:** OKAY. EVERYBODY IS RELEASED.

WE WOULD CALL WANDA HITCHCOCK GREEN.

**MR. LERNER:** I'M GOING TO HAVE A SPECIAL OBJECTION TO THIS IN ADDITION TO THE OBJECTION THAT I ALREADY MADE ABOUT THE SEXUAL ABUSE AND OTHER BAD CONDUCT AND LINGERING REASONABLE DOUBT AS TO THE ISSUE OF RICHARD'S BAD ACTS AND VIOLENCE. THAT'S AN OBJECTION I MADE.

I'M ALSO POSING AN OBJECTION TO THE TESTIMONY OF THIS WITNESS BASED ON THE FACT THAT IT'S EXCESSIVE BECAUSE SHE ALREADY TESTIFIED TO THIS IN THE NINETEEN NINETY SEVEN, I BELIEVE, PROCEEDINGS BEFORE JUDGE CONRAD AND THIS IS ALL ALREADY BEEN -- AND HE ISSUED THE RULING DENYING THE THREE POINT EIGHT FIVE O MOTION AS FAR AS THE CONFESSION OF RICHARD TO HER THAT WAS CONSIDERED AND DENIED. AND THE

FLORIDA SUPREME COURT BOTH FOUND IT PROCEDURALLY BARRED AND FOUND IT HAD NO MERIT. IT WAS NOT BELIEVABLE.

SO I WOULD OBJECT TO THIS WITNESS TESTIFYING ABOUT ANY CONFESSIONS OF RICHARD TO HER ON THAT BASIS BECAUSE IT'S THE LAW OF THE COURT THAT IT HAS NO MERIT AND IT'S EXCESSIVE.

**MR. DRISCOLL:** YOUR HONOR, I WOULD REJECT MR. LERNER'S -- ARGUE WITH MR. LERNER'S CHARACTERIZATION OF WHAT THE FLORIDA SUPREME COURT SAID IN THE LAST HITCHCOCK OPINION. I BELIEVE IT SPEAKS FOR ITSELF. THAT WAS ONLY AN APPEAL FROM THE RESENTENCING AND THAT'S ALL THEY SAID. IT DIDN'T SAY PROCEDURALLY BARRED OR THAT IT COULDN'T BE RAISED OR LAW OF THE CASE OR ANYTHING LIKE THAT. AND WE WILL JUST ASK THAT WHEN RULING ON THIS CASE THAT YOU CONSIDER THAT. AND THERE'S A NUMBER OF THINGS THAT I WILL BE PRESENTING THROUGH MISS GREEN.

**THE COURT:** WELL, GO AHEAD.

**MR. NUNNELLEY:** I PUT THE OPINION IN FRONT OF ME. IT'S HITCHCOCK -- HITCHCOCK VERSUS STATE. SEVEN FIFTY FIVE SOUTHERN SECOND, SIX THIRTY EIGHT. PAGE SIX FORTY ONE OF THAT OPINION IN FOOTNOTE ONE, FLORIDA SUPREME COURT

SETS OUT MR. HITCHCOCK CLAIMS FOR RELIEVE, AND SAYS, I QUOTE IT, WE FIND ALL OF HITCHCOCK'S CLAIMS TO BE PROCEDURALLY BARRED OR WITHOUT MERIT FOR THE REASONS EXPRESSED HERE IN.

THEY CITE THERE WERE THREE CLAIMS CONTAINED IN THAT APPELLATE PROCEEDING THAT RELATED TO THE THREE EIGHT HUNDRED SLASH THREE POINT EIGHT FIVE O PROCEEDING JUDGE CONRAD HEARD. JUDGE CONRAD REJECTED CLAIMS BASED UPON THAT WERE BASED UPON NEWLY DISCOVERED EVIDENCE AS BEING WITHOUT MERIT. THE FLORIDA SUPREME COURT AFFIRMED THAT HOLDING AND IT'S REFERRED TO ON PAGE SIX FORTY FIVE HEADNOTE SIXTEEN OF THE OPINION WHERE THE FLORIDA SUPREME COURT SAID AND I QUOTE, WE REJECT THESE CLAIMS AS BEING WITHOUT MERIT. THESE ISSUES HAVE ALREADY BEEN LITIGATED THROUGH ONE TIME AND THE DEFENDANT IS NOT ENTITLED TO SECOND BITE AT THE APPLE TO RELATE THE SAME CLAIMS. THEY ALREADY BEEN DECIDED. THIS IS RES JUDICATA BAR. IT'S ALREADY BEEN DECIDED. IT'S ALREADY BEEN REJECTED. THIS WITNESSES TESTIMONY TO THE EXTENT IT RELATES TO ANY CONFESSION OR SUCH AS THAT SHOULD BE PRECLUDED BASED UPON THE LAW OF THE CASE AND ON RES JUDICATA GROUNDS SINCE THE

CLAIMS ALREADY BEEN REJECTED COMPLETELY.

**THE COURT:** YEAH. AS I SAID EARLIER I'M NOT SAYING I'M DENYING STATE'S REQUEST. I MAY IN MY RULING AGREE WITH YOU. BUT IT IS AT THIS POINT, I'LL LISTEN TO THE TESTIMONY AT THIS POINT AND WHEN I MAKE MY RULING I'LL SPECIFY WHAT I FEEL IS APPROPRIATE AS FAR AS WHETHER IT'S PROCEDURALLY BARRED OR NOT.

**MR. DRISCOLL:** THANK YOU, YOUR HONOR.

WANDA GREEN, SWORN.

BY MR. DRISCOLL:

Q COULD YOU PLEASE STATE YOUR NAME FOR THE RECORD?

A WANDA HITCHCOCK GREEN.

Q OKAY. AND HOW ARE YOU RELATED TO JAMES ERNEST HITCHCOCK?

A SISTER.

Q AND COULD YOU TELL US WHO ELSE IS IN YOUR FAMILY FROM OLDEST TO YOUNGEST?

A MY OLDER BROTHER JAMES, SISTER BETTY, RICHARD, ME, MARTHA, ERNEY AND BRENDA.

Q AND DID RICHARD HITCHCOCK EVER SEXUALLY ASSAULT YOU?

A NO. BUT HE TRIED.

Q CAN YOU TELL US ABOUT THAT?

A YES. RICHARD WAS VERY ABUSIVE AFTER MY DAD DIED. I WAS ELEVEN YEARS OLD. AND HE ALWAYS TRIED TO PUT HIS HANDS ON ME. ALWAYS BUT I WOULD FIGHT BACK SO HE COULDN'T DO ME THAT WAY. HE ONLY -- HE CAN ONLY DO THE ONES THAT WAY THAT WERE, I'M NOT GOING TO SAY -- WELL, YOUNGER. HE COULDN'T HANDLE ME LIKE THAT.

Q AND HOW DID RICHARD VIEW THE YOUNGER FEMALES IN THE FAMILY?

A I HAD TWO SISTERS RIGHT BY HIM.

Q WOULD IT BE FAIR TO SAY THAT HE WAS POSSESSIVE OF THEM SEXUALLY?

A YES, HE WAS.

Q AND IN FACT HE TRIED TO ABUSE YOU SEXUALLY BUT YOU WERE ABLE TO RESIST OVER THE YEARS?

A RIGHT.

Q WAS THIS MORE THAN ONE OCCASION?

A THIS WAS AN ONGOING THING.

Q AND WHEN YOU RESISTED HOW WOULD RICHARD REACT?

A RICHARD HE WOULD SLAM ME AGAINST THE WALL AND HE WOULD ALMOST CHOKE ME TO DEATH. AT ONE POINT, ONE POINT I PASSED OUT AND HE THOUGHT HE HAD CHOKED ME TO DEATH.

Q OKAY. WHAT BROUGHT ON THAT CHOKING?

A RAGE.

Q AND WHAT WOULD SET THE MAN OFF?

A ANYTHING THAT HE COULDN'T CONTROL. HE WANTED TO CONTROL EVERYBODY. WHEN MY DAD DIED HE THOUGHT HE WAS BOSS AND MY MOTHER LET HIM GET WITH IT.

Q CAN YOU TELL US ANYTHING, ANY OTHER SPECIFIC TIMES WHEN RICHARD CHOKED YOU?

A YES. ONE TIME I CAME IN I GUESS I WAS SIXTEEN AND I DIDN'T KNOW THAT MARTHA AND BRENDA WAS AT HOME BY THEIR SELF WITH HIM. AS I WALKED THROUGH THE DOOR HE WAS TRYING TO RAPE MARTHA AND I CAUGHT HIM AND I DID. CARL GRABBED ME AROUND THE NECK AND WAS CHOKING ME AND HE SLAMMED ME THROUGH THE FRONT DOOR WHICH WAS A PLATE GLASS DOOR, THE TOP PART. AND WHEN HE DID THE GLASS FELL AND CUT MY LEG OPEN ON THE SIDE OF MY LEG WHICH I STILL GOT A SCAR ABOUT THAT LONG. AND HE LIKE, HE ALMOST KILLED ME THEN. HE LIKED TO CHOKE ME THEN. HE RAN MY HEAD THROUGH THE WINDOW THEN.

Q OKAY. DID RICHARD CARL HITCHCOCK EVER REACT TO YOU BEING INTERESTED IN ANOTHER BOY OR POSSIBLY BEING INTERESTED AS YOUNG GIRLS OFTEN ARE AT THAT AGE?

A YES.

Q HOW OLD ARE YOU?

A THIRTEEN.

Q COULD YOU TELL US WHAT HAPPENED WITH THAT?

A AT FIFTEEN YEARS OLD, AND THIS WAS A DATE THAT CARL ARRANGED HISSELF, HE DECIDED I COULD GO. MY COUSIN PATRICIA AND HER BOYFRIEND PICKED ME AND THIS OTHER GUY UP AND IT WAS ONE OF CARL'S FRIENDS. AND HE LET US GO RIDING AROUND. I WAS SUPPOSE TO BE HOME ELEVEN O'CLOCK. WE HAD A FLAT. WE DIDN'T GET THERE UNTIL ELEVEN FIFTEEN. WHEN I WALK THROUGH THE DOOR HE GRABBED ME AROUND THE NECK AND ALMOST CHOKE ME TO DEATH AND BEAT ME WITH A BROOM STICK.

Q DID HE SAY ANYTHING TO YOU?

A YES. HE CALLED ME ALL SORTS OF WHORES AND EVERYTHING ELSE AND HE JUST CONTINUALLY DONE THAT AND MY MOTHER STOOD THERE AND LET HIM DO THIS. AND THEN FINALLY, WHEN HE FINALLY QUIT I WAS BLACK AND BLUE. SO THE NEXT MORNING HE GETS UP AND HE TELLS MY MOTHER, HE SAYS YOU HAVE A CHOICE. EITHER SHE CAN STAY HERE AND I WILL LEAVE OR SHE CAN LEAVE AND I'LL STAY HERE. AND MY MOTHER SENT ME AWAY.

Q WAS THERE ANY OTHER EXAMPLES OF CHOKING WHERE RICHARD WOULD BECOME UPSET BECAUSE YOU APPEARED BEING INTERESTED IN ANOTHER BOY OR ANYTHING LIKE THAT?

A HE WAS ALWAYS UPSET WHEN YOU WERE INTERESTED IN OTHER BOYS. BUT IT DIDN'T HAVE TO BE OVER THAT. IT -- OUR HOMEWORK, FOR INSTANCE. IF WE MADE BELOW C AVERAGE HE WOULD GRAB YOU AND HOLD YOU AROUND THE NECK AND CHOKE YOU WHILE HE WAS WHIPPING YOU.

Q HOW MANY TIMES WOULD YOU SAY RICHARD, HE CHOKED YOU THROUGHOUT THE YEARS?

A OH, LORD. I WOULD SAY ABOUT TWENTY TIMES.

Q OKAY. AND YOU INDICATED ONE TIME YOU HAD PASSED OUT. WERE THE ANY OTHER TIMES YOU PASSED HOUSE OUT?

A NO. MOST OF THE TIME HE WAS CHOKING ME -- WELL, THE TIME THAT I ALMOST -- THE TIME THAT I PASSED OUT HE HAD DONE IT WITH A NECK TIE THAT TIME. BUT OTHER TIMES HE HAD CHOKED ME HE WOULD HAVE ME UP AGAINST THE WALL. HIS HANDS WERE SO BIG. I WAS SO SKINNY. HIS HAND WOULD WRAP AROUND MY NECK ANY WAY.

Q WAS HE ABLE TO DO THAT DESPITE LIKE SOME SORT OF ARTHRITIS HE HAD?

A HIS ARTHRITIS DIDN'T AFFECT HIS ARMS WHATSOEVER. AND IT DIDN'T AFFECT HIS SEX DRIVE EITHER.

Q NOW, SOME POINT DID YOU LEAVE THE HOUSE?

A YES.

Q OKAY. WHEN DID YOU -- HOW HOW OLD WERE YOU? WHEN -- WHEN DID THIS STOP?

A WHEN DID CARL QUICK CHOKING ME?

Q YES?

A I WAS ALREADY MARRIED. ONE TIME AFTER I WAS MARRIED WE TOOK AND GOT INTO IT. AND NATURALLY FIRST THING HE STARTED TO DO IS CHOKE ME. BUT ONLY THING I EVER DID IS I HAD BEEN MESSING WITH A FLOWER GARDEN. I HAD A BRICK SETTING BESIDE ME. I HIT HIM IN THE HEAD WITH A BRICK AND HE TURNED ME LOSE.

Q HOW OLD WERE YOU ABOUT THAT TIME?

A I WAS SIXTEEN THEN.

Q WAS HE TRYING TO SEXUALLY ABUSE YOU AT THAT TIME POINT?

A NO. HE QUIT THAT WHENEVER I WAS ALMOST SIXTEEN.

Q OKAY. DID YOU LOSE CONTACT WITH HIM AFTER THAT.

A NO.

Q OKAY. DID YOU LEAVE YOUR MOTHER'S HOUSE AT THAT POINT AND --

A YES. I MARRIED SO I COULD LEAVE.

Q AFTER YOU WERE MARRIED DID THERE -- DID YOU STAY IN CONTACT WITH RICHARD -- CARL RICHARD?

A YES, I DID.

Q HOW WAS THAT -- I MEAN, DESPITE HIM CHOKING YOU, WAS THERE A REASON FOR THAT?

A FOR ME LEAVING?

Q NO. AFTER YOU LEFT WOULD YOU SEEK RICHARD OUT OR --

A NO. I JUST SAW HIM WHEN I GO TO MY MOM'S HOUSE AND ALL. HE LIVED IN ANOTHER STATE FOR A PERIOD OF TIME.

Q THIS WOULD BE WHEN HE WOULD COME TO VISIT?

A RICHARD DIDN'T LEAVE. WHEN RICHARD WENT TO FLORIDA TO LIVE HE WENT WITH ME. HE WAS IN ARKANSAS UP UNTIL HE WAS PROBABLY TWENTY FOUR.

Q OKAY. SOME POINT DID YOU MOVE BACK TO ARKANSAS?

A FROM FLORIDA?

Q YES.

A I MOVED BACK IN NINETEEN NINETY FOUR.

Q OKAY. AND CHOKING HAPPENED LIKE HOW CLOSE TO NINETEEN SEVENTY SIX?

A IT WAS IN NINETEEN SIXTY NINE.

Q OKAY. AND NINETEEN SIXTY NINE DO YOU RECALL HOW OLD YOU WOULD HAVE BEEN?

A I WAS SIXTEEN.

Q OKAY. AND DID YOU GO TO JAMES HITCHCOCK'S TRIAL IN NINETEEN SEVENTY SIX OR NINETEEN SEVENTY

SEVEN?

A NO, I DID NOT.

Q IF SOMEBODY FROM MR. HITCHCOCK'S DEFENSE TEAM BACK THEN HAD CONTACTED YOU WOULD YOU HAVE TOLD WHAT YOU TOLD HERE TODAY?

A I NEVER TALKED TO ANY OF THEM.

Q HAD YOU BEEN CONTACTED.

A AFTER I MADE THAT STATEMENT ON T V I.

Q NO BUT I WANT TO TAKE YOU BACK TO NINETEEN SEVENTY SIX?

A I NEVER GOT CONTACTED.

Q HAD YOU BEEN CONTACTED ABOUT ERNEY HITCHCOCK'S CASE WOULD YOU HAVE DISCUSSED THAT WITH AN INVESTIGATOR?

A NO.

Q AND WHY WAS THAT?

A WELL, BECAUSE STATE OF FLORIDA HAD SAID THAT HE WAS GUILTY. AND AS FAR AS I WAS CONCERNED HE WAS GUILTY EVEN THOUGH I DIDN'T THINK HE WAS GUILTY. ALL -- EVERYTHING THAT HAPPENED REFLECTED BACK TO MY OTHER BROTHER CARL. BUT STATE OF FLORIDA SAID HE WAS GUILTY AND SO I WOULDN'T HAVE TALKED TO 'EM.

Q BEFORE HE WAS FOUND GUILTY WOULD YOU HAVE TALKED TO AN INVESTIGATOR OR -- INVESTIGATOR?

A I WASN'T NEVER CONTACTED.

Q IF YOU WERE CONTACTED.

A I DOUBT IT.

Q SOME POINT DID YOU EVER HAVE A CONVERSATION WITH RICHARD HITCHCOCK WHERE HE ADMITTED TO THE CRIME THAT JAMES HITCHCOCK SITS ON DEATH ROW FOR TODAY?

A YES, I DID.

Q WHEN WAS THAT APPROXIMATELY?

A IT WAS AROUND APRIL -- AUGUST EIGHTH OF NINETY-FOUR.

Q AND CAN YOU TELL US WHAT HAPPENED WITH THAT?

A WE WERE SITTING AT THE KITCHEN TABLE TALKING ABOUT -- WELL, ACTUALLY TALKING ABOUT OUR GRANDSONS BECAUSE THEY WERE FIXING TO START SCHOOL. AND I WAS TELLING HIM ABOUT SOME LITTLE JEANS I HAD BECAUSE JOSH WAS SHORTER THAN MY GRANDSON PATRICK. AND THEN WE WERE DRINKING COFFEE AND WE PROCEED, I'D TOLD HIM, I SAID IT'S GOING TO BE ROUGH ON MY MAMA WHEN THEY EXECUTE ERNEY. AND HE SAID THEY'RE NOT GOING TO EXECUTE ERNEY. I SAID YEAH, THEY'LL EXECUTE HIM FOR THE MURDER. AND HE SAID THEY'RE NOT GOING TO EXECUTE HIM BECAUSE HE DIDN'T DO THAT MURDER.

Q DID HE SAY ANYTHING ELSE?

A YEAH, HE DID. HE SAID -- I SAID NO, THEY'RE GOING TO EXECUTE HIM. THEY'RE GOING TO EXECUTE HIM FOR MURDER. AND HE SAID THEY AIN'T GOING TO EXECUTE HIM FOR RAPE. AND IN OTHER WORDS HE TOLD ME THAT HE WAS KNEELING RIGHT THERE, THAT ERNEY ONLY RAPED.

Q WHAT DID YOU DO IN RESPONSE TO THAT?

A I TOLD HIM I WAS GOING TO HAVE TO TELL SOMEBODY AND HE INFORMED ME HE KNEW THAT I WAS GOING TO.

Q DO YOU THINK YOU WERE -- LAST TIME YOU CAME TO COURT FOR ERNEY DO YOU THINK YOU WERE COMING TO DO THAT WHEN HE --

A THAT'S EXACTLY WHAT I WAS COMING TO DO. ALL THEY WANTED TO KNOW WAS IF ERNEY CHOPPED COTTON OR PICKED OR HAD A ROUGH LIFE.

Q SOME POINT DID YOU GET TO --

**MR. DRISCOLL:** NOTHING FURTHER AT THIS POINT?

**THE COURT:** CROSS EXAMINATION.

CROSS EXAMINATION

BY MR. LERNER:

Q SO WHEN YOU AND RICHARD GREW UP YOU BECAME VERY CLOSE, DIDN'T YOU?

A NO. WE WEREN'T CLOSE WHEN WE GREW UP.

Q YOU WEREN'T CLOSE TO RICHARD?

A NO, WE WEREN'T CLOSE. WE WERE CLOSE IN AGE.

Q BUT YOU WEREN'T CLOSE TO EACH OTHER?

A NO.

Q AND WHEN YOU CAME UP TO VISIT WOULD IT BE YOUR TESTIMONY YOU PRETTY MUCH GO OVER SEE HIM ALMOST EVERYDAY?

A NOW THIS IS WHEN WE WERE GROWN. WHEN WE WERE KIDS WE WERE NOT CLOSE.

Q I'M NOT TALKING ABOUT -- TALKING ABOUT WHEN YOU GREW UP.

A YEAH, WE WERE PRETTY CLOSE AFTER HE MARRIED.

Q SO IN SPITE OF ALL YOU SAID, YOU TESTIFIED TO HISTORY WITH RICHARD, YOU BECAME CLOSE TO HIM WHEN YOU GREW UP?

A RIGHT.

Q IS THAT BECAUSE HE CHANGED?

A NO. IT'S 'CAUSE I WASN'T RAPED BY HIM.

Q WELL, LET'S GET INTO THE THAT. HE HAD THE OPPORTUNITY TO RAPE YOU?

A HE COULDN'T RAPE ME. I WAS ABLE TO PHYSICALLY ABLE TO KEEP HIM OFF OF ME. THEY

WEREN'T.

Q INCLUDING THE TIME WHEN YOU WERE UNCONSCIOUS TO THE POINT YOU BECAME UNCONSCIOUS?

A MY MOTHER AND A HOUSE FULL OF PEOPLE WERE THERE THEN. HE COULDN'T -- WOULDN'T DO IT THEN ANY WAY.

Q BUT WITH THIS HISTORY YOU CAME CLOSE TO RICHARD AFTER YOU GREW UP?

A AFTER I GREW UP.

Q AND WHEN HE COME UP AND VISIT YOU GO OVER THERE ALL EVERYDAY, WOULDN'T YOU?

A THAT'S RIGHT. WELL, WHENEVER HE WAS UP TO VISIT.

Q AND WHENEVER HE WAS UP TO VISIT THIS LADY NAMED ROBBIE MEACHAM WOULD COME OVER TO SEE HIM ALSO, WOULDN'T SHE?

A I SAW HER THERE ABOUT EVERY TIME HE CAME.

Q AND THEY WOULD BE HUGGING AND KISSING AND THAT SORT OF THING?

A I DIDN'T SAY THEY WERE HUGGING AND KISSING. THEY HAD THEIR ARMS AROUND EACH OTHER.

Q AND WAS IT YOUR IMPRESSION THEY WERE BOYFRIEND GIRLFRIEND, WASN'T IT?

A IT WAS MY IMPRESSION THAT MARRIED MEN DON'T DO THAT.

**MR. DRISCOLL:** I OBJECT TO RELEVANCE. BEYOND SCOPE OF DIRECT.

**THE COURT:** OVERRULE THE OBJECTION.

BY MR. LERNER:

Q AND THE ONLY TIME THAT YOU WOULD SEE ROBBIE MEACHAM OVER AT YOUR MOTHER'S IS WHEN RICHARD WAS THERE. IS THAT CORRECT?

A THAT'S THE ONLY TIME I SAW HER.

Q WHEN HE COME IN HE CALLED YOU AND ROBBIE WOULD ALWAYS COME OVER, CORRECT?

A SOMETIMES DURING THE WEEKEND SHE WOULD BE THERE.

Q AND THAT WOULD BE TO SEE RICHARD?

A RIGHT.

Q NOW, YOU DID NOT TELL ANYBODY ABOUT WHAT RICHARD SAID TO YOU UNTIL AFTER HIS DEATH, DID YOU?

A NO, I DIDN'T. I WAS GOING TO CONFRONT RICHARD WHEN HE CAME BACK BECAUSE HE MADE A MONTHLY VISIT BUT HE NEVER MADE IT BACK.

Q AND YOU DIDN'T CALL THE POLICE WHEN HE TOLD YOU THAT? YOU'RE SHAKING YOUR HEAD NO?

A I'M SORRY. NO.

Q ONE MORE THING. THIS IS JUST FOR HOUSEKEEPING. YOU KEPT SAYING CARL IS RICHARD. CARL IS YOUR BROTHER?

A THAT'S RIGHT.

Q AND I DON'T KNOW IF IT'S BEEN IN THE RECORD SO FAR BUT YOU ALL WITHIN THE FAMILY CALL JAMES ERNEST HITCHCOCK THE DEFENDANT HERE ERNEY.

A RIGHT.

Q SO IF YOU SAY ERNEY THAT'S WHO YOU'RE REFERRING TO?

A YES.

Q IF YOU SAY CARL YOUR REFERRING RICHARD?

A RICHARD.

Q OKAY.

**THE COURT:** ANY OTHER QUESTIONS?

**MR. LERNER:** NO FURTHER QUESTIONS.

**MR. DRISCOLL:** NO FURTHER QUESTIONS, YOUR HONOR.

**THE COURT:** MA'AM, YOU CAN STEP DOWN.

**MR. DRISCOLL:** I WOULD CALL JUDY GAMBLE.

JUDY GAMBLE, SWORN.

DIRECT EXAMINATION.

BY MR. DRISCOLL:

Q COULD YOU PLEASE STATE YOUR NAME FOR THE RECORD.

A JUDY HITCHCOCK GAMBLE.

Q AND HOW ARE YOU RELATED TO JAMES ERNEST HITCHCOCK?

A I'M HIS NIECE.

Q AND DID YOU ALSO KNOW ANOTHER INDIVIDUAL BY THE NAME OF RICHARD CARL HITCHCOCK?

A YES, I DID.

Q AND HOW DID YOU GET TO KNOW HIM?

A HE'S MY UNCLE.

Q OKAY. AND WHEN YOU GREW UP WERE YOU AROUND RICHARD CARL HITCHCOCK?

A YES, I WAS.

Q CAN YOU TELL ME WHO'S YOUR DAD AND MOM?

A JAMES AND FAY HITCHCOCK.

Q AND THAT WOULD BE RICHARD, CARL'S OLDER BROTHER AND WIFE?

A RICHARD IS CARL'S OTHER BROTHER.

Q RICHARD CARL HITCHCOCK OLDER BROTHER IS YOUR FATHER?

A YES.

Q AND DID YOU REALLY EVEN KNOW JAMES HITCHCOCK WHEN YOU WERE GROWING UP?

A VERY LITTLE BUT YES.

Q AND DID YOU KNOW CYNTHIA DRIGGERS?

A VERY LITTLE. WE PLAYED TOGETHER WHEN WE WERE KIDS.

Q DID YOU -- DID THERE COME A POINT IN TIME AFTER HER DEATH THAT YOU WERE OVER RICHARD CARL HITCHCOCK'S HOME?

A YES.

Q AND CAN YOU -- WERE YOU ATTACKED BY RICHARD CARL HITCHCOCK?

A I WAS.

Q CAN YOU TELL US WHAT HAPPENED?

A MY PARENTS WERE OUT OF TOWN. THEY WENT ON A JOB FOR RICHARD AND RUBY AND JERRY WERE IN THE ROOM ASLEEP. I WAS ON THE COUCH SLEEPING IN THE LIVING ROOM AND RICHARD COME IN THERE AND WAS TRYING TO MESS WITH ME AND I KEPT ASKING HIM TO LEAVE ME ALONE. HE KEPT SAYING, HE TOLD ME THAT IF I DIDN'T SHUT UP SAME THING WOULD HAPPEN TO ME THAT HAPPENED TO CINDY. I GOT SCARED. HE WAS TRYING TO PULL MY CLOTHES OFF AND I STARTED FIGHTING HIM BACK AND I GOT UP. I GOT HIM OFF OF ME AND I GOT MY SISTER AND

WE JUST I WENT BACK TO MY HOUSE AND TOLD MY PARENTS ABOUT IT.

Q CAN YOU TELL US WHAT HE WAS DOING WHEN HE WAS ON TOP OF YOU WITH HIS HANDS?

A HE WAS MESSING WITH MY BREAST AND MY LOWER PARTS OF MY BODY.

Q DID HE EVER PUT HIS HAND ON YOUR NECK?

A NO.

Q HOW OLD WERE YOU WHEN THIS HAPPENED?

A I WAS TWELVE OR THIRTEEN.

Q DID RICHARD -- DID YOU CONSIDER RICHARD FAMILY AND --

A YES, I DID.

Q DID YOU TELL YOU'RE PARENTS RIGHT AWAY?

A WHEN THEY GOT BACK FROM SYRACUSE, NEW YORK I DID.

Q DO YOU KNOW ABOUT WHAT YEAR THIS WOULD HAVE BEEN?

A IT WAS IN EIGHTY-TWO OR EIGHTY-THREE.

**MR. DRISCOLL:** I HAVE NOTHING FURTHER AT THIS TIME.

**THE COURT:** STATE, CROSS EXAMINATION.

CROSS EXAMINATION

BY MR. LERNER:

Q NOW WHEN THIS HAPPENED YOUR UNCLE RICHARD

DIDN'T USE ANY VIOLENCE AGAINST YOU, DID HE?

A NO. JUST TRYING TO HOLD ME DOWN.

Q AND YOU USED VIOLENCE AGAINST HIM TO GET HIM OFF, DIDN'T YOU?

A YES, I DID.

Q YOU KICKED HIM?

A YES, SIR.

Q AND YOU WERE ABLE TO GET AWAY FROM HIM WITHOUT ANY DIFFICULTY BY DOING THAT?

A JUST STRUGGLING TO GET OFF FROM UNDERNEATH OF HIM.

Q AND YOU WERE HOW OLD WHEN THIS HAPPENED?

A TWELVE OR THIRTEEN.

Q AND HOW LARGE WERE YOU PHYSICALLY AT THAT AGE?

A I WASN'T VERY BIG BACK THEN.

Q YOU TOLD YOUR FATHER ABOUT THIS THAT SAME DAY OR WHEN HE CAME BACK FROM NEW YORK?

A WHEN HE GOT BACK. YES, I DID.

Q AND HE LIVED IN -- I BELIEVE YOU SAID AT THAT TIME YOU LIVED IN GROVELAND?

A YES, WE DID.

Q SO WHEN THIS HAPPENED YOU GOT YOUR SISTER AND WENT BACK TO GROVELAND. WAS THAT CORRECT?

A YES.

**MR. LERNER:** NO FURTHER QUESTIONS.

**THE COURT:** DEFENSE HAVE ANY OTHER QUESTION.

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q AT THAT TIME WHEN YOU WERE -- RICHARD HITCHCOCK ATTACKED YOU, WAS HE IN GOOD PHYSICAL CONDITION?

A YES, HE WAS.

Q OKAY. AND YOU SAY -- HOW WAS IT AGAIN? WHERE WAS IT THAT YOU KICKED HIM THAT YOU WERE ABLE TO GET HIM OFF OF YOU?

A I DON'T KNOW EXACTLY WHERE I KICKED HIM. I KICKED HIM AND WAS FIGHTING TO GET OFF FROM UNDERNEATH OF HIM.

Q WHEN HE SAID WHAT HAPPENED TO CINDY HE KNEW YOU WHO CINDY WAS?

A YES, HE DID.

**MR. DRISCOLL:** NOTHING FURTHER.

**THE COURT:** STATE.

**MR. LERNER:** HOW OLD WERE YOU WHEN CINDY DIED?

**THE WITNESS:** SIX OR SEVEN.

**MR. LERNER:** NO FURTHER QUESTIONS.

**THE COURT:** ANYTHING ELSE?

**MR. DRISCOLL:** NOTHING FURTHER.

MAY THIS WITNESS BE RELEASED AS WELL?

**THE COURT:** MR. LERNER?

**MR. LERNER:** YES, SHE MAY.

**THE COURT:** TAKE A TEN MINUTE RECESS AT THIS TIME. LIKE TO WORK TO TWELVE THIRTY. TAKE A RECESS AT THIS TIME.

(AT THIS TIME THE JUDGE LEAVES THE COURT ROOM AND A RECESS IS TAKEN)

(AT THIS TIME THE JUDGE ENTERS THE COURTROOM)

**THE COURT:** I THINK I'M GOING TO HAVE TO WORK UNTIL ABOUT ONE O'CLOCK TODAY BECAUSE I HAVE AN APPOINTMENT I CAN'T GET OUT OF AT TWO. SO I A -- I HAVE TO DO IN-JAIL ARRAIGNMENTS, WORK UNTIL ONE, COME BACK AT THREE.

**MR. DRISCOLL:** OKAY. WE HAVE -- I'M NOT CALLING ANY MORE FAMILY MEMBERS. WE HAVE ONE WITNESS LEFT AND I THINK MIGHT TAKE CLOSE TO ONE O'CLOCK IF WE GET ANY --

**THE COURT:** OKAY.

DO YOU HAVE ANY WITNESSES FOR THIS AFTERNOON?

**MR. DRISCOLL:** WE'RE PICKING THEM UP NOW, GETTING THEM HERE.

**THE COURT:** OKAY. STILL WANT TO BE ABLE TO -- WOULDN'T BE ABLE TO START BACK UNTIL THREE.

**MR. DRISCOLL:** OKAY. THANK YOU, YOUR HONOR.

**MR. DRISCOLL:** ROBERT KOPEC.

ROBERT KOPEC, SWORN

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q GOOD AFTERNOON.

A GOOD AFTERNOON, SIR.

Q COULD YOU PLEASE STATE YOUR NAME FOR THE RECORD?

A ROBERT KOPEC.

Q AND MR. KOPEC WHAT'S YOUR EDUCATIONAL BACKGROUND?

A STUDIED AT THE NEW YORK STATE UNIVERSITY COLLEGE AT FREDONIA. RECEIVED BACHELOR OF SCIENCE DEGREE FOR GRADUATE WORK IN THE AREA OF FORENSIC SEROLOGY, GEORGE WASHINGTON UNIVERSITY IN WASHINGTON D C. I TAKEN MANY MANY COURSES IN FORENSIC SCIENCE THROUGHOUT THE COUNTRY SUCH AS AT THE E M V MC CRONE RESEARCH INSTITUTE, F B I SCIENTIFIC TRAINING DIVISION, QUANTICO, VIRGINIA.

Q DID YOU EVER TAKE COURSES DEALING WITH USE OF MICROSCOPE OR HAIR ANALYSIS?

A QUITE A NUMBER. I TAKEN MICROSCOPY SCANNING, ELECTRON MICROSCOPY AT MC CRONE INSTITUTE IN CHICAGO. TOOK A COURSE SPECIFICALLY IN MICRO ANALYSIS OF HAIR AT F B I SCIENTIFIC TRAINING

DIVISION IN QUANTICO.

Q WHAT POSITION IN THIS FIELD HAVE YOU HELD?

A I'VE BEEN EMPLOYED IN THE FIELD ABOUT THIRTY TWO YEARS. I STARTED WITH THE METROPOLITAN POLICE DEPARTMENT IN WASHINGTON D C WHERE I DID FORENSIC WORK, CRIME SCENE WORK. NEXT WORKED FOR THE HEADQUARTERS LABORATORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS A SHORT TIME. I WAS SENIOR CRIMINALIST FOR THE OREGON STATE POLICE. FROM THEN I MOVED TO THE SANFORD REGIONAL CRIME LABORATORY OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT WHERE I WAS SUPERVISOR IN THE MICRO ANALYSIS SECTION. I WAS THEN EMPLOYED BY THE SEMINOLE COUNTY OFFICE AS CRIME SCENE INVESTIGATOR AND CRIMINAL SEROLOGIST AT THE TIME. ELEVEN YEARS I'VE BEEN IN PRIVATE PRACTICE FORENSIC CONSULTING SCIENTIST.

Q YOU BELONG TO ANY PROFESSIONAL ASSOCIATION?

A YES. I AM A FELLOW OF THE AMERICAN ACADEMY OF FORENSIC SCIENCES. I'M A MEMBER OF THE INTERNATIONAL ASSOCIATION FOR IDENTIFICATION -- INTERNATIONAL ASSOCIATION OF BLOOD STAIN PATTERN ANALYST. ASSOCIATION OF ANALYTICAL CHEMIST AND A NUMBER OF OTHERS.

Q AND HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT IN THE AREA OF HAIR ANALYSIS?

A YES, I HAVE.

Q HOW MANY TIMES?

A IT WOULD BE HARD TO GIVE AN EXACT NUMBER. I TESTIFIED AS EXPERT IN EXCESS OF FIFTEEN HUNDRED TIMES IN THE PAST THIRTY TWO YEARS. AT LEAST HALF OF THOSE HAVE BEEN THAT THE AREA OF HAIR ANALYSIS.

Q CAN YOU TELL US WHAT COURTS YOU TESTIFIED OR SOME OF THEM?

A IN THIS ONE. NOT IN THIS PARTICULAR COURTROOM, THIS JURISDICTION. I TESTIFIED VIRTUALLY EVERY STATE IN THE UNITED STATES. IN CIRCUIT COURTS, FEDERAL COURTS. ALMOST EVERY LEVEL OF COURT. I TESTIFIED AT MILITARY COURT MARTIALS IN THE UNITED STATES AND IN FOREIGN COUNTRIES. I'VE TESTIFIED IN ALMOST EVERY COUNTY IN THIS PARTICULAR STATE.

Q WHEN YOU TESTIFY WERE YOU ACCEPTED AS AN EXPERT IN YOUR FIELD?

A YES.

**MR. DRISCOLL:** YOUR HONOR, AT THIS TIME WE WOULD TENDER MR. KOPEC AS EXPERT IN THE AREA OF FORENSIC SCIENCES AND HAIR ANALYSIS.

**THE COURT:** ANY VOIR DIRE BY THE STATE?

VOIR DIRE CROSS EXAMINATION

BY MR. LERNER:

Q YOU MENTIONED CRONE RESEARCH INSTITUTE?

A MC CRONE.

Q MC CRONE?

A RIGHT. M C C R O N E.

Q AND YOU WERE TALKING ABOUT THE AREA OF MICROSCOPY?

A THAT'S THE MAIN AREA OF EXPERTISE.

Q THAT'S M I C R O S C O P Y?

A I BELIEVE SO, YES.

Q OKAY. WHEN YOU TESTIFIED WHAT SPECIFIC ANALYTIC PROCESSES HAVE YOU TESTIFIED ABOUT IN COURT?

A IN THE LARGER SENSE OF FORENSICS SCIENCE OR RELATES TO HAIR OR WHAT --

Q FORENSICS SCIENCE IS A PRETTY BROAD AREA THAT INVOLVES D N A SEROLOGY?

A THAT'S WHAT I'M ASKING TO QUALIFY.

Q WHAT DO YOU CONSIDER YOURSELF QUALIFIED TO GIVE EXPERT OPINION ABOUT AS FAR AS ANALYTIC TECHNIQUES?

A MY EXPERTISE IS IN THE AREA OF MICRO ANALYTICAL TECHNIQUES THAT WOULD INCLUDE THINGS LIKE THE MICROSCOPIC COMPARISON OF ALL HAIR LIKE MICRO COMPARISON OF SOIL, CHEMICAL ANALYSIS GO ALONG WITH

THAT. THINGS I'VE BEEN TRAINED IN THE ARE AREAS OF GLASS, GUN SHOT RESIDUE ANALYSIS.

Q OKAY. SO, AS FAR AS LOOKING AT THINGS UNDER THE MICROSCOPE YOU LOOK AND SEE WHAT VISIBLE CHARACTERISTICS ARE SIMILAR IN A KNOWN AND UNKNOWN. IS THAT WHAT YOU DO?

A IN SOME TYPE OF ANALYSIS THAT IS A TECHNIQUE YOU USE. THAT'S A COMPARISON BETWEEN KNOWN AND UNKNOWN. MANY OTHER TECHNIQUES OF MICROSCOPY OR EVIDENCE ANALYSIS MAY NOT REQUIRE COMPARISONS. MAY BE IDENTIFYING. ANALYSIS DEPENDS WHAT YOU'RE TRYING TO DO.

Q WHAT YOU CONSIDER YOURSELF TO BE EXPERT IN THEN OR TO QUALIFY TO GIVE OPINION WOULD BE LOOKING AT THINGS UNDER A MICROSCOPE AND BEING ABLE TO PICK UP THE CHARACTERISTICS OF WHAT YOU ARE LOOKING AT AND DESCRIBE IT IN A SCIENTIFIC WAY?

A WELL, THAT WOULD BE PART OF MY EXPERTISE. THAT WOULD BE PART OF MANY OF THE ANALYSIS THAT I WOULD DO WITH SOME TYPES OF EVIDENCE EXAMINATION. OTHER ONES WOULD REQUIRE EXTREME ANALYSIS. THAT IS SOME KIND OF EVIDENCE REQUIRE THINGS SUCH AS THE GASTRONOMER TO GET GASTRIC JUICES. THESE ARE THINGS MICROANALYSISTS COMMONLY DO.

Q WE'RE JUST TALKING ABOUT THE FIELD OF

MICROANALYSIS, RIGHT?

A WELL, MICROANALYSIS DOESN'T NECESSARILY LIMIT ITSELF TO THE AREA -- LET ME -- MAYBE SHOULD DEFINE THE TERM FIRST. PROBABLY SHOULD HAVE DONE THIS FIRST. MICROANALYSIS DOES NOT MEAN ANALYSIS NECESSARILY BY THE MICROSCOPE. WHAT IT MEANS IS ANALYSIS OF VERY SMALL QUANTITIES OF MATERIAL. MICROSCOPE IS ONE TOOL THAT WOULD BE USED IN THE ANALYSIS OF SMALL QUANTITIES OF MATERIAL. THEN THERE ARE OTHER THINGS THAT COULD BE USED. CHEMICAL TECHNIQUES. MANY OTHER THINGS COULD BE USED IN THE ANALYSIS OF SMALL QUANTITIES OF THINGS.

Q YOU'RE ALSO TRAINED IN THE CHEMICAL ANALYSIS AS WELL OR WOULD YOU REFER THAT TO SOMEONE ELSE?

A NO, NO. DEPENDS ON WHAT IT IS IN THE AREAS I MENTIONED; GLASS, HAIR, SOIL, GUN SHOT RESIDUE. I'VE BEEN TRAINED IN THE CHEMICAL ANALYSIS, MICROSCOPIC ANALYSIS OF THESE AREAS.

Q OKAY. NOW REFERENCE TO D N A DO YOU HAVE ANY EXPERTISE AS FAR AS DOING THAT?

A I'M NOT D N A ANALYST, NO.

Q YOU MENTIONED THAT YOU WERE ORIGINALLY -- LOOKED LIKE YOU WERE TRAINED IN THE AREA OF SEROLOGY?

A THAT IS CORRECT.

Q HAVE YOU GONE OUT OF THAT AREA NOW INTO THIS AREA OF MICROANALYSIS?

A NO. I'VE BEEN IN THE AREA OF MICROANALYSIS MY ENTIRE CAREER, ABOUT THIRTY TWO YEARS. DURING PART OF THAT, ROUGHLY THREE QUARTERS OF IT, I ALSO WAS INVOLVED IN SEROLOGY ANALYSIS. THAT WAS NORMAL THING BACK IN THE SEVENTIES, EIGHTIES THAT IS MICROANALYSISTS ALSO DID SEROLOGICAL WORK. NOW IT'S CHANGED. IT'S NO LONGER LIKE THAT.

Q BUT YOU'RE NOT HOLDING YOURSELF OUT TO BE EXPERT IN THE AREA OF SEROLOGY FOR TODAY'S PURPOSE?

A FOR TODAY'S PURPOSE, NO.

Q WE'RE JUST TALKING ABOUT MICROANALYSIS?

A WELL, THAT WOULD DEPEND WHAT QUESTION I'M ASKED. I DON'T ANTICIPATE TESTIFYING TO ANY SEROLOGY BUT I DON'T KNOW WHAT THE QUESTION THAT WILL BE ASKED BY THE ATTORNEYS.

**MR. LERNER:** YOUR HONOR, I WOULD HAVE NO OBJECTION TO HIM BEING QUALIFIED AS EXPERT TO GIVE EXPERT OPINION IN THE AREA OF MICROANALYSIS AS HE'S JUST DESCRIBED IT. BUT I WOULD OBJECT TO HIM BEING QUALIFIED AS EXPERT IN THE GENERAL AREA OF FORENSIC SCIENCE WITHOUT

FURTHER QUALIFICATIONS.

**MR. DRISCOLL:** WE ONLY TENDER HIM AS EXPERT IN MICROANALYSIS -- MICROSCOPY AND MICROANALYSIS.

**THE COURT:** ALLOW HIM TO BE EXPERT IN THAT FIELD ONLY THEN.

BY MR. DRISCOLL:

Q LET'S START BACK WITH -- DID YOU COME TO WORK HERE IN FLORIDA AND IN NINETEEN SEVENTY EIGHT?

A THAT IS CORRECT.

Q AND WHERE DID YOU GO TO WORK?

A I WORKED -- I WAS EMPLOYED BY THE SANFORD REGIONAL CRIME LABORATORY OF THE FLORIDA DEPARTMENT LAW ENFORCEMENT THAT'S SINCE MOVED TO ORLANDO.

Q AND WHEN YOU CAME IN WHAT WAS YOUR POSITION?

A I WAS THE HEAD OF THE MICROANALYSIS SECTION.

Q AND AS PART OF THAT DID YOU COME TO SUPERVISE AN INDIVIDUAL BY THE NAME OF DIANA BASS?

A YES, I DID.

Q AND DID YOU HAVE THE OPPORTUNITY TO EVALUATE HER PERFORMANCE?

A YES.

Q AND ARE YOU FAMILIAR WITH STEVEN PLATT AND

BETTY BUCHANAN?

A YES.

Q WERE THESE ALSO PEOPLE WHO WORKED IN THE LAB AT THAT TIME?

A YES.

Q WERE THEY -- DID THEY HAVE YOUR LEVEL OF EXPERTISE OR SPECIALTY IN MICROANALYSIS?

A TO THE BEST OF MY KNOWLEDGE NEITHER ONE OF THOSE TWO INDIVIDUALS ARE MICROANALYSTS. ONE IS A SUPERVISING ADMINISTRATIVE SUPERVISOR. BETTY BUCHANAN, STEVEN PLATT WAS SEROLOGISTS.

Q OKAY. REGARDING HER PERFORMANCE AS YOU OBSERVED IN NINETEEN SEVENTY EIGHT, CAN YOU TELL US HOW -- WHAT WAS YOUR CONCLUSION CONCERNING HER PERFORMANCE AS A MICROANALYST --

**MR. LERNER:** I WOULD OBJECT. IT'S IRRELEVANT.

**MR. DRISCOLL:** -- IN THE AREA OF HAIR?

**THE COURT:** HOW IS IT RELEVANT?

**MR. DRISCOLL:** WE HAVE RAISED A CLAIM THAT A NUMBER OF WAYS. MR. KOPEC CAME IN AND HE WAS ABLE TO PIN POINT THE PROBLEM THAT DIANA BASS HAD AS A MICROANALYST CONCERNING HER ABILITY, HER TRAINING, WHETHER SHE WAS CAPABLE OF COMING TO COURT AND RENDERING AN OPINION ON HAIR WHICH

LED TO THE CONVICTION OF JAMES ERNEST HITCHCOCK. THIS MAN'S AN EXPERT IN THE AREA AND HE WAS -- ALSO HAPPENED TO BE DIANA BASS'S SUPERVISOR SO HE WOULD HAVE HAD OCCASION TO VIEW HER ABILITIES AS A MICROANALYST. HE WOULD HAVE VIEWED THE OPPORTUNITY TO OBSERVE HER LAB PROCEDURE; WHETHER SHE PROPERLY MAINTAINED EVIDENCE, WHETHER PROPER PROCEDURES WERE FOLLOWED. AND WE BELIEVE IT'S RELEVANT TO THE CLAIMS WE RAISED IN OUR MOTION.

**MR. LERNER:** THE TRIAL WAS CONCLUDED BEFORE NINETEEN SEVENTY EIGHT BEFORE THIS GENTLEMAN CAME ON THE SCENE. SO HE COULD HAVE ABSOLUTELY NO TESTIMONY REGARDING ANY WORK THAT MISS BASS ACTUALLY DID IN THIS CASE. THAT'S ONE POINT OF OBJECTION. ANOTHER POINT OF OBJECTION IS THAT BACK IN NINETEEN SEVENTY SEVEN AT THE TRIAL MR. HITCHCOCK TOOK THE STAND. IT'S TRUE THAT THE HAIR WAS PUT IN AND DIANA BASS TESTIFIED ABOUT IT APPARENTLY TO SHOW INTIMATE CONTACT BETWEEN THE DEFENDANT AND CINDY DRIGGERS WHO IS THE VICTIM IN THIS CASE. BUT THEN IN HIS SIDE OF THE CASE MR. HITCHCOCK ACTUALLY TOOK THE STAND AND ADMITTED TO INTIMATE CONTACT BETWEEN HIMSELF AND DENISE

DRIGGERS. ALSO ADMITTED THAT HE IS THE ONE THAT HID THE BODY. SO HE ADMITTED THE POINT TO WHICH THAT THE HAIR WAS ADMITTED TO SHOW. SO THAT POINT IS ABSOLUTELY IRREFUTABLY PROVED ON THE RECORD OUT OF THE DEFENDANT'S OWN MOUTH. AS A MATTER OF FACT WHEN HE WAS QUESTIONED ABOUT THE HAIR IN HIS TESTIMONY HE SAID I GUESS THAT'S MY HAIR BECAUSE I HAD SEX WITH CINDY. SOMETHING TO THAT WHEN YOU GO BACK LOOK AT THE RECORD SO.

ADDITIONAL POINT OF OBJECTION IS THIS TESTIMONY COULD ONLY GO TO PROVE LINGERING REASONABLE DOUBT. WE'RE HERE ON A RECONSIDERATION OF THE PENALTY PHASE PROCEEDING THAT TOOK PLACE IN NINETEEN NINETY-SIX. AND LINGERING REASONABLE DOUBT IS NOT APPROPRIATE CONSIDERATION. THAT'S THE LAW OF THIS CASE. SO THAT IS THE POINTS OF OBJECTION.

ADDITIONALLY, WHEN YOU LOOK AT THE RECORD OF NINETEEN NINETY-SIX YOU WILL SEE THAT DUE TO THE WORK OF MISS CASHMAN DIANA BASS' TESTIMONY WAS NOT ADMITTED INTO EVIDENCE. IT'S NOT PART OF THE RECORD OF THAT NINETEEN NINETY-SIX PENALTY PHASE. IT PLAYS NO PART. SO THE NINETEEN -- ANYTHING THAT HAPPENED IN NINETEEN

NINETY SEVEN, AS FAR AS GUILT PHASE, IS SOMETHING THAT COULD AND SHOULD HAVE BEEN RAISED BOTH ON APPEAL AND ON COLLATERAL ATTACK IN SOME PRIOR PROCEEDING. AND IT IS PROCEDURALLY BARRED FOR THAT REASON. AND I WOULD POINT OUT AGAIN, I SHOWED YOU THE STATE'S A AND B FOR IDENTIFICATION WHICH IS THE MOTION THAT MISS CASHMAN FILED IN NINETEEN NINETY SEVEN AS TO UNDER THREE POINT EIGHT FIVE O. SHE HAD THE OPPORTUNITY TO BRING UP ANYTHING SHE WANTED ABOUT THE NINETEEN NINETY SEVEN TRIAL. SHE WAS NOT THE ATTORNEY. SHE COULD HAVE BROUGHT UP INEFFECTIVE ASSISTANCE. SHE COULD HAVE BROUGHT UP DIANA BASS'S DIFFICULTY. SHE DID NOT BRING THAT UP. THE SUPREME COURT CONSIDERED WHAT SHE HAD TO PRESENT AND REJECTED IT. HELD IT TO BE WITHOUT PERMIT. THE ISSUE HAS BEEN DECIDED. IT SHOULD HAVE BEEN BROUGHT UP AT THAT TIME. IT IS SUCCESSIVE AT THIS POINT. FOR ALL THESE REASONS STATE OBJECTS TO THIS QUESTION AND TO ANY EVIDENCE ABOUT THE ISSUE OF DIANA BASS'S PERFORMANCE IN NINETEEN NINETY SEVEN.

**MR. DRISCOLL:** YOUR HONOR.

**THE COURT:** NINETEEN SEVENTY SEVEN, SORRY.

**MR. DRISCOLL:** WE'RE NOT ARGUING LINGERING REASONABLE DOUBT. NEVER HAD LINGERING DOUBT. WE ASKED FOR A HEARING ON ONE OF THE ISSUES WE RAISED THAT CONCERNS DIANA BASS. THIS MAN HAD THE OPPORTUNITY TO OBSERVE HER. THIS MAN IS AN EXPERT. THIS MAN IS WELL TRAINED IN THE AREA OF HAIR ANALYSIS. WE WOULD LIKE TO PRESENT THAT KNOWING FULL WELL THAT REGARDLESS OF WHAT WE RAISE THE STATE'S GOING TO ARGUE THAT WE'RE TRYING TO ARGUE LINGERING DOUBT BUT WE'RE NOT. IT'S GOING TO ARGUE WE'RE PROCEDURALLY BARRED. I THINK IT WAS ACTUALLY ARGUED, IT WAS ACTUALLY, IN THE NINETEEN -- THE VOID MOTION OF NINETEEN NINETY-SIX. SO I WOULD JUST ASK THAT I CAN JUST PRESENT MR. KOPEC'S TESTIMONY AND YOU CAN EVALUATE IT FOR WHAT IT'S WORTH. WE BELIEVE WE HAVE THE RIGHT TO PRESENT THAT.

ONLY ANOTHER THING I WOULD SAY IS JAMES HITCHCOCK NOT NOW, NOT BACK THEN OR TODAY WILL HE BE A HAIR EXPERT. WE'RE NOT GOING TO BRING HIM IN. SO WHAT HE SAID IS REALLY IRRELEVANT.

**THE COURT:** SUSTAIN THE OBJECTION AT THIS POINT ON THIS ISSUE.

BY MR. DRISCOLL:

**MR. DRISCOLL:** MAY I PROFFER?

**THE COURT:** YES.

BY MR. DRISCOLL:

Q OKAY. DID YOU HAVE THE OPPORTUNITY TO EVALUATE DIANA BASS'S PERFORMANCE?

A YES, I DID.

Q WAS THIS IN NINETEEN SEVENTY EIGHT?

A YES.

Q WOULD IT BE YOUR EXPERIENCE THAT SOMEBODY -- DID DIANA BASS, WHEN SOMEBODY GETS MORE EXPERIENCE AS MICROANALYST, DO THEY USUALLY GET WORSE OR GET BETTER?

A WELL, HOPE WOULD BE WITH ADDITIONAL TRAINING A PERSON WOULD CONTINUE TO IMPROVE THROUGHOUT THE YEARS.

Q IF SOMEBODY HAD A BASIC LEVEL OF TRAINING WOULD THEY GO BELOW THAT BARRING SOME SORT OF EXTERNAL SOURCE LIKE MENTAL BREAK DOWN OR THINGS LIKE THAT. ONCE SOMEBODY OBTAINS BASIC LEVEL OF UNDERSTANDING WOULD THEY CONTINUE WITH THAT BASIC LEVEL OF UNDERSTANDING AND ADD TO THAT THROUGH TRAINING OR OVER TIME?

A WELL, REALLY, OF COURSE, DEPENDS ON THE INDIVIDUAL. I WOULD -- MY EXPERIENCE HAS BEEN MOST PEOPLE GET BETTER AND BETTER AND BETTER. THEY HAVE A DESIRE TO DO A BETTER JOB. THERE ARE OTHER PEOPLE

WHO TEND TO GET SLOPPY, SLOPPY AND SLOPPIER AS TIME GOES BY AND GETS WORSE.

Q DID YOU HAVE THE OPPORTUNITY TO EVALUATE MISS BASS'S SKILLS AND PERFORMANCE AS A HAIR ANALYST?

A YES, I DID.

Q AND COULD YOU TELL US WHAT YOU OBSERVED.

A AT THE TIME DIANA BASS HAD ABOUT THREE YEARS OF EXPERIENCE AT THE SANFORD REGIONAL CRIME LABORATORY. DIDN'T REALLY EXHIBIT THE LEVEL OF KNOWLEDGE AND EXPERIENCE THAT SHE SHOULD HAVE HAD IN THREE YEARS IN MANY ASPECTS. SHE DIDN'T EXHIBIT MANY OF THE EVEN BASIC SKILLS THAT ANY ANALYST SHOULD HAVE HAD IN THEIR FIRST YEAR OF ANALYSIS. IN PARTICULAR, THE VERY BASIC SKILLS WERE MISSING. WHAT SEEMED TO BE A FAILURE TO UNDERSTAND THE IMPORTANCE OF THE INTEGRITY OF ITEMS OF EVIDENCE, MICROANALYTICAL EVIDENCE, WHICH MUCH OF THE TIME YOU CAN'T SEE. EVIDENCE HANDLING SKILLS WERE EXTREMELY POOR AND I HAVE -- I WOULD SUSPECT THAT -- WELL, MY EXPERIENCE HAS BEEN THIS IS ONE OF THE -- THIS IS THE ONE OF THE FIRST THINGS YOU LEARN AND SHE DID NOT EXHIBIT EVEN VERY BEGINNING OF UNDERSTANDING HOW TO HANDLE EVIDENCE.

FOR INSTANCE, IT WAS ON QUITE A

NUMBER OF OCCASIONS WHEN I OBSERVED HER DOING HAIR CASES. ONE OF THE THINGS SHE WOULD DO WOULD BE TO TAKE OUT HAIRS FROM MULTIPLE ITEMS OF EVIDENCE AT ONE TIME AND HAVE MULTIPLE HAIR ITEMS ON THE DESK AT ONE TIME. THERE WAS -- NORMALLY IN A SITUATION LIKE THAT IT WAS EASY TO CONTAMINATE ONE SAMPLE WITH ANOTHER SAMPLE. HAIR IS SO LIGHT, SIMPLY ONE PERSON WALKING BY THE DESK COULD BLOW A HAIR FROM ONE PILE TO THE NEXT PILE. OCCASIONALLY, SHE WOULD HAVE THESE MULTIPLE SAMPLES OUT. SHE WOULD TAKE LITTLE STICK ON DOTS. SHE WOULD STICK THE HAIR DOWN ON A PIECE OF PAPER, LINE IT WAS GRAPH PAPER, AS I RECALL. AND THIS EVIDENCE WOULD BE REMAIN ON THE DESK IN THAT CONDITION THROUGHOUT LUNCH PERIODS. I OBSERVED HER DO THAT OVERNIGHT ON A NUMBER OF OCCASIONS. EVEN THOUGH SHE WAS CONSTANTLY TOLD NOT TO DO THIS TYPE OF THING SHE CONTINUED TO DO IT. AND AGAIN THIS IS A VERY DANGEROUS SITUATION PARTICULARLY WITH MICROANALYTICAL EVIDENCE. THERE WAS NO PROTECTION OF THE EVIDENCE AT. ALL SIMPLY DIDN'T QUIET UNDERSTAND HOW IMPORTANT MAINTAINING INTEGRITY OF EACH ITEM IS FIRST. PROBABLY FIRST MONTH'S TRAINING WE WOULD NORMALLY TEACH THAT YOU ONLY EXAMINE ONE ITEM OF EVIDENCE AT ONE TIME. PEOPLE REMOVE HAIR FROM ONE ITEM AT A TIME AND ONLY

HAVE IT UNDER THE MICROSCOPE ONE ITEM AT A TIME. NEVER HAVE MORE THAN ONE ITEM AT A TIME OPEN. THIS IS VERY VERY BASIC UNDERSTANDING WITH MICROANALYTICAL SKILLS UNTIL YOU FIND A WAY TO PERMANENTLY PROTECT THE HAIRS. AND THAT MIGHT BE BY MOUNTING THEM ON MICROSCOPE SLIDES SO THEY CAN'T BLOW AWAY. BUT AGAIN, SHE HAD EXHIBITED NONE OF THE VERY BASIC THINGS IN THAT ASPECT.

AT THAT TIME, SANFORD LAB, IT WAS COMMON TO ASSIGN ONE ANALYST MULTIPLE CASES. AND THE MAIN PURPOSE FOR THAT WAS TO GIVE SOMEBODY RESPONSIBILITY OF FOLLOWING THAT CASE UP. THE EXPECTED PROCEDURE WOULD HAVE BEEN THE ANALYST WOULD HAVE WORKED ON ONE CASE AT A TIME, HAD THE EVIDENCE OPENED FROM ONE CASE AT A TIME. THE EXPECTED PROCEDURE WOULD HAVE BEEN THAT THOSE OTHER CASES WOULD HAVE BEEN IN THE EVIDENCE ROOM AND THE FOLDERS MAY HAVE, THE ADMINISTRATIVE FOLDERS MAY HAVE BEEN AT AN ANALYSTS DISK BUT THEY WERE ONLY WORKING ONE CASE AT A TIME. DIANA'S -- MISS BASS' PROCEDURES WAS THAT SHE WOULD START ON ONE CASE AND WHEN SHE GOT TO A POINT WHERE SHE HAD DIFFICULTY OR BOARD WITH A CASE OR SOMETHING ALONG THOSE LINES, SHE WOULD STOP THE ANALYSIS ON THAT CASE AND LEAVE THE EVIDENCE OUT ON HER WORK TABLE, GET ANOTHER CASE,

BRING THAT, OPEN THAT ONE UP AND AGAIN, IT WAS POSSIBLE TO HAVE CONTAMINATION BETWEEN THE TWO DIFFERENT CASES, VERY VERY HIGH, CONSIDERING THE WAY SHE HANDLED EVIDENCE.

AND AGAIN THESE ARE THE VERY VERY BASIC, VERY VERY BASIC THINGS. SHE WAS INSTRUCTED TIME AND AGAIN OF THE PROPER PROCEDURES AND SHE REFUSED TO FOLLOW THEM. SHE HAD QUITE A NUMBER OF DEFICIENCIES IN THE AREA OF BASIC SKILLS. I WANT TO SAY I WAS APPALLED BY WHAT I SAW AND I WAS. AND SHE JUST -- I INSTRUCTED HER AS BEST AS I COULD BUT SHE DIDN'T SEEM TO WANT TO LEARN.

SECONDARILY, SHE HAD A VERY POOR UNDERSTANDING OF THE TECHNIQUES USED IN MICROANALYTICAL ANALYSIS OF HAIR.

Q COULD YOU DESCRIBE TO US WHAT THE PROCEDURE BACK THEN WOULD HAVE BEEN FOR ANALYZING HAIR?

A ACTUALLY, THE METHOD OF EXAMINING HAIR THEN IS BASICALLY THE SAME AS IT IS NOW, SAME AS IT WAS IN NINETEEN THIRTY. IT HASN'T CHANGED VERY MUCH EXCEPT FOR THE INTRODUCTION OF D N A EVIDENCE RECENTLY. NORMAL PROCEDURE WOULD HAVE BEEN TO EXAMINE SPECIFIC TYPE OF THING WE'RE TALKING ABOUT, KNOWN AND UNKNOWN HAIR FROM THE CRIME SCENE TO THE

KNOWN SAMPLE OF HAIR FROM A SPECIFIC PERSON. IT'S A COMPARATIVE ANALYSIS, ONE AGAINST ANOTHER. IT'S DONE MICROSCOPICALLY. HOWEVER, NORMAL PROCEDURE WOULD BE TO OPEN UP THE PACKET ENVELOPE WITH THE KNOWN HAIR OF ONE OF THE PEOPLE, EXAMINE IT UNDER LOW POWER MICROSCOPE TAKING CARE NOT TO ALLOW ANY OF IT TO GET BLOWN AWAY, ANY CONTAMINATES IN THE ROOM FALL. EXAMINE IT ON LOW POWER TO DESCRIBE THE HAIR LENGTH AND GENERAL COLOR. GENERAL AMOUNT OF CURL, THIS TYPE OF THING. VERY LOW LEVEL ANALYSIS. AT THAT POINT THE HAIRS, THEN THOSE SPECIFIC HAIRS WOULD HAVE BEEN MOUNTED ON MICROSCOPE SLIDES. THAT IS LITTLE GLASS SLIDE, ONE INCH BY THREE INCHES. HAIR WOULD HAVE BEEN CEMENTED AND FUSED TO THE GLASS PLATES AND A COVER IS SLIPPED OVER THAT WHICH WOULD HAVE BEEN CEMENTED ALSO. THIS MAKES A PERMANENT PROTECTIVE BOX, SO TO SPEAK FOR THE HAIR. ALSO ALLOWS THE HAIR TO SIT FLAT SO YOU CAN LOOK AT IT UNDER THE MICROSCOPE.

ONCE THAT WAS DONE, ALL OF THOSE KNOWN HAIRS THAT WERE NOT MOUNTED WERE PUT AWAY IN THE ENVELOPE THAT CAME IN, THEN YOU WOULD GO TO THE QUESTIONED HAIRS AND EACH ONE WOULD BE THE SAME PROCEDURE WOULD BE FOLLOWED FOR EACH ONE OF THOSE SPECIFIC HAIRS. AND AGAIN IF THE QUESTIONED HAIRS

CAME FROM MULTIPLE PLACES OF THE CRIME SCENE; ONE WAS FOUND IN A CAR, ONE WAS FOUND ON THE BODY, ONE WAS FOUND ON THE FLOOR, EACH ONE OF THOSE WOULD BE EXAMINED SEPARATELY AWAY FROM THE OTHER ONES. THEY ARE MOUNTED SEPARATELY. THEY WOULD -- PACKAGES WOULD BE OPENED SEPARATELY, EXAMINED SEPARATE AND MOUNTED SEPARATELY. AND THEN YOU WOULD GO TO THE NEXT ONE DO THE SAME PROCEDURE. THEN WHAT YOU WOULD DO IS COMPARE SLIDES CONTAINED IN THE KNOWN HAIRS. SO HAIRS ON THE KNOWN SLIDE TO THE MOUNTED HAIRS ON THE QUESTIONED SAMPLE. THIS IS DONE MICROSCOPICALLY. IT WAS DONE GENERALLY USING EITHER COMPARISON MICROSCOPE OR A HIGH QUALITY MEDICAL TYPE MICROSCOPE.

Q WERE THERE ANY -- IF AN -- BECAUSE WE'RE DEALING WITH SOMETHING THAT'S SO FINE, IF YOU DON'T KEEP YOUR KNOWN SAMPLES SEPARATE DUE TO SLOPPY WORK PROCEDURES, THEY'RE A CHANCE YOU WOULD FALSELY INCLUDE SOMEBODY THROUGH YOUR HAIR ANALYSIS BECAUSE YOU GOT THE SAMPLES MIXED UP?

A WELL, THIS -- WITH IMPROPER HANDLING IT IS LIKELY THAT THAT COULD HAPPEN. AND WHAT I MEAN BY THAT IS IF THE KNOWN SAMPLE OF HAIR FROM AN INDIVIDUAL OR SUSPECT OR VICTIM OR WHATEVER IS IN ONE PILE AND NEXT TO IT ARE THE QUESTIONED HAIRS,

THE HAIR CAN EASILY BE BLOWN FROM ONE PILE TO THE OTHER ONE OR ONE OF THOSE LITTLE DOTS I MENTIONED COULD DETACH AND HAIR -- AGAIN THOSE DOTS DETACH VERY EASILY. THAT HAIR CAN BE BLOWN FROM ONE PILE TO ANOTHER ONE. IT IS POSSIBLE. THAT'S WHY WE DON'T ALLOW THAT TYPE OF PROCEDURE TO BE USED.

Q AND THAT WAS -- IS THAT THE TYPE OF PROCEDURE THAT WAS BEING USED BY DIANA BASS AT THAT TIME?

A YES. AS FAR AS EVIDENCE HANDLING PROCEDURES. THAT WAS HER NORMAL WAY OF DOING THINGS THERE.

**MR. DRISCOLL:** IF I CAN HAVE A MOMENT.

BY MR. DRISCOLL:

Q NOW, IF UNDER THE CIRCUMSTANCES WHERE KNOWN SAMPLES OF HAIR WERE MIXED UP WOULD IT BE -- IS THERE ANY WAY THAT YOU COULD UNMESS THEM UP AT THIS POINT THROUGH HAIR ANALYSIS?

A NO, THERE ISN'T. ONCE THE HAIRS MIX UP THEY'RE MIXED UP. THERE'S NO WAY TO SEPARATE THEM, THAT IS, IF ONE OF THE KNOWN HAIRS BLEW INTO THE PILE, FELL ON TO THE PILE OF QUESTIONED HAIRS, THERE WOULD BE NO WAY TO KNOW VALIDITY OF ANY OF THOSE SPECIFIC HAIRS.

Q IF IN FACT, IF IN FACT NEXT -- THE SAMPLES

WEREN'T MESSED UP, DID DIANA BASS HAVE THE SKILL NECESSARY TO PROPERLY IDENTIFY A HAIR AS COMING FROM A SOURCE?

A NO, SHE DID NOT.

Q CAN YOU TELL US ABOUT THE METHOD YOU FOUND SHE WAS USING?

A WELL, DIANA EXHIBITED VERY VERY LOW LEVEL OF TRAINING IN THE ACTUAL COMPARISON OF HAIR IN THE ANALYSIS COMPARISON OF HAIR. I DON'T BELIEVE SHE HAD ANY FORMAL TRAINING SUCH AS AT THE F B I ACADEMY OR ANY OF THE OTHER SCHOOLS THAT SPECIFICALLY TAUGHT HAIR ANALYSIS. I BELIEVE SHE WORKED WITH SOMEONE WHO HAD A MINIMAL AMOUNT OF HAIR EXPERIENCE TRAINING, THAT IS, AND THEN I BELIEVE SHE WAS SELF TAUGHT BY READING SCIENTIFIC JOURNALS ON PROCEDURES. BUT HER ANALYTICAL METHODS WERE VERY INCOMPLETE AND VERY POOR. SOME OF THE TECHNIQUES SHE USED HAD BEEN DISCARDED TWENTY, THIRTY YEARS AGO AS BEING VIRTUALLY USELESS.

Q AND COULD YOU TELL US BRIEFLY WHAT THOSE METHODS WERE?

A ONE OF THE THINGS THAT I FOUND OUT THAT TECHNIQUES SHE WAS USING WAS CALLED TWO THINGS. ONE WAS SCALE CASTING WHERE SHE MADE CAST IMPRESSION OF THE SCALES OF A HAIR. AND THEN WHAT THIS PROCEDURE

HERE IS SIMPLY YOU WOULD TAKE A LIQUID LIKE LACQUER, LAY THE HAIR IN THE LIQUID LACQUER. WHEN IT DRIED IT FORMED ITSELF AROUND THE HAIR AND PULLED THE HAIR OUT OF IT AND MADE AN IMPRESSION, RECORDED AN IMPRESSION OF THE SCALES OF THE HAIR. ONE TIME IT WAS BELIEVED THAT THE SHAPES AND EDGES OF THE SCALES THAT COVER HAIR WERE VERY IMPORTANT IN THE ABILITY TO COMPARE HAIR FROM ONE PERSON TO ANOTHER PERSON. IT TURNED OUT THAT IT DIDN'T TAKE. ALONG IN THE NINETEEN FORTIES, BEFORE, THAT TECHNIQUE WAS FOUND TO BE TOTALLY DISCREDITED. ADDITIONALLY, IT WAS DISCOVERED THAT THAT TECHNIQUE ACTUALLY ALTERED THE APPEARANCE OF THE HAIR. AND THAT IS WHEN YOU PULL THE HAIR OUT OF THE MEDIUM IT RIPS THE SCALES. IT PUT ROUGH EDGES ON SCALES THAT WERE NOT THERE BEFORE. REMOVED SOME OF THE SCALES SO THE HAIR LOOKED DIFFERENT AFTER YOU DID THIS.

ANOTHER TECHNIQUE SHE USED THAT WAS AGAIN VERY VERY POOR WAS AGAIN, A TECHNIQUE DEVELOPED IN THE NINETEEN FORTIES IN CALIFORNIA. WAS THE CONCEPT OF COUNTING THE NUMBER OF SCALES PER UNIT LENGTH. THAT IS YOU WOULD COUNT THE SCALES AND SAY THERE WAS TWENTY NINE SCALES PER QUARTER INCH. AND ONE TIME IT WAS THOUGHT THIS COULD DISTINGUISH BETWEEN DIFFERENT PEOPLE. SOME PEOPLE HAVE FINE

SCALES. SOME PEOPLE HAVE COURSE SCALES. TURNS OUT THAT TECHNIQUE OF SCALE COUNTING IN THE NINETEEN FORTIES WAS ALSO DISCREDITED. IT'S A TECHNIQUE THAT PEOPLE MENTION IN TRAINING AS NOT VERY VALID. IT'S A TECHNIQUE THAT'S IN THE OLD SCIENTIFIC LITERATURE, ALSO ARTICLES DISCREDITING THAT TECHNIQUE. THIS IS A TECHNIQUE ABSOLUTELY NOBODY USES ANY MORE BECAUSE IT'S A NO VALUE. HOWEVER, SHE CONTINUED TO USE THIS TECHNIQUE. AND --

Q THIS WAS IN NINETEEN SEVENTY EIGHT?

A YES. WHEN I OBSERVED HER IN NINETEEN SEVENTY EIGHT. SO THESE TYPE OF TECHNIQUES TENDS TO CONFUSE THE ISSUE. IN MY MIND WOULD CONFUSE THE ISSUE OF SOMEONE REALLY WASN'T VERY EXPERIENCED IN THE AREA OF HAIR ANALYSIS. THEY USED ANTIQUATED TECHNIQUES. THEY BELIEVED THESE TECHNIQUES TO BE AVAILABLE. THEY USED THEM IN PART OF THAT COMPARISON AND THIS, OF COURSE, COULD LEAD TO FALSE CONCLUSION.

Q DID YOU EVER CONDUCT ANY PROFICIENCY TEST ON DIANA BASS?

A YES, I DID.

Q DID SHE EVER FALSELY INCLUDE IN THE PROFICIENCY EXAMS OR MAKE A FALSE MATCH?

A YES. IN THE TYPE OF PROFICIENCY TEST I

GAVE HER WERE SIMULATED CASES OR CASES, OLD CASES THAT HAD BEEN WORKED BY SOMEBODY ELSE EXAMS, I EXAMINED MYSELF BEFORE I GAVE TO IT HER. ON SOME OF THE PROFICIENCY TESTS SHE FAILED TO FIND A GOOD COMPARISON BETWEEN THE KNOWN AND UNKNOWN. IN OTHER CASES, IN OTHER PART OF THIS TEST, SHE INCLUDED HAIRS THAT WERE CLEARLY NOT FROM THE KNOWN SAMPLE AND MADE AN IDENTIFICATION. SHE SAID THEY WERE SIMILAR AND THIS WOULD HAVE BEEN A FALSE IDENTIFICATION.

Q AND IF SOMEBODY LACKED THE ABILITY OR THE SKILLS NECESSARY TO ANALYZE HAIR, IS IT POSSIBLE THAT OTHER HAIR IN A CASE WOULD BE FALSELY SAID NOT TO MATCH A KNOWN SAMPLE? IN OTHER WORDS, FALSE EXCLUSION?

A YES. THAT'S ENTIRELY POSSIBLE. IF A PERSON IS NOT USING EITHER COMPLETE ANALYSIS OR DOESN'T KNOW HOW TO DO ANALYSIS YOU COULD ELIMINATE A HAIR EASILY. HAIR COMPARISON IS EXTREMELY SUBJECTIVE ANALYSIS AND VERY EASY TO EXCLUDE HAIRS.

**MR. DRISCOLL:** NOTHING FURTHER AT THIS TIME. THAT CONCLUDES MY PROFFER.

**THE COURT:** STATE, CROSS EXAMINATION.

**MR. LERNER:** I WOULD LIKE TO CROSS EXAMINE, CLARIFY SOME OF THE THINGS HE SAID ON

THE PROFFER. I WOULD LIKE THE RECORD TO REFLECT BY DOING SO I'M NOT WITHDRAWING MY OBJECTION TO THE OBJECTION THAT I MADE TO THIS WHOLE LINE OF QUESTIONING.

**THE COURT:** RECORD WILL SO REFLECT.

CROSS EXAMINATION

BY MR. LERNER:

Q CASE LOAD GOING UP POSSIBLY CAUSE A DETERIORATION IN AN ANALYST'S PERFORMANCE?

A CASE LOAD WAS ALWAYS EXTREMELY HIGH AT THE SANFORD REGIONAL CRIME LABORATORY. HOWEVER, CASES ARE SUPPOSE TO BE HANDLED ON A ONE CASE PER TIME BASIS. YOU TAKE WHATEVER TIME -- POLICY WAS YOU TAKE WHATEVER TIME IS NECESSARILY TO DO THAT CASE PROFICIENTLY BEFORE YOU START ANOTHER CASE. THERE WERE LITERALLY THOUSANDS OF CASES BACK LOGGED AND IT REALLY, IN MY OPINION DID NOT HAVE ANY AFFECT ON THE QUALITY OF THE ANALYSIS THAT SHOULD HAVE BEEN DONE THERE AS FAR AS IN SEVENTY EIGHT. IN SEVENTY EIGHT, AS FAR AS I CAN TELL THROUGH THE RECORDS WAS THE SAME FOR LAST PROCEEDING FIVE YEARS. SO THERE WAS NO DIFFERENCE. ALL OF THE OTHER ANALYSTS COULD HANDLE MULTIPLE CASES WITHOUT ANY PROBLEM. DIANA BASS WAS THE ONLY ONE THAT COULD NOT HANDLE MULTIPLE CASES.

Q YOU ARRIVED WHEN IN NINETEEN SEVENTY EIGHT?

A I BELIEVE IT WAS MAY.

Q SO HALF WAY THROUGH ALMOST HALF WAY THROUGH NINETEEN SEVENTY EIGHT?

A YES.

Q DID YOU UNDERTAKE TO EVALUATE MRS. BASS OR MISS BASS'S PERFORMANCE ON ANY PRIOR CASES THAT HAD BEEN WORKED BEFORE THAT POINT?

A PRIOR TO MY ARRIVAL?

Q YES.

A I DON'T BELIEVE I DID. I CAN'T REALLY BE SURE AT THIS TIME. IT'S BEEN TOO LONG.

Q WHEN YOU -- IF A SAMPLE IS CONTAMINATED IT'S TOTALLY WORTHLESS FOR ANY KIND OF FURTHER EVALUATION OR EXAMINATION. IS THAT CORRECT.

A IN A GENERAL SENSE, YES.

Q AND THAT CAN EITHER BE BY MISHANDLING OR DAMAGING THE SAMPLES IN SOME WAY OR MIXING THEM UP?

A IN GENERAL, YES.

Q DOES HAIR CHANGE ITS CHARACTERISTICS OVER TIME IF STORED?

A IF IT'S STORED PROPERLY IT DOES NOT. AND WHAT I MEAN BY THAT IS NORMAL WAY WE WOULD STORE THINGS LIKE HAIR WOULD BE TO PUT IT IN AN ENVELOPE

SO IT CAN STAY DRY. IT WOULD NORMALLY BE HANDLED UNDER NORMAL CONDITIONS. HAIRS SUBJECTED TO HIGH HEAT OR THAT ARE ALLOWED TO BECOME MOLDY AS RESPONSE TO BEING IN DAMP -- IN DAMP, WARM CONDITIONS CAN BE DAMAGED.

Q FOR INSTANCE, WHAT DO YOU MEAN BY DAMP CONDITIONS? WHAT ARE YOU TALKING ABOUT? AMBIENT HIGH HUMIDITY IN THE A AIR?

A THAT WOULD BE, COULD BE POSSIBLE. THE HAIR PACKAGE CONTAINING THAT HAIR COULD BE PLACED NEXT TO ANOTHER SAMPLE THAT HAS EXTREMELY HIGH MOISTURE CONTENT. FOR INSTANCE, COMMONLY, MARIJUANA PLANTS ARE TAKEN INTO EVIDENCE, BEING GREEN LEAFY MATERIAL THEY INTEND TO BE HIGH IN MOISTURE, MOLD VERY VERY QUICKLY. AND THIS ADS A LOT OF HUMIDITY TO THE AIR. AND IF THAT PACKAGE IS ADJACENT TO THAT DAMP PACKAGE IT COULD CONTRIBUTE, I WOULD SAY, QUIET A BIT OF HUMIDITY THERE. SO THERE IS A POSSIBILITY THE HAIR -- THERE ARE MANY CASES DOCUMENTED WHERE HAIR HAS CHANGED THROUGH STORAGE.

Q OKAY. SO FOR INSTANCE THIS PRESENT FACILITY HERE BY A YEAR AFTER IT OPENED THEY HAD A REALLY WET YEAR. THERE WAS ACTUALLY WATER LEAKING IN THE BASEMENT AREA. THAT COULD HAVE HAD AN EFFECT IF THE SAMPLE, ANY SAMPLES IN THIS CASE AND STORED

DOWN IN THE EVIDENCE SECTION IN THE BASEMENT OF THE PUBLIC DEFENDER'S BUILDING FOR INSTANCE?

A IT'S POSSIBILITY IF THE HAIR BECAME MOLDY OR BAG OR CONTAINER OR ENVELOPE DAMPENS IT COULD HAVE BEEN DAMAGED. IT'S SPECULATION BUT IT'S POSSIBLE.

Q NOW THIS LIQUID LACQUER TECHNIQUES IS THAT -- GIVE ME?

A SCALE CASTING. LIKE YOU WOULD CAST FOOT PRINT AT A CRIME SEEN. THIS IS A SIMILAR TYPE THING.

Q YOU DON'T KNOW IF THAT WAS USED IN THIS PARTICULAR CASE, DO YOU?

A I CAN'T RECALL.

Q AND YOU JUST ARRIVED AT THE LAB IN MAY OF SEVENTY EIGHT, CORRECT?

A I BELIEVE THAT WAS THE MONTH I CAME TO THE LABORATORY.

Q HOW LONG WAS IT BEFORE YOU GOT ALONG -- GOT INTO ACTUALLY EVALUATING THE PERSONNEL THERE?

A THAT WAS ONE OF THE REASONS I WAS HIRED WAS TO EVALUATE THE PERSONNEL AND DEGREE OF TRAINING AND PROCEDURE, EFFICIENCY. THAT STARTED VERY VERY QUICKLY. THERE WERE MANY OTHER, AT LEAST SIX OTHER ANALYSTS, THAT HAD TO BE SUPERVISED ALSO OR

EVALUATED ALSO. SO I DIDN'T JUST SIMPLY CONCENTRATE IN DIANA POINTEDLY TO BEGIN WITH. I HAD -- I DID HAVE OTHER ONES TO SUPERVISE AND ANALYZE. I DID HOWEVER, ONCE I NOTICED SOME OF THE THESE GRAVE DEFICIENCIES I CONCENTRATED MY EFFORTS AWAY FROM OTHER PEOPLE TOWARD DIANA.

Q HOW LONG DID THAT PROCESS TAKE AFTER YOU ARRIVED?

A NOT VERY LONG. JUST A FEW MONTHS BEFORE IT BECAME VERY OBVIOUS THERE WAS VERY SERIOUS PROBLEMS.

Q SO THE FOCUSING ON MISS BASS MIGHT HAVE BEEN ALMOST INTO NINETEEN SEVENTY NINE? CORRECT?

A IT'S POSSIBLE. I'M NOT REALLY SURE.

**MR. LERNER:** NO FURTHER QUESTIONS.

**THE COURT:** REDIRECT?

REDIRECT EXAMINATION

BY MR. DRISCOLL:

Q DID YOU EVER MAKE A WRITTEN EVALUATION THAT WAS FILED WITH F D L E CONCERNING DIANA BASS?

A YES, I DID.

Q AND DID YOU FILE ON THAT REPORT WITH F D L E PRIOR TO NINETEEN EIGHTY EIGHT?

A YES.

Q AND BASED ON WHAT YOU OBSERVED WITH DIANA

BASS, WAS THERE EVER ANY REVIEW OF CASES SHE MIGHT HAVE HANDLED?

A I DON'T KNOW IF THERE WAS A REVIEW OF CASES SHE MAY HAVE HANDLED. I LEFT THE LABORATORY ABOUT SIX MONTHS TO A YEAR AFTER THIS. I'M NOT REALLY SURE AT THIS POINT. I KNOW THAT I DID PERSONALLY REVIEW SOME OF HER CURRENT CASES AT THAT PARTICULAR TIME. RIGHT BEFORE WE MADE THE DECISION TO HAVE HER STOP DOING THESE TYPE OF ANALYSIS.

Q DID YOU -- WHAT YOU FOUND ABOUT DIANA BASS, DID YOU EVER COMMUNICATE THAT TO ANY STATE ATTORNEY'S OFFICE?

A I COMMUNICATED THESE FACTS TO THE SUPERVISOR LABORATORY AND FOR F D L E TO TAKE WHATEVER ACTION. IT WASN'T PROPER FOR ME AS MID LEVEL SUPERVISOR TO CONTACT ANYBODY OUTSIDE OF THE LABORATORY. I PRESUME FEDERAL F L E WOULD HAVE DONE THIS.

**MR. DRISCOLL:** BASED ON THE TESTIMONY WE WOULD ASK IT BEEN ADMITTED AS EVIDENCE.

**THE COURT:** I THINK MY RULING WILL BE THE SAME PREVIOUSLY. ALLOW YOU TO HAVE YOUR PROFFER. MY RULING DOESN'T CHANGE.

**MR. DRISCOLL:** THANK YOU, YOUR HONOR.

MAY MR. KOPEC BE RELEASED?

**MR. LERNER:** NO OBJECTION.

**THE COURT:** NO OBJECTION. STEP DOWN, SIR.

DO YOU HAVE ANY OTHER TESTIMONY AT THIS TIME?

**MR. DRISCOLL:** LET ME SEE IF WE HAVE ANY OTHER WITNESSES YET.

I HAVE A WITNESS, YOUR HONOR.

**MR. DRISCOLL:** DEFENSE CALL STEVEN PLATT.

STEVEN PLATT, SWORN

DIRECT EXAMINATION

BY MR. PICKARD:

Q PLEASE STATE YOUR NAME FOR THE RECORD?

A STEVEN RUSSELL PLATT.

Q HOW ARE YOU EMPLOYED?

A I'M EMPLOYED BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REGIONAL CRIME LABORATORY; JACKSONVILLE, FLORIDA.

Q HOW LONG HAVE YOU BEEN SO EMPLOYED?

A I'VE BEEN WITH THE DEPARTMENT OF LAW ENFORCEMENT SINCE JULY NINETEEN NINETY FIVE.

Q AND DID YOU SUPERVISE AN INDIVIDUAL BY THE NAME OF DIANA BASS?

A YES, I DID.

Q AND ABOUT HOW LONG DID YOU SUPERVISE HER?

A I THINK FOR APPROXIMATELY A YEAR AND A HALF. MAYBE TWO YEARS.

Q AND WAS YOUR SUPERVISION TAKEN OVER BY AN INDIVIDUAL BY THE NAME OF ROBERT KOPEC, SUPERVISION OF DIANA BASS?

A YES, IT WAS.

Q AND SOMETIME IN NINETEEN EIGHTY-THREE WERE YOU INVOLVED IN A CASE IN BARTOW WHERE THE HAIR

ANALYSIS OF DIANA BASS WAS DISCREDITED?

A I KNOW IT WAS DISCREDITED BUT I WAS INVOLVED IN THAT CASE.

Q YOU KNOW HER HAIR ANALYSIS WAS CALLED INTO QUESTION?

A YES, IT WAS.

**MR. LERNER:** AT THIS POINT I'M GOING TO ASK -- GOING TO OBJECT AGAIN ON THE GROUNDS OF RELEVANCY TO THIS ISSUE. I MEAN ALL OF THIS, MY UNDERSTANDING, ALL THIS HAPPENED SOMETIME AFTER CONCLUSION OF THE TRIAL IN THIS CASE BUT ON CERTAINLY EARLY ENOUGH TO HAVE BEEN RAISED IN SOME OF THE PRIOR PROCEEDINGS IN THIS CASE. SO, AGAIN, I HAVE AN OBJECTION ON GROUNDS OF RELEVANCY ON THE GROUNDS OF PROCEDURAL BAR BOTH BECAUSE IT'S SUCCESSIVE AND COULD AND SHOULD HAVE BEEN RAISED IN EARLIER PROCEEDINGS.

**MR. DRISCOLL:** YOUR HONOR, THIS IS SOMETHING WE BEEN GRANTED. THIS GOES TO ISSUES WE'VE BEEN GRANTED A EVIDENTIARY HEARING ON. WE DON'T BELIEVE IT GOES TO LINGERING DOUBT. IT GOES TO WHETHER MR. HITCHCOCK RECEIVED A FAIR TRIAL IN NINETEEN SEVENTY SIX. ALSO GOES TO THE CLAIMS WE RAISED WHERE THERE WAS BRADY QUIGLIO VIOLATION. IT WAS SCIENTIFIC EVIDENCE

WAS NOT RELIABLE AT THE TIME. WE BELIEVE WE'RE ENTITLED TO PROCEED ON THIS ROAD WITH OUR CLAIM.

**THE COURT:** OVERRULE THE OBJECTION.

BY MR. DRISCOLL:

Q WAS THAT IN FACT THE PEEK CASE?

A ANTHONY RAY PEEK WAS THE DEFENDANT I BELIEVE.

Q AND PRIOR TO MY -- DID YOU BECOME AWARE PRIOR TO THAT HEARING, DID YOU BECOME AWARE OF SOME CIRCUMSTANCES SURROUNDING DIANA BASS'S HAIR EXAMINATION?

A I DID NOT HAVE PERSONAL KNOWLEDGE BUT I WAS AWARE BY CONVERSATION WITH AN INDIVIDUAL WHO TOLD ME.

**MR. LERNER:** OKAY. I WOULD OBJECT TO THE GROUNDS OF HEARSAY, LACK OF FIRST HAND KNOWLEDGE.

**MR. DRISCOLL:** YOUR HONOR, THIS GOES TO THE EFFECT ON THE HAIR AND KNOWLEDGE.

**THE COURT:** SUSTAIN THE OBJECTION AT THIS TIME.

BY MR. DRISCOLL:

**MR. DRISCOLL:** CAN I PROFFER HIS ANSWER?

**THE COURT:** YES, YOU CAN.

Q DID YOU BECOME -- DO YOU RECALL WHAT WAS TOLD TO YOU CONCERNING DIANE BASS'S HAIR EXAMS?

A I RECALL THERE WAS SOME QUESTION ABOUT THE STRENGTHS OF THE CONCLUSIONS TO WHICH SHE TESTIFIED.

Q WERE YOU HER SUPERVISOR THEN?

**MR. NUNNELLEY:** ARE WE FINISHED WITH THE PROFFER NOW?

**MR. DRISCOLL:** YES.

**THE COURT:** OKAY.

**MR. NUNNELLEY:** THANK YOU, SIR.

BY MR. DRISCOLL:

Q WERE YOU HER SUPERVISOR THEN?

A I DON'T RECALL.

Q DID YOU DO ANYTHING AFTER YOU HEARD THAT TO INVESTIGATE THIS?

A DID I PERSONALLY? NO, I DID NOT.

Q AND DO YOU RECALL WHETHER YOU PERSONALLY DID ANY PROFICIENCY EXAMS CONCERNING DIANA BASS'S HAIR ANALYSIS?

A SUCH TESTS WERE CONDUCTED DURING HER TRAINING PROGRAM. PROFICIENCY TYPE TESTING. COMPETENCY TESTING.

Q DO YOU HAVE ANY SPECIFIC RECALL OF YOU HANDLING THAT?

A NO, I DO NOT.

Q TODAY AT F D L E DO YOU HAVE PROFICIENCY EXAMS?

A YES, WE DO.

Q IS THAT HANDLED BY EXTERNAL ORGANIZATION?

A WHEN SUCH ORGANIZATION IS AVAILABLE, YES. THERE'S SOME AREAS OF THE FORENSIC SCIENCES WERE THERE ARE PROBABLY NOT EXTERNAL ORGANIZATIONS THAT PROVIDE PROFICIENCY TESTS.

Q DID YOU HAVE OCCASION TO TESTIFY IN NINETEEN EIGHTY EIGHT NOT ONLY CONCERNING YOUR WORK IN SEROLOGY AND IN MR. HITCHCOCK'S CASE BUT ALSO TO TAKE THE STAND AND STEP INTO THE SHOES OF DIANA BASS AND TESTIFY IN THE ROLE OF DIANA BASS.

**MR. LERNER:** YOUR HONOR, I'M GOING TO POSE AN OBJECTION HERE AS TO RELEVANCE. THE NINETEEN NINETY EIGHT -- NINETEEN EIGHTY EIGHT CASE WAS A PENALTY PHASE ONLY. AND IT WAS OVERTURNED AND REDONE BOTH IN NINETEEN NINETY THREE AND IN NINETEEN NINETY-SIX. SO WHATEVER HAPPENED AT THAT TIME CERTAINLY NOT RELEVANT TO ANYTHING UNDER CONSIDERATION BEFORE THIS COURT. IT'S NOT RELEVANT TO ANY OF THE CLAIMS.

**MR. DRISCOLL:** YES, YOUR. HONOR IT'S OUR POSITION THAT THE DEFICIENCIES ARE THAT THE DEFICIENCIES -- TRAINING DEFICIENCIES IN DIANA

BASS'S SKILLS AS MICROANALYST WERE KNOWN AT F D L E. MR. PLATT KNEW IT AND IN NINETEEN EIGHTY EIGHT HE TESTIFIED BOTH AS HIMSELF AND AS DIANA BASS. AND IT'S OUR POSITION THAT BY THAT TIME HE HAD KNOWN THAT DIANA BASS WAS A PROBLEM HAIR ANALYST.

**THE COURT:** SUSTAIN THE OBJECTION.

**MR. DRISCOLL:** JUST CAN I ADD ONE OTHER THING FOR THE RECORD. THIS WOULD GO TO AS STATE CONTINUALLY RAISES THE PROCEDURAL BAR AND THINGS AS TO THIS. THE FACT IS THAT THIS COULDN'T HAVE BEEN RAISED EARLIER, THE DEFICIENCIES IN DIANA BASS'S TESTIMONY, BECAUSE THEY WOULDN'T HAVE BEEN KNOWN FROM THE DEFENSE BECAUSE AS LATE AS NINETEEN EIGHTY EIGHT MR. PLATT WAS APPEARING AND DIANA BASS WASN'T THERE.

**THE COURT:** STILL SUSTAIN THE OBJECTION.

**MR. DRISCOLL:** CAN I HAVE JUST A MOMENT?

**THE COURT:** YES.

**MR. DRISCOLL:** CAN I, YOUR HONOR, JUST FOR THE RECORD, PROFFER HIS ANSWER?

**THE COURT:** YES, YOU MAY.

BY MR. DRISCOLL:

Q OKAY. DID YOU, IN NINETEEN EIGHTY EIGHT,

YOU IN FACT CAME AND READ DIANA BASS'S TESTIMONY INTO THE RECORD. IS THAT CORRECT?

A YES. I READ FROM A TRANSCRIPT OF A PREVIOUS HEARING IN THAT HEARING.

Q AND BY THAT TIME YOU KNEW HER ABILITY AS HAIR ANALYST HAD BEEN QUESTIONED?

A I WAS AWARE AT THE TIME STATE HAD DIFFICULTY IN LOCATING MISS BASS AND THAT WAS THE PRETENSE UNDER WHICH I WAS PRESENTING THE TESTIMONY THERE. READING THE TESTIMONY.

Q DID YOU EVER TELL THE PROSECUTORS IN THIS CASE THAT DIANA BASS HAD DIFFICULTIES OR HAD HER RESULTS AS A SCIENTIST QUESTIONED?

A I DON'T RECALL.

Q WAS THERE A PROBLEM WITH HER WORK?

A I DON'T RECALL THAT BEING AN ISSUE AT THE TIME.

Q DID YOU -- DO YOU RECALL IF YOU TOLD THE COURT THAT YOU DIDN'T FEEL COMFORTABLE READING DIANA BASS'S TESTIMONY INTO EVIDENCE BECAUSE YOU KNEW THERE WAS A PROBLEM WITH HER WORK?

A I DON'T RECALL.

Q DO YOU RECALL EVER CONTACTING THE PROSECUTORS IN THIS CSE AND TELLING THEM THAT YOU HAD IN FACT FOUND DIANA BASS?

A I DO BELIEVE THAT I TOLD THEM.

**MR. LERNER:** AGAIN, I WOULD OBJECT TO THE RELEVANCE. I DON'T BELIEVE THIS GOES TO ANY CLAIM THAT THEY HAVE MADE. THERE'S NO BRADY CLAIM OR ANY SORT OF CLAIM THAT I KNOW OF RELATING TO THE NINETEEN EIGHTY EIGHT HEARING. AND IF THERE WERE IT'S NOT RELEVANT BECAUSE THERE COULD BE NO POSSIBLE PREJUDICE.

**MR. DRISCOLL:** THIS IS THE LAST QUESTION. I THOUGHT I WAS STILL PROFFERING, I JUST --

**THE COURT:** YOU ASKED TO PROFFER?

**MR. DRISCOLL:** YES.

**THE COURT:** I DIDN'T KNOW THAT.

**MR. DRISCOLL:** I THOUGHT I GOT SHOT DOWN AND I GOT UP TO PROFFER.

**MR. LERNER:** IF WE'RE STILL ON A PROFFER THEN I THOUGHT HE WAS DONE WITH THE PROFFER.

**THE COURT:** I THOUGHT SO TOO.

**MR. LERNER:** I'M OBJECTING THIS IS NOT RELEVANT.

**THE COURT:** YOU DOING IT FOR THE PURPOSE OF PROFFER I'LL ALLOW YOU TO DO IT. I DIDN'T KNOW YOU DOING PROFFER HERE.

**MR. DRISCOLL:** I WOULD JUST -- WANTED TO PROFFER THIS FOR THE RECORD.

Q DID AT ANY POINT YOU IN FACT TELL PROSECUTORS THAT YOU HAD FOUND DIANA BASS?

A I RECALL PROBABLY LEAVING A TELEPHONE MESSAGE TO THE EFFECT I THOUGHT SHE WAS IN SAINT AUGUSTINE, FLORIDA AT THE TIME.

Q WAS THIS BEFORE THE TRIAL?

A BEFORE THE HEARING, YES.

**MR. DRISCOLL:** THANK YOU.

NOTHING FURTHER.

**THE COURT:** STATE, CROSS EXAMINATION.

**MR. LERNER:** COULD I CROSS EXAMINE FOR THE PURPOSE OF THE PROFFER, YOUR HONOR, FIRST?

**THE COURT:** YES.

CROSS EXAMINATION

BY MR. LERNER:

Q OKAY. THIS IS NINETEEN EIGHTY EIGHT HEARING. I'M SHOWING YOU A TRANSCRIPT OF THE -- PARTIAL TRANSCRIPT OF THAT EIGHTY EIGHT HEARING WHICH I ATTACHED TO A MOTION FILED BEFORE THE COURT AND PROVIDED DEFENSE COUNSEL ENTITLED STATE'S RESPONSE TO MOTION FOR HAIR ANALYSIS AND MOTION TO BIFURCATE HEARING OR IN THE ALTERNATIVE TO PERPETUATE TESTIMONY. AND STATE'S MOTION TO LIMIT EVIDENCE OF BAD CHARACTER OF RICHARD CARL HITCHCOCK TO PROFFER.

I ATTACHED A PARTIAL EXHIBIT A OF AS EXHIBIT A TO THAT RESPONSE A PARTIAL TRANSCRIPT WHICH INCLUDES INDEX. SO WHAT I WANTED YOU TO DO IS JUST REFRESH YOUR RECOLLECTION AS FAR AS DATE OF THE -- DATE OF THAT PENALTY PHASE HEARING WAS FEBRUARY OF NINETEEN EIGHTY EIGHT, CORRECT?

A THAT IS CORRECT.

Q AND IT SHOWS THAT YOU TESTIFIED ON PAGES SIX SIXTY THREE TO SIX SEVENTY SIX?

A THAT IS CORRECT.

Q NOW WOULD THAT BE YOUR RECOLLECTION THAT THAT'S THE PROCEEDING YOU WERE JUST TESTIFYING ABOUT WITH MR. DRISCOLL AS FAR AS NINETEEN EIGHTY EIGHT PENALTY PHASE?

A YES.

Q SO THAT WOULD REFRESH YOUR RECOLLECTION AS TO THE DATE THAT TOOK PLACE?

A YES.

Q HE ASKED YOU ABOUT PEEK. SHOWING YOU A COPY OF THE -- I WOULD ALSO ASK THAT COURT TAKE JUDICIAL NOTICE OF THIS CASE AT FOUR EIGHTY EIGHT SOUTHERN SECOND FIFTY TWO. STATE VERSUS ANTHONY RAY PEEK.

IS THAT THE OTHER CASE THAT YOU WERE DISCUSSING WITH MR. DRISCOLL THAT YOU WENT DOWN AND

YOU SAW DIANA BASS AND YOU TESTIFIED?

A YES, IT IS.

Q AND DOES THIS APPEAR TO BE THE SUPREME COURT DECISION THAT ROSE OUT OF THAT PROCEEDING?

A I BELIEVE SO.

Q SO THE SUPREME COURT DECISION WAS ISSUED IN NINETEEN EIGHTY SIX, CORRECT?

A THIS IS DATED APRIL SEVENTEENTH NINETEEN EIGHTY SIX. AND REHEARING DENIED JUNE FOURTH NINETEEN EIGHTY SIX.

Q AND YOU TESTIFIED AT THAT TIME ON THE RECORD ABOUT WHATEVER DIFFICULTIES WERE THERE WERE REGARDING MISS BASS'S WORK IN THAT CASE?

A I DON'T RECALL WHAT I WAS CALLED TO TESTIFY TO IN ANTHONY RAY PEEK'S APPEAL BECAUSE IN BOTH OF THESE CASES I HAD DONE LABORATORY ANALYSIS AND SEROLOGY AND BLOOD TESTING. THAT MAY HAVE BEEN WHAT I WAS CALLED FOR. I DON'T RECALL.

Q LET ME ASK YOU THIS: IF THE ISSUE OF DIANA BASS' PROFICIENCY OR NOT WAS BROUGHT OUT IN PEEK AS MR. DRISCOLL SAYS IT WAS, THEN IT WAS BROUGHT OUT PRIOR TO NINETEEN EIGHTY SIX, CORRECT?

A YES.

Q SO THAT WOULD HAVE BEEN TWO YEARS IN THE PAST BY THE DATE OF NINETEEN EIGHTY EIGHT?

A YES.

Q OKAY. AND WOULD HAVE BEEN AVAILABLE TO ANYBODY READING THE FLORIDA CASE LAW?

A I PRESUME SO.

**MR. NUNNELLEY:** WE CAN HAVE JUST A MINUTE. YOUR HONOR?

**THE COURT:** YES YOU MAY.

BY MR. LERNER:

Q AND YOU DON'T REMEMBER AT THIS POINT WHAT, IF ANYTHING YOU TESTIFIED REGARDING PEEK IN THE PEEK CASE, DO YOU?

A I DO RECALL THE ORIGINAL TRIAL AND THE TESTIMONY INVOLVED THERE. I DO NOT RECALL SPECIFICALLY TESTIMONY AT THAT HEARING.

**MR. LERNER:** NO FURTHER QUESTION.

**MR. DRISCOLL:** JUST FOR THE RECORD, WAS MR. LERNER'S CROSS EXAMINATION. WAS THAT A PROFFER CROSS EXAMINATION OR?

**THE COURT:** I'LL ASSUME HE WAS QUESTIONING PROFFER.

**MR. LERNER:** IT WAS PROFFER BECAUSE YOUR HONOR, IT'S STILL IS THE STATE'S POSITION THAT WHAT HAPPENED WITH RESPECT TO QUESTIONING DIANA BASS'S PROFICIENCY IN A SEPARATE CASE THAT APPARENTLY OCCURRED YEARS AGO, YEARS AGO AFTER

THE CASE IN QUESTION, IS NOT RELEVANT. AND FROM THE DATES, OF COURSE, AGAIN, I'M ARGUING IS SOMETHING THAT COULD AND SHOULD HAVE BEEN RAISED BEFORE THIS TIME AND IS PROCEDURALLY BARRED IN MANY DIFFERENT WAYS AS TO THE NINETEEN SEVENTY SEVEN TRIAL AS I ALREADY OBJECTED TO PREVIOUSLY.

**THE COURT:** OKAY.

**MR. DRISCOLL:** YOUR HONOR, AS PART OF THE PROFFER I WOULD LIKE TO PROFFER TWO EXHIBITS. I DON'T BELIEVE WE ENTERED ANYTHING INTO EVIDENCE YET.

**THE COURT:** YOU CAN MARK THEM. SHOW THEM TO THE STATE.

HE HAS TO PROFFER. HE ASKED TO PROFFER. THAT'S WHAT I ASSUME HE'S DOING.

**MR. LERNER:** I HAVE ADDITIONAL OBJECTION AS TO THOSE EXHIBITS, YOUR HONOR.

**THE COURT:** WHAT'S YOUR OBJECTION?

**MR. LERNER:** WELL.

**THE COURT:** I DON'T KNOW WHAT THEY ARE.

**MR. LERNER:** THEY DON'T APPEAR TO BE ANYTHING THE WITNESS CAN IDENTIFY AS BEING INVOLVED OR CAN IDENTIFY WHAT THEY REFER TO. I MEAN HE HASN'T BEEN ASKED YET BUT WHY DOESN'T

HE QUESTION HIM ABOUT THEM AND WE'LL SEE WHERE HE WE GO FROM THERE. I HOLD MY OBJECTION UNTIL TESTIMONY COMES IN.

BY MR. DRISCOLL:

Q MR. PLATT, DID YOU WORK IN F D L E OFFICE IN JACKSONVILLE IN FEBRUARY SIXTEENTH NINETEEN EIGHTY EIGHT?

A YES, I DID.

Q AND IF I WOULD -- YOU RECALL YOUR PHONE NUMBER TO HAVE SUNCOM NUMBER EIGHT TWO SIX DASH SIX THREE NINE ZERO?

A THAT IS CORRECT.

Q AND YOU DID IN FACT CALL THE PROSECUTORS YOU WOULD HAVE TOLD ABOUT DIANA BASS?

A I DO RECALL HAVING MADE THAT CALL.

**MR. DRISCOLL:** YOUR HONOR, I, AT THIS TIME, WE WOULD PROFFER INTO EVIDENCE DEFENSE EXHIBIT D FOR IDENTIFICATION. IT'S ONE OF THE RECORDS CONTAINED IN DISCOVERY PROVIDED BY MR. LEARNER OF THE STATE ATTORNEY'S RECORDS REGULARLY KEPT IN RECORD AS A BUSINESS RECORD.

**THE COURT:** STATE.

**MR. LERNER:** WELL, IF HE'S ALREADY TESTIFIED TO IT I'M NOT SURE WHAT THEY SERVE. BUT HE CERTAINLY HASN'T AUTHENTICATED THEM IN

ANY WAY.

**MR. DRISCOLL:** I MEAN I'M SURE IT'S OVER OBJECTION. I WOULD JUST LIKE TO PROFFER THAT AS WELL.

**MR. LERNER:** ARE THEY SUPPOSE TO BE FRONT AND BACK OF THE SAME?

**MR. DRISCOLL:** I DON'T KNOW.

**MR. LERNER:** STATE'S C FOR IDENTIFICATION. I CAN'T EVEN IDENTIFY WHAT IT'S REFERRING TO OR WHEN IT IS, ANYTHING OF THE SORT.

**THE COURT:** CAN'S I SEE.

**MR. LERNER:** APPEARS IT MIGHT BE THE BACK SIDE BUT I'M NOT SURE.

**THE COURT:** WHAT'S THE PURPOSE OF THIS TO SHOW WHAT?

**MR. DRISCOLL:** YOUR HONOR, CORROBORATES HE IN FACT HAD CONTACT WITH THE PROSECUTORS AND TOLD THEM THAT HE HAD IN FACT FOUND DIANA BASS.

**MR. LERNER:** WHAT CLAIM DOES THESE RELATE TO?

**MR. DRISCOLL:** RELATES TO THE DIANA BASS CLAIM.

**MR. NUNNELLEY:** WHICH IS WHAT?

**MR. DRISCOLL:** WE'LL WITHDRAW THAT.

**MR. LERNER:** I WOULD JUST OBJECT TO THIS

WHOLE LINE OF TESTIMONY. APPEARS TO GO THROUGH SOME SORT OF BRADY CLAIM. I DON'T SEE A BRADY CLAIM RAISED IN THE MOTION SO I WOULD ASK THE COURT TO STRIKE THE TESTIMONY THAT RELATES TO WHAT --

**THE COURT:** YOU TALKING ABOUT THIS LAST PROFFER?

**MR. LERNER:** I GUESS IT'S A PROFFER. ADDITIONALLY OBJECT TO IT DOESN'T RELATE TO ANY CLAIM.

**THE COURT:** I'M NOT GOING TO STRIKE THE TESTIMONY.

**MR. DRISCOLL:** SORRY?

**THE COURT:** I SAID I'M GOING TO STRIKE THE TESTIMONY.

**MR. DRISCOLL:** THANK YOU, YOUR HONOR.

I THINK OUR MOTION SPEAKS FOR ITSELF.

NOTHING FURTHER, YOUR HONOR.

**THE COURT:** STATE.

**MR. LERNER:** NOTHING FURTHER, YOUR HONOR.

**THE COURT:** THANK YOU, SIR.

THIS WITNESS EXCUSED?

**MR. DRISCOLL:** YES, YOUR HONOR.

**THE COURT:** STATE?

**MR. LERNER:** YES, YOUR HONOR.

**MR. NUNNELLEY:** YES, YOUR HONOR.

**THE COURT:** WE'LL BE IN RECESS UNTIL THREE O'CLOCK.

(AT THIS TIME THE JUDGE LEAVES THE COURTROOM)

(LUNCHEON RECESS IS TAKEN)

A F T E R N O O N  S E S S I O N.

(AT THIS TIME THE JUDGE ENTERS THE COURTROOM)

**MR. DRISCOLL:** JUST ONE PRELIMINARY MATTER, YOUR HONOR, I FAILED TO BRING UP THIS MORNING.

MR. TABSCOTT CALLED MY SECRETARY AND I BELIEVE HE CALLED MR. LEARNER AND I BELIEVE HE CALLED BECAUSE HE THOUGHT HE GOT THE DATES WRONG HIS AMOUNT OF TIME WITH THE PUBLIC DEFENDER'S OFFICE. I'M GOING TO TRY TO CONTACT HIM AND SINCE I DID CALL HIM AS A WITNESS, IF THERE'S ANYTHING, I'LL TRY TO CORRECT IT. I DON'T BELIEVE IT WAS ANYTHING MATERIAL.

**THE COURT:** OKAY.

**MR. DRISCOLL:** BUT I WANTED TO INFORM THE COURT.

**THE COURT:** OKAY.

**MR. DRISCOLL:** DEFENSE WOULD CALL DIANA BASS.

DIANA BASS, SWORN

DIRECT EXAMINATION

BY MR. DRISCOLL:

Q PLEASE STATE YOUR NAME FOR THE RECORD.

A DIANA BASS.

Q AND MISS BASS, WERE YOU EMPLOYED WITH SANFORD CRIME LAB IN THE YEAR OF NINETEEN SEVENTY SIX?

A YES.

Q AND YOU, JUST SO FOR OUR UNDERSTANDING, WHEN YOU BEGAN AT THE CRIME LAB WAS IT SANFORD CRIME LAB AND DID IT CHANGE OVER?

A WHEN I BEGAN IT WAS THE SANFORD CRIME LABORATORY AND IT LATER BECAME THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT.

Q OKAY. AND WHAT WAS YOUR BACKGROUND BEFORE YOU CAME TO WENT TO WORK THERE?

**MR. NUNNELLEY:** AT THIS POINT WE'RE GOING TO INTERPOSE SAME OBJECTION WE'VE BEEN MAKING IN THIS LINE-UP OF TESTIMONY. THIS CLAIM IS PROCEDURALLY BARRED FOR THE SAME REASON ARGUED PREVIOUSLY. IT'S IRRELEVANT. AND GIVEN THAT MR. HITCHCOCK ADMITTED TO HAVING HAD SEXUAL

RELATION WITH THE VICTIM. THIS WITNESSES TESTIMONY AT THE NINETEEN SEVENTY SEVEN GUILT STAGE PROCEEDINGS IS IRRELEVANT TO THE ISSUE BEFORE THIS COURT WHICH IS THE NINETEEN NINETY-SIX RESENTENCING PROCEEDING GIVEN MR. HITCHCOCK ADMITTED MORE THAN THIS WITNESSES TESTIMONY COULD HAVE PROVEN.

WE OBJECT TO THIS TESTIMONY AT THIS POINT.

**MR. DRISCOLL:** WE WOULD HAVE A SIMILAR RESPONSE TO THAT. OTHER THAN MR. HITCHCOCK WHO TESTIFIED AT TRIAL THAT HE DIDN'T IN FACT COMMIT THIS OFFENSE, WE BELIEVE THAT SUPPORTS THIS. WHEN HE MAY HAVE ADMITTED TO OR WHAT THE STATE PURPORTS HE ADMITTED TO ANOTHER TIME IS ONE THING THAT WOULD BE -- MAKE SOMETHING THE COURT WOULD CONSIDER. THAT'S NOT SOMETHING THAT PRECLUDES US FROM PUTTING ON EVIDENCE WHICH IS RELATED TO A CLAIM WE HAVE RAISED IN OUR THIRTY EIGHT FIFTY ONE MOTION.

**THE COURT:** WHAT'S THE EVIDENCE THAT YOU'RE TRYING TO ELICIT FROM THIS WITNESS?

**MR. DRISCOLL:** MISS BASS WAS THE HAIR ANALYST IN THIS CASE AND I WAS GOING TO ASK HER ABOUT TRAINING AND BACKGROUND. I WAS GOING TO ASK HER IF SHE FELT SHE GOT ADEQUATE TRAINING

AND SOME OF THE CONDITIONS, WHICH ANALYSIS WAS DONE, WHEN MR. HITCHCOCK'S CASE WAS ANALYZED BY THAT LAB.

**THE COURT:** WELL, I THINK THAT WHAT I'VE READ IN THIS RECORD IS PRETTY CLEAR TO THIS ISSUE. I'M GOING TO SUSTAIN THE OBJECTION. I'M ASSUMING YOU WANT TO PROFFER THE TESTIMONY SO I'LL ALLOW YOU TO DO THAT.

**MR. DRISCOLL:** YES, YOUR HONOR.

Q WHAT KIND OF TRAINING DID YOU HAVE IN MICROANALYSIS?

A I HAD A DEGREE IN BIOLOGY AND WHEN I WENT TO WORK AT THE SANFORD CRIME LABORATORY I RECEIVED ON THE JOB TRAINING.

Q OKAY. DO YOU REMEMBER WHO IT WAS YOU TRAINED UNDER?

A MORE OR LESS SPENT TIME WITH EVERYBODY WHO WAS THERE.

Q WERE YOU LIKE A CRIMINALIST, WERE YOU, WHERE YOU HANDLED ALL SORTS OF DIFFERENT TYPES OF FORENSICS OR LIMITED TO MICROANALYSIS?

A I WAS A CRIMINALIST.

Q SOME POINT DID YOU SWITCH OVER WHERE YOU WERE HANDLING PRIMARILY MICROANALYSIS?

A YES.

Q AND WOULD IT BE FAIR TO SAY THAT YOU DIDN'T GET ADEQUATE TRAINING IN HAIR ANALYSIS?

**MR. NUNNELLEY:** EXCUSE ME. LEADING QUESTION. ALSO, I DIDN'T UNDERSTAND EXACTLY WHAT THE INTRODUCTORY PORTION OF THE QUESTION WAS. IF IT CAN BE RESTATED IN A NON LEADING FASHION.

**THE COURT:** OBJECTION WAS LEADING. I'LL ASK YOU TO REPHRASE THE QUESTION.

BY MR. DRISCOLL:

Q HOW WOULD YOU CHARACTERIZE YOUR TRAINING WHEN YOU WERE AT THE LAB?

A WELL, I DIDN'T REALLY HAVE ANYTHING TO COMPARE IT TO. WHEN A PARTICULAR INSTANCE CAME UP IN WHICH I DIDN'T HAVE ANY BACKGROUND SOMEBODY MADE THE EFFORT TO DEMONSTRATE TO ME HOW TO PERFORM THE PROPER EXAMINATIONS.

Q OKAY. HAVE YOU EVER BEEN ASKED BEFORE IN A PROCEEDING IN ANOTHER CASE IS IT TRUE THAT YOU DID NOT GET ADEQUATE TRAINING IN HAIR ANALYSIS FROM COMPETENT INSTRUCTORS?

**MR. NUNNELLEY:** OBJECTION. LEADING.

**THE COURT:** WHAT'S YOUR RESPONSE?

**MR. DRISCOLL:** ATTEMPTING TO IMPEACH.

**THE COURT:** OVERRULE THE OBJECTION.

**MR. NUNNELLEY:** HE'S IMPEACHING HIS OWN WITNESS.

**THE COURT:** WELL, IT'S A PROFFER TESTIMONY SO I'M GOING TO ALLOW HIM TO IMPEACH.

BY MR. DRISCOLL:

Q DO YOU RECALL EVER BEING ASKED THAT QUESTION AND ANSWERING I WOULD SAY SO?

A I DON'T RECALL ANY OTHER TESTIMONY VERBATIM THAT I'VE TESTIFIED TO BEFORE.

Q WASN'T THE LACK OF TRAINING ONE OF THE REASONS WHY YOU LEFT THE LAB?

A I WOULD SAY IT WAS ONE OF THE REASONS.

Q OKAY. NOW, DID YOU FEEL THAT YOU NEEDED IN ORDER TO STAY ON TOP OF YOUR FIELD MORE TRAINING THAN WHAT WAS PROVIDED AT THE SANFORD CRIME LAB OR F D L E?

A YES.

Q AND IS IT TRUE WHEN YOU REQUESTED TRAINING YOU WERE DISCOURAGED FROM ACTUALLY DOING THAT BECAUSE YOU HAD SUCH A HEAVY CASE LOAD?

A YES.

Q AND WOULD IT BE FAIR TO SAY -- HOW WAS YOUR CASE LOAD DURING THE PERIOD OF NINETEEN SEVENTY SIX?

A I DON'T RECALL THAT PARTICULAR PERIOD.

HOWEVER, I DO REMEMBER SOME POINT DURING THE TIME I WORKED THERE WE HAD A BACK LOG OF CASES THAT WAS OVER A YEAR IN LENGTH.

Q OKAY. WOULD THAT BE A YEAR AROUND NINETEEN SEVENTY SIX?

A IT COULD HAVE BEEN.

Q AND WAS THERE SOME SORT OF QUOTA SYSTEM IMPOSED?

A AT ONE TIME, YES.

Q AND THROUGHOUT YOUR TENURE AT THE LAB WAS THERE PRESSURE TO COMPLETE CASES?

A YES.

Q NOW DO YOU THINK FROM THE TIME YOU BEGAN CONDUCTING HAIR ANALYSIS TO THE POINT WHERE YOU LEFT THE FLORIDA DEPARTMENT OF CRIMINAL LAW ENFORCEMENT DID YOU BECOME MORE PROFICIENT AT IT IN YOUR OPINION OR LESS?

A THE FIRST YEAR OR TWO THAT I WORKED THERE I FEEL LIKE I GAINED PROFICIENCY AND THEN AFTER THAT I DIDN'T FEEL LIKE I PROGRESSED ANY FURTHER.

Q BUT DID YOU, FROM WHEN YOU LEFT IN NINETEEN SEVENTY EIGHT, THAT WOULD HAVE BEEN WHEN YOU HAD YOUR MOST AMOUNT OF TRAINING AND EXPERIENCE?

A I'M NOT SURE I UNDERSTAND.

Q YOU GAINED EXPERIENCE -- WOULD IT BE FAIR

TO SAY YOU GAINED EXPERIENCE OVER YOUR TENURE AT THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT?

A YES.

Q SO WOULD IT BE FAIR TO SAY THAT NINETEEN SEVENTY EIGHT YOU WERE A BETTER HAIR ANALYST THAN YOU WERE IN NINETEEN SEVENTY SIX?

A YES.

Q WAS THERE A PROBLEM WITH THE LAB CONCERNING STORAGE OF EVIDENCE?

A UP UNTIL THE TIME WE GOT AN EVIDENCE VAULT I DON'T RECALL WHAT WE DID WITH EVIDENCE BEFORE THEN.

Q OKAY. DID YOU GET THE EVIDENCE VAULT RIGHT BEFORE YOU LEFT THE DEPARTMENT OR WAS IT EARLY ON IN YOUR CAREER?

A IT WAS IN THE NEW BUILDING THAT WE MOVED TO DURING THE TIME THAT I WORKED THERE.

Q OKAY. AND DO YOU REMEMBER WHAT YEAR THAT WAS?

A NO.

Q WOULD IT HAVE BEEN CLOSER TO WHEN YOU HAD LEFT?

A IT PROBABLY WAS ABOUT HALF WAY DURING THE TIME THAT I WAS THERE.

Q OKAY. AND YOU BEGAN IN WHAT YEAR?

A NINETEEN SEVENTY FOUR.

Q AND YOU LEFT IN WHAT YEAR?

A NINETEEN SEVENTY EIGHT.

Q NOW WAS HAIR EVER LEFT OUT OVERNIGHT?

A YES.

Q AND WOULD YOU AGREE WITH ME THE PROTECTION OF EVIDENCE THAT'S FINITE AS HAIR OR SMALL AS HAIR IS EXTREMELY IMPORTANT?

A YES.

Q IN DID YOU LIVE IN THE STATE OF FLORIDA IN NINETEEN EIGHTY EIGHT?

A YES.

**MR. DRISCOLL:** I HAVE IF I CAN HAVE A MOMENT.

YOUR HONOR, I HAVE NOTHING FURTHER AT THIS TIME.

**THE COURT:** CROSS EXAMINATION.

**MR. NUNNELLEY:** YOUR HONOR, AGAIN BY MY CROSS EXAMINING THIS WITNESS I'M NOT WAIVING THE OBJECTION.

**THE COURT:** I KNOW. THIS IS CROSS EXAMINATION PROFFER TESTIMONY.

CROSS EXAMINATION

BY MR. NUNNELLEY:

Q MISS BASS, YOU ATTENDED I BELIEVE MC CRONE

INSTITUTE. DID YOU NOT?

A YES.

Q WHERE IS THAT LOCATED?

A IN CHICAGO.

Q AND HOW DID YOU COME TO ATTENDING MC CRONE INSTITUTE? YOU PAY FOR IT ON YOUR OWN OR F D L E, SOMEBODY ELSE, PAY FOR YOU TO ATTEND? HOW DID THAT WORK?

A I DID NOT PAY FOR IT MYSELF. I'M NOT SURE EXACTLY WHERE THE FUNDS CAME FROM.

Q I BELIEVE YOU ALSO ATTENDED CLASSES, COURSES, OR DID COURSE WORK AT THE F B I ACADEMY. THAT IS CORRECT?

A YES.

Q AND F B I ACADEMY IS LOCATED IN QUANTICO, VIRGINIA. ISN'T IT?

A YES.

Q AM I CORRECT IN ASSUMING THAT YOU DID NOT BEAR THE FINANCIAL BURDEN FOR ATTENDING THOSE COURSES YOURSELF?

A THAT IS CORRECT.

Q YOU HAVE A DEGREE IN BIOLOGY?

A YES.

Q WHEN IN NINETEEN SEVENTY FOUR DID YOU START WITH THE SANFORD CRIME LAB PLEASE, MA'AM?

A I DON'T REMEMBER EXACT MONTH.

Q EARLY IN THE YEAR, LATE IN THE YEAR OR JUST DON'T REMEMBER?

A I'M SORRY. I REALLY DON'T REMEMBER.

Q OKAY. FAIR ENOUGH. IT'S BEEN A LONG TIME AGO.

NOW SOMETIME DURING THE -- YOU WORKED THERE ABOUT FOUR YEARS, RIGHT?

A YES.

Q AND DURING THOSE FOUR YEARS THE MANAGEMENT, I SUPPOSE, CHANGED FROM BEING SANFORD CRIME LAB TO COMING UNDER THE AUSPICES OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT. IS THAT CORRECT?

A YES.

Q WHEN DID THAT HAPPEN? DO YOU REMEMBER?

A I DON'T REMEMBER.

Q WAS -- OKAY. WAS IT CLOSER TO THE TIME THAT YOU LEFT OR CLOSER TO THE TIME THAT YOU STARTED?

A I REALLY DON'T REMEMBER. IT WAS PROBABLY SOMEWHERE IN THE MIDDLE.

Q DO YOU RECALL -- LET ME BACK UP.

DURING YOU'RE DIRECT EXAMINATION YOU MENTIONED SOMETHING ABOUT QUOTAS HAVING BEEN SET UP.

DO YOU RECALL THAT?

A YES.

Q DID THE QUOTA SYSTEM, FOR LACK OF A BETTER WORD, GET PUT IN PLACE AFTER THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT HAD TAKEN OVER THE LAB?

A I DON'T REMEMBER.

Q WAS THE QUOTA SYSTEM IN PLACE WHEN YOU FIRST WENT TO WORK IN NINETEEN SEVENTY FOUR?

A NO.

Q DO YOU RECALL ABOUT HOW LONG AFTER YOU BECAME EMPLOYED THE QUOTA SYSTEM CAME INTO BEING?

A I THINK THAT IT MIGHT HAVE POSSIBLY BEEN SOMETIME IN MY THIRD YEAR OF EMPLOYMENT.

Q WHICH WOULD BE NINETEEN SEVENTY SEVEN?

A YES.

Q OKAY. WHEN YOU DID LEAVE IN NINETEEN SEVENTY EIGHT DO YOU REMEMBER --

A SORRY. WHEN?

Q WHEN IN NINETEEN SEVENTY EIGHT DID YOU LEAVE THE LAB?

A I DON'T RECALL EXACTLY.

Q AND IS IT FAIR TO SAY BURN OUT WAS ONE OF THE MAIN REASONS, IF NOT THE MAIN REASON, YOU LEFT THE EMPLOY OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT?

A YES.

Q HOW WERE YOU EMPLOYED AFTER YOU LEFT THE DEPARTMENT OF LAW ENFORCEMENT?

A I WENT TO WORK FOR GULF OIL CORPORATION.

Q WHAT WAS YOUR JOB TITLE WITH GULF OIL?

A MY FIRST ASSIGNMENT WHEN I WENT TO WORK FOR THEM WAS TO BE PLACED IN CHARGE OF GASOLINE ALLOCATIONS FOR THE STATE OF FLORIDA. THIS WAS DURING THE TIME OF THE EXTREME SHORTAGES AND ALLOCATIONS WHICH TOOK PLACE AT THE END OF THE SEVENTIES. AND THEN I WENT INTO INDUSTRIAL AND COMMERCIAL MARKETING WHICH WAS THE POSITION I WAS ACTUALLY HIRED FOR.

Q MISS BASS, I ASKED YOU ABOUT MC CRONE INSTITUTE, ABOUT F B I ACADEMY. I NEGLECTED TO TIE UP -- YOU WENT TO THOSE TWO OR THOSE INSTITUTIONS WHILE YOU WERE UNDER THE EMPLOY OF THE CRIME LAB. IS THAT CORRECT?

A YES.

**MR. DRISCOLL:** BRIEFLY REPROFFER.

WHEN YOU WENT TO THE LIMITED SEMINARS OR TRAINING YOU DID GET -- THESE JUST -- THESE WEREN'T ON HAIR ALONE. IS THAT CORRECT? THEY HANDLED PAINT, FIBERS, RUGS, ALL DIFFERENT THINGS THAT YOU WOULD DEAL WITH AS A

MICROANALYST?

**THE WITNESS:** CORRECT.

**MR. DRISCOLL:** NOTHING FURTHER.

BY MR. NUNNELLEY:

Q GOOD MORNING, MISS BASS, I SHOULD HAVE ASKED YOU THIS QUESTION. YOU VOLUNTARILY RESIGNED FROM THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT, DIDN'T YOU?

A YES. IN FACT I HAD TO RESIGN SEVERAL TIMES BEFORE IT WOULD STICK.

Q SO I GUESS ITS FAIR TO SAY THEY DIDN'T FIRE YOU, DID THEY?

A AS I RECALL THEY LITERALLY BEGGED ME TO STAY AND OFFERED ME A SUPERVISOR'S JOB IN A TRANSFER TO ANOTHER LAB IF I WOULD JUST SIMPLY STAY WITH THE SYSTEM.

**MR. NUNNELLEY:** WITH THAT, I HAVE NOTHING FURTHER.

**MR. DRISCOLL:** NOTHING FURTHER.

**THE COURT:** THANK YOU, MA'AM. STEP DOWN.

**MR. DRISCOLL:** MISS BASS BE RELEASED?

**MR. NUNNELLEY:** YES, YOUR HONOR.

**THE COURT:** YES. CALL YOUR NEXT WITNESS.

**MR. DRISCOLL:** YOUR HONOR, I THINK WE'RE OUT OF WITNESSES. WE HAVE LIKE TWO, THREE MORE

BUT THEY'RE NOT GETTING IN. WE HAD ANOTHER HAIR EXPERT BUT HE GOT INTO A CAR ACCIDENT AND HIS PLAIN DIDN'T MAKE IT IN. I BELIEVE HE'S COMING IN AT FIVE TONIGHT.

**THE COURT:** OKAY.

**MR. DRISCOLL:** WE TRIED TO KEEP -- WE WERE GOING TO CALL SOME MORE FAMILY MEMBERS BUT WE DIDN'T BELIEVE IT NECESSARY SO WE APOLOGIZE FOR THAT AND WE TRY TO MAKE GOOD USE OF THE COURT'S TIME. BUT WE ARE OUT.

**THE COURT:** HOW MANY WITNESSES YOU HAVE FOR TOMORROW?

**MR. DRISCOLL:** THREE, YOUR HONOR.

**THE COURT:** OKAY. STATE BE CALLING ANY WITNESSES?

**MR. LERNER:** ONLY WITNESS WE MIGHT CALL WOULD BE MISS CASHMAN. AS YOU RECALL SHE'S NOT AVAILABLE UNTIL THURSDAY MORNING.

**THE COURT:** OKAY.

**MR. LERNER:** BRIGHT AND EARLY THURSDAY MORNING WE'LL BEEN GLAD TO HAVE HER COME IN.

**MR. DRISCOLL:** BECAUSE OUR EXPERT IS FLYING OUT TOMORROW, JUST ONE OF THEM. WE HAVE TO GET HIM OUT BY THREE. IF YOU'RE THINKING OF JUST OF THE AFTERNOON.

**THE COURT:** NO. I'M STARTING IN THE MORNING.

**MR. DRISCOLL:** WE'LL BE READY IN THE MORNING.

**MR. LERNER:** YOUR HONOR, FOR PLANNING PURPOSE, IF THEY'RE GOING TO CALL DOCTOR TOOMER AND DEE THEY'RE GOING TO BE LONGER WITNESSES JUST BY THE NATURE OF THE NUMBER OF TESTS THEY DID AND SO FORTH.

**THE COURT:** I'M LOOKING AT MY DOCKET IN THE MORNING. I DON'T HAVE AS MUCH STUFF TOMORROW MORNING AS I HAD TODAY. SHOULD BE READY TO START AT TEN O'CLOCK SO.

**MR. DRISCOLL:** WE'LL BE HERE.

**THE COURT:** BE IN RECESS WITH THIS CASE UNTIL TEN O'CLOCK IN THE MORNING.

**MR. DRISCOLL:** THANK YOU, YOUR HONOR.

(AT THIS TIME THE JUDGE LEAVES THE COURTROOM)

# C E R T I F I C A T E

STATE OF FLORIDA:

COUNTY OF ORANGE:

I, LINDA A. TOMPKINS, OFFICIAL COURT REPORTER OF THE NINTH JUDICIAL CIRCUIT OF FLORIDA, DO HEREBY CERTIFY PURSUANT TO FLORIDA STATUTE 29, THAT I WAS AUTHORIZED TO AND DID REPORT IN STENOGRAPHIC SHORTHAND THE FOREGOING PROCEEDINGS, AND THAT THEREAFTER MY STENOGRAPHIC SHORTHAND NOTES WERE TRANSCRIBED TO TYPEWRITTEN FORM BY THE PROCESS OF COMPUTER-AIDED TRANSCRIPTION, AND THAT THE FOREGOING PAGES CONTAIN A TRUE AND CORRECT TRANSCRIPTION OF MY SHORTHAND NOTES TAKEN THEREIN.

WITNESS MY HAND THIS 223RD DAY OF MAY 2003, IN THE CITY OF ORLANDO, COUNTY OF ORANGE, STATE OF FLORIDA.

LINDA A. TOMPKINS, RPR

OFFICIAL COURT REPORTER

No. _____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

**IN RE JAMES E. HITCHCOCK, PETITIONER**,

---

**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

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**Appendix G:** Order of the Supreme Court of Florida's Order dated May 3, 2005.

# Supreme Court of Florida



TUESDAY, MAY 3, 2005

**CASE NO.:** SC03-2203
Lower Tribunal No.: 48-1976-CF-001942-O

JAMES HITCHCOCK vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The Court has determined that the circuit court erred in holding that guilt phase issues were procedurally barred. In order for this Court to review the guilt phase issues on the merits, the jurisdiction of the above case is hereby relinquished to the circuit court for an evidentiary hearing and decision on the merits of all guilt phase claims raised by petitioner in petitioner's 3.851 motions. This includes all claims raised as to the guilt phase trial held in 1977 and all newly discovered evidence claims. In contemplation of these claims, the circuit court shall permit the parties to present additional evidence. Any additional evidence shall be considered together with evidence previously presented at the evidentiary hearing held in support of petitioner's claims. Based on this evidence, the circuit court shall prepare and file an order making specific findings on the merits of each guilt phase issue.

In respect to petitioner's newly discovered evidence claim concerning witnesses who have come forward to testify that a third person has confessed to the crime, the circuit court shall determine and express in the order among the issues determined whether such evidence would be admissible at a new trial applying section 90.804(2)(c), Florida Statutes (statement against interest hearsay exception), and Jones v. State, 709 So. 2d 512 (Fla. 1998).

The evidentiary hearing and order should be filed in no more than 180 days and the circuit court shall upon the filing of its order return the case to this Court.

Counsel for the parties are hereby directed to file Status Reports with this Court every sixty (60) days as to the progress of the relinquishment proceeding.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE and BELL, JJ., concur.
CANTERO, J., dissents.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

kb
Served:

CHRIS A. LERNER
DAVID ROBERT GEMMER
JAMES L. DRISCOLL, JR.
ERIC PINKARD ✓
KENNETH S. NUNNELLEY
HON. REGINALD KARL WHITEHEAD, JUDGE
HON. LYDIA GARDNER, CLERK

No. _____

---

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

**IN RE JAMES E. HITCHCOCK, PETITIONER**,

---

**ON PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS**

---

**Appendix H:** Opinion of the Supreme Court of Florida *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008).

991 So.2d 337
Supreme Court of Florida.

James HITCHCOCK, Appellant,
v.
STATE of Florida, Appellee.
James E. Hitchcock, Petitioner,
v.
Walter A. McNeil, etc., Respondent.

Nos. SC03-2203, SC04-1286.
|
May 22, 2008.
|
Rehearing Denied Sept. 17, 2008.

**Synopsis**

**Background:** After affirmance of his conviction for first-degree murder and death sentence, 413 So.2d 741, affirmance of his death sentence at resentencing, 755 So.2d 638, and affirmance of the denial of his motion for postconviction DNA testing, 866 So.2d 23, defendant filed postconviction motion to vacate sentence, relating to his conviction and his death sentence at resentencing. The Circuit Court, Orange County, Reginald Karl Whitehead, J., denied defendant's postconviction claims. Defendant appealed and petitioned for writ of habeas corpus.

**Holdings:** The Supreme Court held that:

counsel did not perform deficiently in putting defendant's reputation for good character at issue, at guilt phase, even if counsel opened the door to negative character evidence;

defendant was not entitled to postconviction DNA analysis of pubic hairs and non-pubic hairs found on victim;

evidence that defendant had threatened to rape and kill the victim if she told her mother about the "inappropriate things" that defendant was doing to her was relevant, at penalty phase, to aggravating circumstance that the crime was especially heinous, atrocious, or cruel;

counsel did not perform deficiently with respect to resentencing, in failing to refer defendant to a neuropsychologist for examination after learning that there were indications of possible brain damage; and

error was harmless as to failure of trial court, at penalty phase, to instruct jury on elements of the underlying felony, for purposes of aggravating factor of murder committed during course of enumerated felony.

Affirmed; petition denied.

**Attorneys and Law Firms**

***342** Bill Jennings, Capital Collateral Regional Counsel, and James L. Driscoll, Jr. and Eric C. Pinkard, Assistant CCR Counsel, Middle Region, Tampa, Florida, for Appellant/Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida, and Kenneth S. Nunnelley, Senior Assistant Attorney General, Daytona Beach, Florida, for Appellee/Respondent.

  

**Opinion**

PER CURIAM.

James Ernest Hitchcock appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.850 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

## I. FACTUAL AND PROCEDURAL BACKGROUND

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.1982) (*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. ***343** *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). On remand, 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 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* ).

In Hitchcock's third resentencing proceeding, the jury recommended the death penalty by a vote of ten to two. The trial court followed the recommendation, finding four aggravating circumstances: (1) the crime was committed while Hitchcock was under a sentence of imprisonment; (2) he committed the crime while he was engaged in the enumerated felony of sexual battery; (3) he committed the crime for purpose of avoiding or preventing a lawful arrest; and (4) the crime was especially heinous, atrocious, or cruel (HAC). The court found one statutory mitigating factor: Hitchcock was young, twenty years of age, at the time of the murder. The court also found twenty-three nonstatutory mitigating circumstances, divided among the following

  

three categories: (1) there were mitigating circumstances concerning the crime;[1] (2) there were adverse features in Hitchcock's background;[2] and (3) Hitchcock had positive character traits.[3] *State v. Hitchcock,* No. CR 76-1942 (Fla. 9th Cir. Ct. amended sentencing order filed October 8, 1997) (Sentencing Order). Hitchcock appealed his death sentence, asserting eighteen claims. This Court affirmed, finding that all of the claims were procedurally barred or without merit. *Hitchcock v. State,* 755 So.2d 638 (Fla.2000) (*Hitchcock VI* ), *cert. denied,* ***344** 531 U.S. 1040, 121 S.Ct. 633, 148 L.Ed.2d 541 (2000).[4]

Hitchcock filed the instant motion for postconviction relief in 2001, raising thirteen claims.[5] The circuit court conducted an evidentiary hearing on this motion from April 7 through April 10, 2003, which was continued on May 8, 2003. In an October 27, 2003, order, the circuit court denied as procedurally barred each of Hitchcock's claims related to the 1977 guilt phase of his trial and denied each of Hitchcock's claims related to his 1996 resentencing on their merits. *State v. Hitchcock,* No. CR76-1942 (Fla. 9th Cir. Ct. order filed October 27, 2003) (Postconviction Order I). Hitchcock appealed the circuit court's denial of the motion, raising eleven issues.[6] ***345** Hitchcock also petitioned this Court for a writ of habeas corpus, raising six issues.[7]

On March 10, 2005, this Court held oral argument on Hitchcock's postconviction and habeas claims. We determined that the circuit court erred in ruling that the claims relating to the 1977 guilt phase were procedurally barred. We temporarily relinquished jurisdiction to the circuit court for an evidentiary hearing and a ruling on the merits of Hitchcock's guilt-phase issues and newly discovered evidence claims. *Hitchcock v. State,* No. SC03-2203 (Fla. order filed May 3, 2005). Pursuant to this Court's order, the circuit court considered the evidence presented and proffered in the 2003 evidentiary hearing regarding Hitchcock's guilt-phase claims and conducted a two-part hearing on November 15, 2005, and December 7, 2005, during which the parties presented additional evidence. On March 29, 2006, the circuit court issued an order denying relief on Hitchcock's guilt-phase and newly discovered evidence claims. *State v. Hitchcock,* No. CR76-1942 (Fla. 9th Cir. Ct. order filed March 29, 2006) (Postconviction Order II). We now consider Hitchcock's remaining issues on appeal and his petition for a writ of habeas corpus.

## II. RULE 3.850 MOTION FOR POSTCONVICTION RELIEF

### A. Guilt-Phase Claims

#### 1. Character Evidence Regarding James and Richard Hitchcock

Hitchcock argues that his guilt-phase counsel was ineffective for opening ***346** the door to admission of negative character evidence about Hitchcock and for failing to secure admission of negative character evidence about his brother, Richard Hitchcock. In order to prove ineffective assistance of counsel, Hitchcock must demonstrate both that counsel's performance was deficient and that

  

the deficiency caused prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To be deficient, the attorney's performance must fall below an objective standard of reasonableness based on prevailing professional norms. *Cherry v. State,* 781 So.2d 1040, 1048 (Fla.2000). The standard for prejudice is a reasonable probability that but for counsel's deficiency, the result of the trial would have been different-that is, a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052; *Cherry,* 781 So.2d at 1048. Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771-72 (Fla.2004).

First, Hitchcock argues that Charles Tabscott, his guilt-phase counsel, was ineffective because Tabscott put Hitchcock's reputation at issue and thereby allowed negative character evidence about Hitchcock to be introduced. Tabscott called several witnesses to offer evidence of Hitchcock's good character. In response, the State called Judy Hitchcock, the victim's mother, who testified that Hitchcock physically attacked his ex-girlfriend and that he did not have a good reputation. The State also called Richard Hitchcock who testified that Hitchcock "stayed in trouble all the time" when he lived in Arkansas. Hitchcock asserts that his counsel was ineffective because the testimony of the defense witnesses was not entirely positive and the testimony of Judy Hitchcock, Richard Hitchcock, and Hitchcock's ex-girlfriend was devastating to his defense. Hitchcock argues that had counsel adequately consulted with him regarding the likely testimony of the witnesses, counsel could have avoided opening the door to prejudicial testimony.[8]

The circuit court denied this claim. The circuit court concluded that "[d]efendant's allegations lack sufficient credibility or in the alternative, they are conclusively refuted by the record for the reasons which follow." The circuit court then recited a list of actions taken by counsel during trial that indicated that he did prepare for trial and that he did consult with Hitchcock regarding his defense. The circuit court held that Judy Hitchcock's testimony that Hitchcock physically attacked his girlfriend did not prejudice Hitchcock because the girlfriend later testified that "there was no reason to be afraid of [Hitchcock]." The circuit court did not specifically address Judy Hitchcock's testimony that Hitchcock did not have a good reputation and Richard Hitchcock's testimony that Hitchcock was frequently in trouble.

***347** We agree that Hitchcock is not entitled to relief on this claim. During the postconviction evidentiary hearing, Tabscott testified that he was familiar with the concept of opening the door to character evidence. When asked whether he may have opened the door at trial, Tabscott responded:

> I suppose twenty-six years later you could review the transcript and say that. But I remember that we were in a very desperate situation which as I recall Mr. Hitchcock had confessed to murdering and raping a thirteen year old child. And I think we were

  

> in a position of doing whatever we could to number one, try to get the jury to feel that there was reasonable doubt as to guilt and number two, save him from the death penalty. So if you call that opening the door, I suppose it's possible that a door was opened. I certainly would not have developed these witnesses on my own. It would have come from Mr. Hitchcock.

The record indicates that Tabscott made a strategic decision to put Hitchcock's character at issue. In light of Hitchcock's initial confession, defense counsel essentially had no choice but to put Hitchcock on the stand to explain his recantation, thus putting Hitchcock's credibility and, indirectly, his character at issue. Defense counsel offered testimony by friends and family to bolster Hitchcock's credibility and reputation. Counsel is not ineffective for adopting reasonable strategies, even if in retrospect those strategies appear unadvisable. *See Patton v. State,* 878 So.2d 368, 373 (Fla.2004) (finding counsel's decision to limit use of voluntary intoxication defense in order to disassociate defendant from drug abuse was reasonable and not ineffective); *Howell v. State,* 877 So.2d 697, 705 (Fla.2004) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052)).

Second, Hitchcock argues that Tabscott was ineffective because he failed to successfully present incriminating evidence showing that his brother Richard had committed acts of violence against other young female family members that were strikingly similar to the murder of Cynthia Driggers. Again, we find no basis to reverse the trial court because the record refutes Hitchcock's claim.

Hitchcock's defense was that Richard committed the murder. Tabscott attempted to introduce evidence regarding Richard's violent tendencies in support of this defense theory. Specifically, he attempted to ask Brenda Hitchcock (now Brenda Reed), Martha Hitchcock, James Hitchcock, and Fay Hitchcock whether they had known Richard to be violent. The State objected on relevance grounds, and the trial court sustained the objections. Later, counsel asked to proffer the testimony of these witnesses to demonstrate their relevancy:

> My proffer will be to the effect, that I will call members of the family that I previously called to establish that they do know Richard Hitchcock to have a violent nature, and a violent reputation. And also, that Richard Hitchcock had made sexual advances towards two sisters. They would so testify, Brenda Hitchcock and Martha Hitchcock.

The trial court denied the proffer and refused to admit the testimony. On direct appeal, this Court affirmed the trial court's decision to exclude the evidence. *See Hitchcock I,* 413 So.2d at 744 (holding that testimony regarding Richard's alleged bad acts and violent propensities was not admissible as impeachment evidence and too ***348** attenuated to be relevant to whether Richard committed the murder).

Since counsel did attempt to introduce the incriminating evidence about Richard, the question of deficiency revolves around how

  

much counsel could have been reasonably expected to push for the admissibility of that evidence. Hitchcock argues that the evidence regarding Richard's sexual violence would have been admissible under *Williams v. State,* 110 So.2d 654 (Fla.1959), had counsel argued this point, because it would have proved Richard's motive to kill the victim, his bias in testifying against his brother, and his modus operandi in acting violently against young women. Hitchcock argues that Richard's conduct reflects a clear pattern of claiming ownership over young female family members, including a tendency to become violent and choke the women when they did not submit.

Hitchcock's argument fails because this Court did not hold that *Williams* rule evidence could be used by defendants to incriminate other suspects until 1990, long after Hitchcock's trial. *See Rivera v. State,* 561 So.2d 536 (Fla.1990); *State v. Savino,* 567 So.2d 892 (Fla.1990). This Court has "consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law." *Cherry,* 781 So.2d at 1053. A defendant's ability to exploit the *Williams* exception had not become an established aspect of Florida law at the time of Hitchcock's trial. Thus, Tabscott's performance did not fall below the objective standard of prevailing professional norms, and Hitchcock is not entitled to relief on this claim.

**2. Destruction of Evidence Claim**

Hitchcock argues that the State destroyed exculpatory physical evidence, including hairs, blood samples, and clothing that, if subjected to DNA testing and hair comparison, could have been used to implicate Richard and exonerate Hitchcock. Hitchcock admits that this Court has already concluded that DNA testing would not exonerate Hitchcock, see *Hitchcock VII,* but argues that this Court should nevertheless order DNA testing of the hair samples in light of the postconviction evidence that the original hair analysis may have been flawed.

We agree with the circuit court's finding that Hitchcock has not demonstrated how DNA testing would result in newly discovered evidence likely to produce an acquittal on retrial. DNA analysis of the pubic hairs found on the victim would not exonerate Hitchcock because he admitted having sexual intercourse with her. DNA analysis of the non-pubic hairs found on the victim is also not likely to exonerate Hitchcock because the victim and Richard lived in the same household. Shared living space provides a reasonable, innocent explanation for the presence of Richard's hairs on the victim's body. *See King v. State,* 808 So.2d 1237, 1247 (Fla.2002).

Hitchcock also claims that to the extent that the evidence is unavailable for testing, such destruction of evidence is a violation of his constitutional rights. "The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution." *Guzman v. State,* 868 So.2d 498, 509 (Fla.2003) (citing *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). In his second amended motion, Hitchcock failed to allege bad faith or any facts that would support such an allegation. Therefore, his claim is legally insufficient.

  

### 3. Newly Discovered Evidence of Hitchcock's Innocence

Hitchcock argues that testimony presented at the postconviction evidentiary ***349** hearing is newly discovered evidence which demonstrates his innocence and merits a new trial. To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that: (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998) (*Jones II* ). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II,* 709 So.2d at 526 (quoting *Jones v. State,* 678 So.2d 309, 315 (Fla.1996)). In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State,* 591 So.2d 911, 916 (Fla.1991) (*Jones I* ).

When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we accept the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence if based upon competent, substantial evidence. *Melendez v. State,* 718 So.2d 746, 747-48 (Fla.1998); *Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997). As with rulings on other postconviction claims, we review de novo the trial court's application of the law to the facts. *Cf. Hendrix v. State,* 908 So.2d 412, 423 (Fla.2005) (reviewing de novo trial court's application of law to claim that government withheld material evidence); *Gore v. State,* 846 So.2d 461, 468 (Fla.2003) (reviewing de novo application of law to facts on claim of ineffective assistance of trial counsel).

Throughout the briefing of this issue, Hitchcock refers to the evidence of Richard's physical and sexual abuse of female relatives as newly discovered evidence. This argument is procedurally barred because Hitchcock did not raise it in his postconviction motion. *See Green v. State,* 975 So.2d 1090, 1104 (Fla.2008) ("This claim is procedurally barred because it was neither raised in Green's 3.851 motion nor addressed by the trial court.") Moreover, Hitchcock essentially concedes that the evidence does not qualify as newly discovered evidence because he argued in a separate claim, discussed above, that his trial counsel was ineffective for not presenting evidence that Richard sexually and physical abused family members, which was either known by counsel or could have been discovered by the use of diligence at the time of trial.

Hitchcock did assert in his postconviction motion and argue to the circuit court that newly discovered evidence that Richard "confessed" to the murder of Cynthia Driggers demonstrates his innocence and merits a new trial. At the postconviction evidentiary hearing, Wanda Hitchcock Green testified that sometime in

  

1994, she commented to Richard about how sad their mother will be when Hitchcock is executed. Richard responded that Hitchcock will not be executed because he did not commit the murder; he only committed the rape.[9] Rossi Meacham,[10] an acquaintance of some ***350** members of Hitchcock's family, testified that sometime in 1993 or 1994, when she and Richard were sitting around his mother's kitchen table chatting, Richard confessed to killing "that girl in Florida" and blaming his brother for the crime. Meacham testified that on another occasion, Richard threatened her, stating that he had killed before and was "not ashamed to do it again." Judy Hitchcock Gamble,[11] a niece of James and Richard Hitchcock, testified that in 1982 or 1983, Richard tried to sexually assault her. She was twelve or thirteen years old at the time. Gamble testified that when she resisted, Richard told her that if "I didn't shut up [the] same thing would happen to me that happened to Cindy."

The circuit court denied relief because the evidence of Richard's alleged confessions suffered "from an inherent lack of credibility." The circuit court found that due to this lack of credibility, the evidence did not demonstrate the presence of corroborating circumstances showing the trustworthiness of the statements as required by section 90.804(2)(c), Florida Statutes, and did not satisfy the second prong of *Jones II.*

We do not reach the issue of whether the trial judge erred in his consideration of the admissibility of the evidence under section 90.804(2)(c) because we conclude that the evidence did not satisfy the second prong of *Jones II.* Assuming without deciding that the newly discovered evidence would be admissible pursuant to section 90.804(2)(c), Hitchcock has not demonstrated that the newly discovered evidence would probably produce an acquittal or life sentence on retrial because the witnesses were not convincing. The credibility of Green, Meacham, and Gamble is critical to the newly discovered evidence analysis as set forth in *Jones II,* and the circuit court's finding that these witnesses were not credible is supported by competent, substantial evidence.

Meacham claimed that she did not come forward sooner because she was afraid of Richard. She admitted that she read about Richard's death in the newspaper around the time of his accident in 1994 and called Richard's mother, who confirmed that Richard was deceased. Meacham did not offer a plausible explanation for why she waited nearly a decade after Richard's death to come forward with this evidence. Gamble, likewise, did not offer any reason for her delay in coming forward on her uncle's behalf. Green went public more promptly with her allegations that Richard confessed. She spoke to a reporter in 1996 and testified in an evidentiary hearing on the matter that same year. However, Green did not reveal Richard's alleged confession immediately after the statement was made or even immediately after his death in 1994. Instead, Green waited to reveal one brother's alleged confession until after her other brother was once again sentenced to death in his third resentencing. *See Kormondy v. State,* 983 So.2d 418 (Fla. 2007) (finding fact that Hazen and Kormondy were "reared as cousins" to be one of many factors detracting from Hazen's credibility). Green's credibility is also

  

questionable because her testimony during the instant postconviction hearing was not identical to her original testimony regarding Richard's alleged confession. In the postconviction hearing, Green did not testify that Richard specifically confirmed that he was responsible for the murder.

Moreover, *Jones I* directs courts to "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial" when ***351** evaluating newly discovered evidence claims. 591 So.2d at 916. The heart of the State's case against Hitchcock was his confession and the testimony regarding the discovery and condition of the victim's body. The evidence connecting Hitchcock to the murder was his confession, hair analysis evidence, and testimony regarding a blood stain on Hitchcock's jeans that matched the victim's blood type. Hitchcock's defense was that he did not kill Cynthia Driggers but helped hide her body and confessed to the murder to protect his brother, who was a father figure to him. Hitchcock was the only witness to testify to this theory. The jury obviously gave great weight to Hitchcock's initial confession and rejected his explanation of that confession. *See Melendez,* 718 So.2d at 748 (denying newly discovered evidence claim because evidence presented was unlikely to change the verdict where the jury had already rejected the same defense theory). We agree with the circuit court that given the totality of the evidence, the testimony of these three witnesses, which lacked credibility and merely partially inculpated Richard because he expressed personal responsibility for the murder in only one of the comments, is not evidence that so "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II,* 709 So.2d at 526. We hold that Hitchcock is not entitled to a new trial.

**4. Expert Hair Analysis Testimony**

Hitchcock argues that his constitutional rights were violated when the State failed to disclose the deficiencies of hair analyst Diana Bass and then knowingly presented her incompetent and false testimony in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); that guilt-phase counsel was ineffective for failing to challenge the admissibility of Bass's testimony; and that this newly discovered evidence of Bass's incompetence undermined confidence in his conviction.

At trial, Diana Bass testified as an expert hair analyst. She compared thirty hair samples taken from the victim's body against various standards consisting of hairs taken from the victim, Hitchcock, and Richard, and testified that three of the samples were "consistent in microscopic appearance" with Hitchcock's pubic hair. At the postconviction hearing, Hitchcock called as witnesses Bass and two of her former supervisors, Robert Kopec and Steven Platt. Robert Kopec testified that he evaluated Bass's performance in 1978 and concluded that she was not following the basic procedures to secure the integrity of the evidence that she was handling. Steven Platt confirmed that Bass was the expert referred to in *Peek v. State,* 488 So.2d 52

  

(Fla.1986), whose testimony was discredited. Bass admitted that she was inadequately trained and that she had left hair samples out overnight against procedure on at least one occasion.

Turning to Hitchcock's newly discovered evidence claim, to obtain a new trial based on newly discovered evidence, a defendant must demonstrate that (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such a nature that it would probably produce an acquittal on retrial. *See Jones II,* 709 So.2d at 521. Hitchcock argues that Bass may have erroneously matched the recovered hairs to Hitchcock and failed to find a match with Richard. First, Hitchcock offers no evidence that Bass actually mishandled the hairs in his case. Second, the hairs have been destroyed and cannot be retested. ***352** As a result, Hitchcock's hope of finding a match with Richard is merely speculative. Third, excluding Bass's testimony regarding the match with Hitchcock and non-match with Richard would not likely produce an acquittal. Hitchcock, Richard, and the victim all lived in the same household, and Hitchcock admitted to having sex with the victim. As a result, Bass's testimony that Hitchcock's hairs were found on the victim's body was just as consistent with Hitchcock's defense as it was with the State's case. The hair analysis evidence was of little probative value and cannot reasonably be seen as a definitive feature of the State's case.

We also agree with the circuit court's denial of Hitchcock's *Brady* claim. In order to establish a *Brady* violation, Hitchcock must show the following: (1) the evidence at issue was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the suppression caused prejudice that undermined confidence in the verdict. *Wright v. State,* 857 So.2d 861, 869-70 (Fla.2003). The circuit court found that the State did not suppress evidence of Bass's poor work habits with respect to the 1977 guilt-phase trial because the negative review did not occur until 1978. We agree that the State could not suppress a personnel evaluation that did not yet exist at the time of trial. Also, quoting *Preston v. State,* 528 So.2d 896 (Fla.1988), the circuit court explained that the State's responsibility under *Brady* does not extend "to examining in depth the personnel files of proposed expert witnesses and divulging possible adverse comments to the defense." In respect to the prejudice prong of this *Brady* claim, evidence of Bass's poor job performance would not be exculpatory because Hitchcock admitted to having sex with the victim, which explains the hair matches much more effectively than would evidence regarding the hair analyst's habits. Additionally, we agree that Hitchcock has failed to demonstrate prejudice because he did not present any evidence indicating that Bass mishandled the evidence in his case. *See Grim v. State,* 971 So.2d 85, 93 (Fla.2007) (finding no prejudice from State's failure to disclose documents questioning medical examiner's qualifications where defense failed to present any evidence challenging validity of examiner's autopsy in that case).

Hitchcock's *Giglio* claim is similarly without merit. In order to establish a *Giglio* violation,

  

Hitchcock must show the following: (1) the testimony was false; (2) the prosecutor knew that the testimony was false; and (3) the testimony was material. *Craig v. State,* 685 So.2d 1224, 1226 (Fla.1996). Hitchcock presented no evidence that Bass's testimony in his case was actually false. Hitchcock merely speculates that her analysis came to the incorrect conclusions due to her subsequent poor performance evaluation. Hitchcock also did not offer any evidence indicating that the State knew about Bass's poor work techniques at the time of Hitchcock's trial, much less that the State knew her testimony to be false.

Finally, we also agree with the circuit court's conclusion that Hitchcock's counsel was not ineffective for failing to object to Bass's testimony during the 1977 guilt phase. There is no basis for finding counsel ineffective in the instant case, where the unfavorable report was not written until the year after the trial.

**5. Presence During Peremptory Challenges**

Hitchcock next argues that the circuit court erred in denying his claim that his constitutional rights were violated when he was not present at the bench conference where peremptory challenges ***353** were exercised, that trial counsel was ineffective for failing to ensure that Hitchcock was present during all critical stages of the proceedings, and that the circuit court erred by not ensuring that the transcript was complete.[12] Hitchcock argues that his trial counsel was ineffective because counsel waived Hitchcock's right to be present at bench conferences where certain peremptory strikes were exercised and because counsel failed to request that the discussion at the bench regarding peremptory challenges be transcribed.

The circuit court found that even if some of the peremptory challenges were made at the bench and outside of Hitchcock's presence, his ineffective assistance of counsel claim is without merit because he failed to satisfy the prejudice prong of *Strickland.* The circuit court found that Hitchcock failed to "establish a reasonable probability that the outcome of the proceedings would have been different if jury selection had been carried out in any other manner." We agree. Hitchcock has failed to point to any challenges that were or were not made during the bench conferences that would have been handled differently if he had been present, and he did not allege that he was actually prejudiced by his counsel's actions during jury selection.[13] The trial court did not err in denying relief on this claim.

We also agree that Hitchcock has not demonstrated his counsel to be ineffective for failing to request that the challenges be transcribed. Hitchcock only speculates about the prejudice caused by not having access to the transcripts. Such speculation is insufficient to meet the second prong of *Strickland. Thompson v. State,* 759 So.2d 650, 660 (Fla.2000) (rejecting claim of ineffective assistance of appellate counsel for failure to have proceedings transcribed because petitioner did not point to specific errors that occurred in omitted portions of record).

**B. Penalty-Phase Claims**

  

**1. Testimony of Debra Lynn Driggers**

Hitchcock argues that his resentencing counsel was ineffective for failing to object to testimony by the victim's sister, Debra Driggers. The State called Debra Driggers as a penalty-phase witness. She testified that the victim had told her about "inappropriate things that Ernie [James ***354** Hitchcock] was doing to her" and that when Driggers was twelve years old, she and the victim confronted Hitchcock, who told the girls that he would "rape and kill" them if they told their mother about the inappropriate things that were going on. Driggers testified that as a result of this threat, she and the victim were scared. She stated that on the night prior to the murder, she told the victim that they must tell their mother about Hitchcock, but the victim said "we can't" and begged Driggers not to tell. Driggers testified that she did not tell authorities about these conversations in 1976 because she was scared that Hitchcock would kill her too. Resentencing counsel did not object to any portion of this testimony on any basis.

In his postconviction motion, Hitchcock alleged that his resentencing counsel "was ineffective for failing to object to this damaging and inadmissible testimony and for failing to move for a mistrial" because the "admission of the threats that James Hitchcock allegedly made to Debra Lynn Driggers and Cynthia Driggers and prior inappropriate sexual contact between James Hitchcock and Cynthia [Driggers] was unfairly prejudicial, improper character evidence, immaterial and irrelevant, and a non-statutory aggravator." Hitchcock asserted that the testimony invited the jury to consider uncharged crimes and acts as nonstatutory aggravation, instead of deciding whether the State had met its burden of proof of the statutory aggravators. Hitchcock did not allege that his counsel was ineffective for not objecting to Driggers' testimony, which included several statements made by the victim, on hearsay grounds.[14]

The circuit court denied the claim, holding that counsel's failure to object to the testimony was neither deficient nor prejudicial. The circuit court found that resentencing counsel's performance was not deficient because the testimony was admissible to establish the existence of two aggravating factors: commission in the course of the enumerated felony of sexual battery and HAC. *See* § 921.141(5)(d), (h) (1977), Fla. Stat.[15] The circuit court, citing to section 794.011(4)(c), Florida Statutes, found the testimony relevant to whether the murder was committed during the course of a sexual battery because sexual battery "may occur when the offender coerces the victim to submit by threatening to retaliate against the victim or any other person." ***355** [16] The circuit court found the testimony relevant to the HAC aggravating factor because HAC can be proven by threats that cause the victim to experience fear leading up to the murder.

We agree that resentencing counsel was not ineffective for failing to object to Driggers' testimony on the grounds that it was irrelevant and unfairly prejudicial. The sexual battery statute states that "consent" means "intelligent, knowing, and voluntary consent *and shall not be construed to include coerced submission.*" § 794.011(1)(h), Fla. Stat. (1977) (emphasis

  

added). The evidence of Hitchcock's threats and the ensuing fear experienced by the victim is directly relevant to the issue of consent. With respect to HAC, the circuit court correctly found that a threat on the victim's life contributes to the victim's apprehension prior to death and is thus relevant to the HAC aggravating factor. A threat need not be made contemporaneously with the murder in order to be relevant to the HAC aggravator if it causes the victim to experience fear, emotional strain, and terror in the moments leading up to her murder. *See Pooler v. State,* 704 So.2d 1375, 1378 (Fla.1997) (finding evidence that victim was threatened by defendant two days before she was killed to be relevant to HAC aggravating factor even though threat was not delivered on day of murder).

Moreover, the State's questioning of Driggers did not violate this Court's decision in *Hitchcock V* or the trial court's ruling on defense counsel's objection to the State's comment during opening statements that Hitchcock engaged in "inappropriate conduct" after moving in with his brother's family. The trial court overruled the defense's objection and decided that the State could present evidence of inappropriate conduct between Hitchcock and the victim so long as it was tailored to the aggravating factors but could not present evidence of inappropriate conduct between Hitchcock and Debra Driggers. This ruling was consistent with our direction in *Hitchcock V,* 673 So.2d at 863, that "sexual attacks upon persons other than the victim" not be the subject of the State's questions or evidence. At no time did Driggers testify that she was physically attacked by Hitchcock. Counsel was not deficient for failing to request that the court further limit the State by requiring it to parse out threats made against the witness from highly probative threats made against the victim. As the circuit court noted, "the threats were made to both girls, and Ms. Driggers could hardly testify about her sister's fear without acknowledging her own." The threat to "rape and kill" the sisters was made simultaneously. Driggers necessarily had to convey that she too was threatened if she was to testify about the probative threats made to the victim.

We also agree with the circuit court's conclusion that Hitchcock failed to demonstrate prejudice. Had counsel objected to Driggers' testimony and succeeded in having her testimony limited to threats made only to the victim, there is no reasonable probability that the outcome of the proceedings would have been different. The Sentencing Order explained that Hitchcock's claim that the victim consented to intercourse was unsupported. An expert ***356** testified at the 1996 resentencing that the victim was a virgin when she was sexually assaulted by Hitchcock, and Hitchcock's initial statement following his arrest was inconsistent with his claim that the victim consented to sexual intercourse. As for HAC, the Sentencing Order explained that the victim endured a "painful sexual assault, removal from her home, [and] beatings and chokings in order to secure her eventual silence." Hitchcock's initial statement supports this finding as well. He told police that he "got up and grabbed her by the neck and made her quit hollerin'," and that he "just kept chokin' and chokin'." Sentencing Order at 4. Likewise, even if Hitchcock had asserted that his counsel was ineffective for not objecting to portions of

  

Driggers' testimony as hearsay, Hitchcock was not prejudiced by any of the statements which may have been inadmissible. The aggravating factors are supported without reference to Driggers' testimony that the victim was scared of Hitchcock before her murder and that the victim begged Driggers not to tell their mother about Hitchcock's behavior and threats. Given the totality of the evidence, our confidence in the sentence is not undermined by the scope of Driggers' testimony.

**2. Mitigation Evidence**

Hitchcock argues that resentencing counsel failed to properly investigate and present the following statutory mitigating circumstances: (1) the crime was committed while Hitchcock was under the influence of an extreme mental or emotional disturbance; and (2) he had a substantial impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Hitchcock asserts that counsel was ineffective for not asking the defense's mental health expert to testify to whether these statutory mitigating circumstances applied at the time of the murder. Hitchcock also asserts that counsel was ineffective for retaining a mental health expert too late in the proceedings and for failing to refer Hitchcock to a neuropsychologist for examination after learning from the late-retained mental health expert that there were indications of possible brain damage.

**a. Statutory Mitigation**

With regard to Hitchcock's allegation that counsel was deficient for failing to question the expert about whether Hitchcock was under the influence of extreme mental or emotional disturbance at the time of the murder or whether his capacity to appreciate the criminality of his conduct was substantially impaired, the circuit court "disagree[d] that Dr. Toomer's presentation was inadequate, or that evidence presented at the evidentiary hearing establishes that counsel's performance was deficient or prejudicial in this regard." We agree with the circuit court's conclusion that Hitchcock has not demonstrated that he was prejudiced by his counsel's failure to ask Dr. Toomer if either of the statutory mental health mitigating factors was applicable. Our confidence in Hitchcock's sentence is not undermined by Dr. Toomer's not testifying to his ultimate conclusion on the applicability of the statutory mitigating factors in light of the extensive mitigation that was presented and the extremely weighty aggravators proven in this case.

During resentencing, Dr. Jethro W. Toomer testified as an expert in forensic psychology on Hitchcock's behalf. He opined that Hitchcock suffers from lifelong personality difficulties, including problems with self-concept and self-identification, lacks sufficient skills to make appropriate judgments, and is "characterized by poor interpersonal relationships and overall instability." Dr. Toomer diagnosed Hitchcock ***357** as having borderline personality disorder. He did not diagnose Hitchcock as suffering from any major mental illness. When asked if Hitchcock's personality difficulties would have had an effect on him at the time of the crime, Dr. Toomer answered "[n]ot only at the time of the crime but his entire life." When

  

asked more generally what Hitchcock's mental status would have been at the time of the crime, Dr. Toomer answered:

> At the time of the incident Mr. Hitchcock was experiencing the effects of the forementioned borderline personality difficulties. That was characterized by his impulsivity that was a function of his inability to cope with an emotionally charged situation, his inability to deal with issues relating to abandonment and rejection and his inability to cope with inevitable stressors that individuals encounter. Mr. Hitchcock's behavior was characteristic of individuals who suffer from the personality deficits and dysfunction that we have described.

Dr. Toomer was not asked specifically if he believed that either of the statutory mental health mitigating factors was present. Hitchcock points out that the prosecuting attorney stated during closing argument that "Doctor Toomer did not render the opinion at any time during his testimony that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime."

Dr. Toomer testified during the postconviction hearing. He explained that when his deposition was taken in August of 1996 and at the time of his testimony during the resentencing, he was of the opinion that both statutory mitigating factors, influence of extreme mental or emotional distress and impaired capacity to appreciate criminality or conform one's conduct, were applicable to Hitchcock at the time of the murder. Dr. Toomer added that extreme mental or emotional disturbance "has existed for [Hitchcock] for most of his life." Dr. Toomer testified that he had anticipated being asked to opine as to the presence of those two statutory mitigating factors during resentencing.

Hitchcock's resentencing counsel testified during the postconviction hearing. Attorney Kelly Sims testified that he and co-counsel Patricia Cashman were concerned that the prosecutor would present damaging evidence "under the guise of rebuttal to mitigation." As a result, they were cautious about presenting mental health mitigation. Sims did not recall any strategic decision not to present evidence relevant to the statutory mental mitigating factors and could not remember "any specifics about Doctor Toomer and what he was going to testify to." Sims was asked about a notice filed by Cashman on August 13, 1996, which stated that the defense expert would be presenting evidence that the defendant was under the influence of extreme mental or emotion disturbance at the time of the murder, and he still could not recall discussing that statutory mitigating factor with Cashman or Dr. Toomer. Neither the State nor Hitchcock asked Cashman why she did not ask Dr. Toomer about the presence of statutory mitigation at the 1996 resentencing. In fact, Hitchcock did not cross-examine Cashman at the postconviction hearing.

Having reviewed both Hitchcock's resentencing and the postconviction record, even if we assume that Hitchcock's counsel was deficient, we agree with the circuit court that Hitchcock was not prejudiced. First, substantial mitigating evidence was presented during Hitchcock's resentencing. While counsel did not ask Dr. Toomer for his ultimate opinion regarding statutory mitigation, counsel did

  

present evidence through Dr. Toomer that at time of the offense, Hitchcock was experiencing ***358** the effects of borderline personality disorder, which is characterized by impulsivity and an inability to cope with an emotionally charged situation. Based on Dr. Toomer's testimony and other evidence, including the testimony of family members, fellow death row inmates, and an attorney who represented Hitchcock in a prior appeal, the trial court found one statutory mitigating factor, Hitchcock's young age at the time of the crime, and twenty-three nonstatutory mitigating factors, including that Hitchcock was under influence of lifelong personality difficulties and that his crime resulted from an unplanned impulsive act. During the postconviction hearing, Dr. Toomer did testify that he considered Hitchcock to be under the influence of extreme mental or emotional disturbance for "most of his life" and that this disturbance impaired Hitchcock's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. However, Dr. Toomer did not add any explanation as to whether Hitchcock's impulsivity was particularly acute at the time of the crime or how Hitchcock's borderline personality disorder and personality difficulties caused the sexual assault and murder. As a result, Dr. Toomer's postconviction testimony did not substantially augment the mental health mitigation that was presented at resentencing but, instead, merely offered a bare, unelaborated opinion that two statutory mitigating factors were applicable. This Court has held that counsel is not ineffective for failing to present additional evidence that would be cumulative to that already presented. *See, e.g., Downs v. State,* 740 So.2d 506, 516 (Fla.1999) ("[T]o the extent Downs offers additional facts not previously presented at the resentencing hearing, such facts are cumulative to the evidence presented by Downs during the resentencing and, therefore, are insufficient to warrant relief under *Strickland.*").

Second, the extremely weighty aggravation in this case would outweigh the mitigation, even if Dr. Toomer had specifically opined that the statutory mental health mitigating factors were applicable. The trial court found four aggravating circumstances in this case: (1) Hitchcock committed the crime while he was under a sentence of imprisonment; (2) the crime was committed while Hitchcock was engaged in the enumerated felony of sexual battery; (3) the crime was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the crime was HAC. Given this substantial aggravation, our confidence in his death sentence is not undermined by counsel's failure to solicit Dr. Toomer's opinion regarding the statutory mitigating factors.

**b. Brain Damage**

The circuit court found no merit to Hitchcock's claim that his resentencing counsel was ineffective for retaining a mental health expert too late in the proceedings and for failing to refer Hitchcock to a neuropsychologist for examination after learning that there were indications of possible brain damage. The circuit court held that a "claim that there is a 'possibility' of impairment constitutes mere speculation which is insufficient to state a valid basis for relief" and that Hitchcock was not prejudiced by his counsel's failure to arrange

  

for additional testing for neuropsychological testing. The circuit court reasoned that

> the evidence and testimony presented at the evidentiary hearing are sufficient to support the conclusion that while Defendant may have suffered (and may continue to suffer) from a borderline personality disorder, he had the ability to appreciate the criminality of his conduct. He did not wish to be accused of sexual ***359** battery by the victim, because that could result in returning to prison, where he had already served time. This Court further finds that there is no reasonable probability that the outcome of the proceedings would have been different if counsel had arranged for additional testing for neuropsychological impairment.

Postconviction Order I at 9. We do not find reversible error in the trial court's decision.

During his evaluation of Hitchcock in preparation for the resentencing, Dr. Toomer administered the Bender Gestalt test that screens for evidence of organicity or brain damage. At the postconviction hearing, Dr. Toomer explained that an individual's performance on that test can suggest a possibility of organicity, underlying personality disturbance, or thought process disturbances, and that if an individual's performance raises concern, the "next step would be to conduct a neuropsychological evaluation or some neurologically based assessment in order to pinpoint the extent and the nature of any underlying neurologically based impairment." Dr. Toomer explained that he "could not render an opinion, definitive opinion with regard to whether there was any organic deficit or brain damage" from Hitchcock's performance but that there were "soft signs which means there was some indication that suggested there might be some underlying organically based deficit." He opined that the results were significant enough to make follow-up neuropsychological testing appropriate. Dr. Toomer could not remember if he discussed further testing with defense counsel, but he stated that it was his standard procedure to go over all the results of his evaluation with counsel and to indicate whether further testing is necessary.

Dr. Bill E. Mosman, who was tendered and accepted as an expert in forensic psychology during the postconviction hearing, also evaluated Hitchcock and testified on his behalf. Dr. Mosman reviewed Dr. Toomer's data and testing, and testified that while Dr. Toomer's testing was appropriate for a psychological evaluation, it was his opinion that Hitchcock should have been referred to a neuropsychologist based on Dr. Toomer's evaluation. Dr. Mosman testified that while there are "several explanations" for the test results that Dr. Toomer recorded, such results are "frequently seen in the right hemisphere deficits and brain damage population." On cross-examination, Dr. Mosman admitted that Hitchcock has not manifested behavior indicating brain damage during the decades that he has been in prison. However, Dr. Mosman was of the view that "the controlled, regimented, highly predictable, non-access to drug, alcohol environment" of prison is essentially "treatment" that increases the "probability of good functioning" in brain-damaged individuals. He concluded that "the jury is still out, clinical jury, if you will, on the one piece on exactly the contours of that organic deficit." Yet, Dr. Mosman, who

  

is a neuropsychologist, did not perform a neuropsychological examination of Hitchcock.

Hitchcock next called Dr. Henry Dee, another clinical neuropsychologist who was tendered and accepted as an expert in neuropsychology, during the postconviction hearing. Dr. Dee had performed a neuropsychological evaluation of Hitchcock to determine the presence of any "cerebral damage, insult, disease or affect." Hitchcock performed normally on all of the tests except the Wisconsin Card Sorting Test and the Categories Test. Dr. Dee explained that Hitchcock's failure on these tests indicated the presence of frontal lobe brain damage, which is associated with "deficiency of behavior control" and a "lack of adequate ability to inhibit responding." ***360** Dr. Dee answered in the affirmative when asked if "there was any reasonable degree of neuropsychiatric probability that [Hitchcock] has frontal lobe damage." However, Dr. Dee further explained that a failing score on the tests can only indicate the *presence* of frontal brain damage, not the *extent* of the damage. Dr. Dee did not present the results of any brain imaging or opine as to the extent of any impairment at the time Hitchcock murdered the victim.

In rebuttal, the State called Dr. Harry Albert McClaren as its expert in forensic psychology at the postconviction hearing. He testified that the Bender Gestalt test conducted by Dr. Toomer is a "rough screening tool" and that Hitchcock's results showed "very minor distortions" that could be a reason to recommend a follow-up neuropsychological evaluation. Dr. McClaren administered the WAIS-III intelligence test, which resulted in a thirteen-point spread between verbal and performance scores. Dr. McClaren explained that one explanation for the spread is brain dysfunction, but there are other explanations, and that if he had been hired by defense counsel to evaluate Hitchcock for a capital case, he would have informed counsel of the spread and explained that the spread is statistically significant and that brain dysfunction could be the cause. He would have advised counsel that "one of the things they should consider is consulting with a neuropsychologist." Dr. McClaren cautioned that identifying a test result as statistically significant is one thing but that finding the result to be indicative of brain damage "is another leap." Dr. McClaren pointed out that Hitchcock underwent neuropsychological testing in 1984 and 1988, and the results at that time were normal. Overall, Dr. McClaren opined, "while there is some possibility of a degree of organicity" and "while there's some possibility that this [organicity] may have had some contribution to an act of impulsive violence," other explanations such as not wanting to be sent back to prison, not wanting to be caught, alcohol use, and a personality disorder that makes Hitchcock less concerned about the rights of other people probably contributed more to the commission of the murder than Hitchcock's possible brain damage.

Attorney Sims testified that he did not remember any conversations with Dr. Toomer on the subject of brain damage. Attorney Cashman was not questioned about her decision to not pursue further neuropsychological testing.

  

The circuit court found that Dr. Toomer's psychological evaluation was adequate and that counsel was not deficient for failing to have Hitchcock examined by a neuropsychologist. Competent, substantial evidence supports this finding that counsel was not deficient. As set forth above, during the postconviction hearing, there was conflicting expert testimony presented, which was for the trial judge to resolve.

We also agree that Hitchcock has not demonstrated that he suffered any prejudice as a result of defense counsel's failure to seek neuropsychological testing. The circuit court's finding that Hitchcock offered only speculation that he suffered from brain damage at the time of the murder is supported by competent, substantial evidence. Furthermore, even if Hitchcock's counsel had obtained and presented evidence of brain damage during Hitchcock's resentencing, we find that the circuit court did not err in determining that there is no reasonable probability that the outcome would have been different. First, as discussed above, the aggravating factors in this case are extremely weighty. Second, the mental health experts testified to Hitchcock's normal intelligence, lack of ***361** mental illness, and positive adaptation to prison life.

### 3. *Caldwell* Claim

The United States Supreme Court held in *Caldwell v. Mississippi,* 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Hitchcock argues that the trial court's instruction in his resentencing improperly conveyed to the jury that it had no responsibility for the sentence that would be imposed on Hitchcock and that his resentencing counsel was ineffective for not objecting to the instruction.

We agree with the circuit court that Hitchcock's claim that the trial court improperly instructed the jury is procedurally barred because the claim could have been raised on direct appeal but was not. *See Jones v. State,* 928 So.2d 1178, 1183 n. 5 (Fla.2006) (holding *Caldwell* claim procedurally barred because not raised on direct appeal).

We further hold that resentencing counsel was not ineffective for not objecting to the trial court's jury instruction regarding the jury's recommendation. Upon reviewing the instruction given, we find that it does not materially differ from Florida's standard jury instruction, which "fully advises the jury of the importance of its role, correctly states the law, and does not denigrate the role of the jury." *Brown v. State,* 721 So.2d 274, 283 (Fla.1998) (citations omitted); *see also Card v. State,* 803 So.2d 613, 628 & n. 14 (Fla.2001); *Combs v. State,* 525 So.2d 853, 855-58 (Fla.1988) (holding that the characterization of jury's role as advisory in the standard jury instructions does not violate *Caldwell* ). The instruction given in this case sufficiently instructed the jury of its responsibility and important role in the sentencing process and therefore did not violate *Caldwell.* Counsel cannot be deemed ineffective for failing to make a meritless

  

objection. *See Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992).

**4. Sexual Battery Claim**

Hitchcock argues that his resentencing counsel was ineffective for not arguing that the State failed to prove beyond a reasonable doubt the aggravating factor that the murder was committed *during* the commission of a sexual battery because any sexual battery that may have occurred was completed prior to the murder. Hitchcock also argues that his resentencing counsel was ineffective for not requesting a jury instruction explaining the elements of sexual battery.

The circuit court correctly noted that "[t]here is no requirement that the murder must occur at the exact same time as the underlying felony" for the murder in the course of a felony aggravating factor to be applicable. *See Bogle v. State,* 655 So.2d 1103, 1108 (Fla.1995) (affirming finding of sexual battery aggravating factor, despite the lack of conviction for sexual battery, on basis of medical examiner testimony that sexual activity occurred within three hours of victim's death). In this case, the medical examiner who testified at Hitchcock's resentencing estimated that the victim's hymen tear occurred "a few hours before the death of the victim." At one point, he testified that the tear could have occurred as recently as a half hour before the murder. Hitchcock is wrong to suggest that the time of the hymen tear can identify the time the sexual battery ended. The hymen tear could have occurred at the beginning of the sexual assault, and there was no testimony indicating ***362** how long the sexual assault lasted. Thus, Hitchcock's claim that his resentencing counsel was ineffective for not arguing that the aggravating factor was inapplicable because any sexual battery was completed prior to the murder is without merit.[17]

The circuit court also found that resentencing counsel was not deficient for failing to object to the trial court's instructions regarding this aggravating factor or for failing to request a special instruction that would have required the jury to determine whether a sexual battery actually occurred. We agree that counsel was not deficient for failing to object to the aggravating factor instruction. This Court held in *Hitchcock I* that there was sufficient evidence of a sexual battery to warrant an instruction on murder in the course of a felony. 413 So.2d at 745. The record likewise contains sufficient evidence that the murder was committed during the commission of a sexual battery to warrant giving an instruction on that aggravating factor.

We do agree with Hitchcock's argument that our case law supports that the jury be instructed regarding the elements of sexual battery. This Court explained in *Occhicone v. State,* 570 So.2d 902, 906 (Fla.1990), that the elements of the underlying felony *should* be explained to the jury where the State argues that the aggravating factor of the murder being committed during the course of an enumerated felony applies. However, the Court also held in *Occhicone* that failing to instruct the jury on the elements of the underlying felony was not fundamental error where there were other valid aggravating circumstances. *Id.* The Court further explained that the lack of instruction

  

is harmless error where the State proves the underlying felony beyond a reasonable doubt:

> Speculating that Occhicone's jury may have relied on one word without knowing its specific legal definition is of no moment here because the judge as the sentencer must make written findings supporting the sentence. We must assume that the instant judge knew the technical definition of burglary, and the facts support his finding the mother's murder to have been committed during a burglary.

*Id.* (footnote omitted). Here, Hitchcock was not prejudiced by his counsel's failure to request an instruction on sexual battery because the record supports the trial judge's finding that the aggravating factor that the murder was committed during the commission of a sexual battery was proven beyond a reasonable doubt. Thus, our confidence in the jury's recommendation and the trial court's Sentencing Order is not diminished by counsel's failure to request an instruction detailing the elements of sexual battery.

### 5. *Ring* Claim

On appeal, Hitchcock acknowledges that this Court has denied relief on similar claims and states that he raises the claim only to preserve the issue for federal review. We write only to clarify that Hitchcock is not entitled to relief on this claim because this Court has held that *Ring* does ***363** not apply retroactively. *Johnson v. State,* 904 So.2d 400, 409 (Fla.2005). To the extent that Hitchcock relies on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), his argument is also without merit. This Court has consistently held that *Apprendi* does not require that aggravating circumstances be charged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict. *Porter v. Crosby,* 840 So.2d 981, 986 (Fla.2003); *Brown v. Moore,* 800 So.2d 223, 224-25 (Fla.2001).

## III. PETITION FOR WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus, Hitchcock raises numerous claims. He primarily argues that his appellate counsel was ineffective for failing to raise certain issues on direct appeal. Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for a writ of habeas corpus. *See Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). Consistent with the *Strickland* standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine whether the alleged omissions "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and whether the deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Pope v. Wainwright,* 496 So.2d 798, 800 (Fla.1986); *see also Freeman,* 761 So.2d at 1069. Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel

  

raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Id.* (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994)).

Hitchcock argues, based on *Ring* and *Apprendi,* that he was unconstitutionally deprived of notice that he could be convicted under a theory of felony murder and that he was unconstitutionally deprived of a unanimous verdict identifying whether the jury found him guilty of felony murder or premeditated murder. He also argues that his appellate counsel was ineffective for not raising this issue on direct appeal. This Court rejected virtually identical arguments in *Mansfield v. State,* 911 So.2d 1160, 1178-79 (Fla.2005). Accordingly, Hitchcock's claim is likewise without merit.

Next, we address Hitchcock's habeas claim that Florida's death penalty scheme is unconstitutional as applied to him under *Ring* and *Apprendi* and that his appellate counsel was ineffective for not raising on direct appeal the issue of *Apprendi's* impact on Florida's capital sentencing scheme. As discussed above, this Court has held that Florida's capital sentencing scheme is not unconstitutional. As for Hitchcock's corresponding ineffective assistance of counsel claim, neither *Ring* nor *Apprendi* had been decided when the appeal of Hitchcock's latest resentencing was pending before this Court. *Hitchcock VI,* 755 So.2d at 640, *reh'g denied,* No. SC92717 (Fla. May 3, 2000) (unpublished order). Counsel cannot be expected to anticipate changes in the law. *Walton v. State,* 847 So.2d 438, 445 (Fla.2003). Hitchcock's argument is without merit.

Hitchcock's remaining claims of ineffective assistance of appellate counsel would, as discussed in the related postconviction claims above, "in all probability" have been found without merit if raised on direct ***364** appeal. Thus, Hitchcock's appellate counsel was not ineffective for failing to raise those issues on appeal.

In his final habeas claim, Hitchcock asserts that his rights will be violated because he may be incompetent at the time of execution. This claim is not ripe for review until a death warrant has been issued, which has not occurred in this case. *Rogers v. State,* 957 So.2d 538, 556 (Fla.2007) (citing *Griffin v. State,* 866 So.2d 1, 21-22 (Fla.2003)). Therefore, Hitchcock is not entitled to relief at this time.

## IV. CONCLUSION

For the reasons stated above, we affirm the circuit court's denial of Hitchcock's motion for postconviction relief and deny Hitchcock's petition for a writ of habeas corpus.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

**All Citations**

991 So.2d 337, 33 Fla. L. Weekly S343

  

## Footnotes

1 The mitigating circumstances concerning the crime included: (1) Hitchcock was under the influence of alcohol and marijuana at the time he committed the crime; (2) he was under influence of life-long personality difficulties; (3) the crime resulted from an unplanned, impulsive act; (4) he was unarmed when he committed the crime; (5) he surrendered and cooperated with authorities; and (6) he gave a voluntary statement, freely confessing to the crime.

2 The mitigating features of Hitchcock's adverse background included: (1) he grew up in extreme rural poverty; (2) he experienced the lingering death of his natural father; (3) he witnessed his mother's epileptic seizures; (4) he dropped out of school at the seventh grade and was unable to pursue a formal education; (5) he witnessed and experienced emotional and physical abuse from his alcoholic stepfather; (6) he developed a borderline personality disorder; (7) he left home at an early age; (8) he worked hard in several demanding jobs; and (9) he risked his life to save his uncle's life.

3 The mitigating positive character traits included: (1) Hitchcock learned to read and write, attained a GED, and assisted others in doing the same; (2) he acted as mediator in prison; (3) he remediated childhood character “deficits”; (4) he was thoughtful of family members; (5) he exhibited artistic talent; (6) he undertook steps toward self-improvement, such as quitting smoking; (7) he exhibited good conduct during court proceedings; and (8) he retained love and support of family members.

4 On December 19, 2001, Hitchcock filed a Florida Rule of Criminal Procedure 3.853 motion for postconviction DNA testing, asserting that DNA testing of evidence taken from the scene could prove that Richard Hitchcock was guilty of the murder or that Hitchcock was otherwise innocent. The trial court denied the motion, and this Court affirmed. *Hitchcock v. State,* 866 So.2d 23 (Fla.2004) (*Hitchcock VII* ).

5 Hitchcock's postconviction claims were as follows: (1) resentencing counsel was ineffective for failing to object to the testimony of Debra Lynn Driggers; (2) guilt-phase counsel and resentencing counsel were ineffective for failing to object to testimony and argument that the victim was a virgin at the time of the offense; (3) guilt-phase counsel was ineffective for failing to spend adequate time preparing for trial and thus opened the door to negative character evidence about Hitchcock and for failing to admit evidence implicating Richard Hitchcock in the murder; (4) resentencing counsel was ineffective for failing to recall Dr. Toomer to explain the Minnesota Multiphasic Personality Inventory (MMPI) narrative report introduced by the State; (5) resentencing counsel was ineffective for failing to have Hitchcock evaluated for neuropsychological impairment; (6) resentencing counsel was ineffective for failing to fully develop available statutory and nonstatutory mitigating evidence; (7) the State violated Hitchcock's constitutional rights by destroying exculpatory physical evidence; (8) the trial court's instructions diminished the jury's role in sentencing in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and counsel was ineffective for not objecting to the instructions; (9) newly discovered evidence demonstrated that Richard Hitchcock committed the murder; (10) the State failed to disclose the deficiencies of hair analyst Diana Bass and then knowingly presented the analyst's incompetent and false testimony, guilt-phase counsel was ineffective for failing to challenge the admissibility of Bass's testimony, and this newly discovered evidence of Bass's incompetence undermined Hitchcock's conviction; (11) resentencing counsel was ineffective for failing to object to the court's felony-murder instruction and for failing to request a jury instruction on the elements of sexual battery; (12) Hitchcock's constitutional rights were violated because he was not present at the bench conference when peremptory challenges were exercised, trial counsel was ineffective for failing to ensure that Hitchcock was present during all critical stages of the proceedings, and the trial court erred by not ensuring that the transcript was complete; and (13) Florida's capital sentencing scheme is unconstitutional as applied to Hitchcock.

6 Hitchcock's claims on appeal are: (1) the circuit court erred in holding that Hitchcock's guilt-phase claims were procedurally barred; (2) the circuit court erred in denying Hitchcock's claim that resentencing counsel was ineffective for failing to object to the testimony of Debra Lynn Driggers; (3) the circuit court erred in denying Hitchcock's claim that guilt-phase counsel was ineffective for failing to spend adequate time preparing for trial and thus opened the door to negative character evidence about Hitchcock and for failing to admit evidence implicating Richard Hitchcock in the murder; (4) the circuit court erred in denying Hitchcock's claim that resentencing counsel was ineffective for failing to present available evidence of statutory mitigating circumstances and organic brain damage; (5) the circuit court erred in denying Hitchcock's claim that the State violated his constitutional rights by destroying exculpatory physical evidence; (6) the circuit court erred in denying Hitchcock's claim that the trial court's instructions diminished the jury's role in sentencing, in violation of *Caldwell*

  

*v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and counsel was ineffective for not objecting to the instructions; (7) the circuit court erred in denying Hitchcock's claim that newly discovered evidence demonstrated that Richard Hitchcock committed the murder; (8) the circuit court erred in denying Hitchcock's claim that his constitutional rights were violated when the State failed to disclose the deficiencies of hair analyst Diana Bass and then knowingly presented the analyst's incompetent and false testimony, guilt-phase counsel was ineffective for failing to challenge the admissibility of Bass's testimony, and this newly discovered evidence of Bass's incompetence undermined his conviction; (9) the circuit court erred in denying Hitchcock's claim that resentencing counsel was ineffective for failing to object to the court's felony-murder instruction and for failing to request a jury instruction on the elements of sexual battery; (10) the circuit court erred in denying Hitchcock's claim that his constitutional rights were violated when he was not present at the bench conference where peremptory challenges were exercised, trial counsel was ineffective for failing to ensure that Hitchcock was present during all critical stages of the proceedings, and the trial court erred by not ensuring that the transcript was complete; and (11) the circuit court erred in denying Hitchcock's claim that he is entitled to relief under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

7 Hitchcock's habeas claims are: (1) Hitchcock's constitutional rights were violated when he was deprived of notice of felony murder and a unanimous verdict identifying whether the jury found him guilty on the theory of felony murder or premeditated murder, and appellate counsel was ineffective for failing to raise this claim on direct appeal; (2) appellate counsel was ineffective for failing to raise on direct appeal the claim that Hitchcock's absence from crucial portions of his trial was a violation of his constitutional rights; (3) appellate counsel was ineffective for failing to challenge on direct appeal the trial court's finding that the murder was committed during the course of a sexual battery; (4) appellate counsel was ineffective for failing to raise on direct appeal the claim that the resentencing instructions violated *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (5) Florida's death penalty statute is unconstitutional because it violates *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (6) Hitchcock is incompetent to be executed.

8 On a similar note, Hitchcock argues that counsel was ineffective for not reviewing Hitchcock's testimony and not "counsel[ing] him on avoiding unnecessary and prejudicial responses." Hitchcock is not entitled to relief on this basis because he has not explained what unnecessary and prejudicial responses could have been avoided through additional preparation and how those responses prejudiced him. *See Monlyn v. State,* 894 So.2d 832, 835 (Fla.2004) ("A defendant must point to specific acts or omissions of counsel that are 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052)).

9 Green also testified about this incident in a 1996 evidentiary hearing. At that time, she testified that Richard explicitly confirmed that he was the one responsible for the murder. In the current proceedings, Green did not testify that Richard explicitly confessed to his own involvement in the murder.

10 This witness's name is also sometimes spelled "Rossie Meacham" or "Robbie Meacham" in the record.

11 This witness's name is also sometimes spelled "Gambale" in the record.

12 To the extent that Hitchcock makes the substantive claims that he was denied his right to be present during a critical stage of the proceeding and that he was denied a complete record, these claims are procedurally barred because they could have been raised on direct appeal. *See, e.g., Spencer v. State,* 842 So.2d 52, 68 (Fla.2003) (holding claim of inadequate voir dire procedurally barred because it was not raised on direct appeal). Moreover, Hitchcock's claim that he was denied his constitutional right to be present during a critical stage of the proceeding is without merit. At the time of Hitchcock's trial and this Court's decision to affirm his conviction on direct appeal, the right to be present at jury selection proceedings had not yet been interpreted as a right to be present at the bench during the exercise of peremptory challenges. The right to be present at the actual site where jury challenges are exercised was not established until 1995 in *Coney v. State,* 653 So.2d 1009 (Fla.1995), and this Court has specifically rejected attempts to apply *Coney* retroactively. *See, e.g., Boyett v. State,* 688 So.2d 308, 309 (Fla.1996).

13 Hitchcock argues that the bench conferences being held outside of his presence were such serious errors that prejudice should be presumed. *Strickland* holds that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."

  

466 U.S. at 693, 104 S.Ct. 2052. Hitchcock offers no authority indicating that exclusion from bench conferences is an additional exception to the general prejudice requirement, and we have found none.

14 During a penalty phase, any “evidence which the court deems to have probative value may be received ... provided the defendant is accorded a fair opportunity to rebut any hearsay statements.” § 921.141(1), Fla. Stat. (Supp.1996). This Court has consistently held that a party is not accorded a fair opportunity to rebut hearsay where the declarant is deceased and thus cannot be called as a witness. *See, e.g., Blackwood v. State,* 777 So.2d 399, 411-12 (Fla.2000) (holding that trial court did not err in excluding hearsay testimony because State had no fair opportunity to rebut statements of deceased victim). Because Hitchcock did not raise irrebutable hearsay as a possible ground for objecting to Driggers' testimony before the circuit court or on appeal to this Court, we do not address whether the victim's statements were admissible in the instant case.

15 Section 921.141(5)(d), Florida Statutes (1977), lists “rape” as an enumerated felony for purposes of that aggravating factor. This terminology is not an issue in the present action. The crime of “rape” was called “sexual battery” in 1977. *See* ch. 794, Fla. Stat. (1977) (Sexual Battery). Moreover, in the direct appeal from Hitchcock's latest resentencing, *Hitchcock VI,* 755 So.2d at 644, this Court upheld the trial court's finding of the murder in the course of a felony aggravating factor due to its previous rejection of Hitchcock's claim that sexual battery was improperly used as the underlying felony for that aggravator in *Hitchcock I,* 413 So.2d at 747.

16 The trial court did not specify what year of the Florida Statutes it consulted. Any error is harmless because section 794.011(4)(c), Florida Statutes (1977), the statute in force at the time of Hitchcock's offense, includes similar language explaining that sexual battery occurs “[w]hen the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute these threats in the future.”

17 To the extent that Hitchcock asserts that his resentencing counsel failed to argue generally that the State did not prove this aggravating factor, his claim is refuted by the record. Resentencing counsel did argue that the evidence did not support finding the factor. During closing argument, counsel pointed out to the jury that the medical expert had testified that the victim had no broken nails, no foreign matter under her nails, and no defensive wounds on her wrists or arms, all evidence suggesting that the sexual encounter may have been consensual.

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