IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,

Case No. SC03-2203

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
CASES

MISCELLANEOUS

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The issues contained in this appeal after relinquishment are not complex. The State defers to this Court's judgment as to whether or not oral argument is necessary.

STATEMENT OF THE CASE AND FACTS

The "supplemental statement of the case" set out on pages 1-2 of Hitchcock's brief is incomplete and argumentative. As the Fifth District Court of Appeals has pointed out, "[t]he purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute." *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (5 DCA 2000). The "statement of the case" found in Hitchcock's brief runs afoul of each of those principles, and is subject to being stricken for that reason.[1] Further, on page 2 of the "statement of the case," Hitchcock states that he "incorporates all previous arguments made in the Initial and Reply Briefs."

[1] For example, Hitchcock refers to the trial court's denial of the State's motion to depose Hitchcock before he testified as being a "denial" by the trial court of "the State's attempt to violate Mr. Hitchcock's rights." *Initial Brief,* at 1. In addition, Hitchcock includes discussion of matters which are not issues on appeal, and seem to be included for no reason other than as a means to direct *ad hominem* abuse at the State.

Initial Brief, at 2.[2] Such "incorporation by reference" is inappropriate because it is an attempt by the Appellant to evade the page limitations applicable to this proceeding, and because it "briefs" issues that are not identified with any specificity to this Court or to the State. The purpose of an appellate brief is to present legal argument in support of the party's position, and this practice does not achieve that result. *Jones v. State*, 928 So. 2d 1178 (Fla. 2006) ("The purpose of an appellate brief is to present arguments in support of the points on appeal." *quoting Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)); *see also, Simmons v. State*, 31 Fla. L. Weekly S285 n.12 (Fla. May 1, 2006). Moreover, Hitchcock's brief contains **no** statement of the facts, contrary to the explicit requirements of *Florida Rule of Appellate Procedure* 9.210(b). The State relies on the following Statement of the Facts.

At the April 7-10, 2003, (V5-8, R55-436) and May 8, 2003, (V9, R437-564) evidentiary hearing, the following witnesses testified as follows:

[2] On page 9 of his brief, Hitchcock complains that "because of page limits" he "lacks the space for a full discussion of jury selection." However, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983). And, since he never moved this Court for an enlargement of the page limitation, Hitchcock should not be heard to complain.

Charles Tabscott represented Hitchcock at his murder trial. (V5, R102-03). Without the benefit of reviewing the trial record, he did not specifically recall how he prepared for this case. (V5, R112). Generally, he would review all police reports, take depositions, consult with his client, and meet with any witnesses he intended to call at trial. (V5, R113). He did not recall anything about his preparation in this case that he would have done differently. (V5, R114). Hitchcock told him that his brother Richard was the murderer. (V5, R116). Although he had no specific recollection of speaking with family members regarding Richard Hitchcock's violent tendencies, he would have used that testimony at trial. (V5, R117). He did not recall questioning Richard Hitchcock about his involvement, if any, in this case. (V5, R122).

On cross-examination, Tabscott said he would have presented evidence that Hitchcock's brother Richard, " ... would have a propensity to do this type of thing." (V5, R129). The trial record reflected that Tabscott questioned Hitchcock family members regarding Richard's violence toward others. (V5, R133).

Martha Galloway is Hitchcock's sister. (V6, R143). Her older brother, Richard, molested her from the age of eight to

seventeen.[3] (V6, R144, 145). These assaults occurred before James Hitchcock's murder trial took place. (V6, R144-45). Richard became jealous and enraged when she became interested in boys. (V6, R147). She had told Hitchcock's trial attorney, Charles Tabscott, that Richard had abused her and had been violent. (V6, R148). Tabscott told her, "... Richard wasn't on trial ... we didn't need to hear nothing about Richard. We need to know about Erney ..."[4] (V6, R149). During a court proceeding in 1988, she explained how Richard abused her, but "not to the extent they really needed to know for this trial." (V6, R149). Richard was possessive over young girls. (V6, R150).

On cross-examination, Galloway said Richard did not have much to do with her after she turned seventeen. (V6, R151). During the trial, Hitchcock's attorney questioned her on Richard's abuse. (V6, R152). At age thirteen, she went to reform school, "to get away from him." (V6, R154). James was always a good brother to her. (V6, R155).

Rossie Meacham, an acquaintance of the Hitchcock siblings, did not know the Appellant. (V6, R160). On one occasion, Richard discussed a murder that had occurred. (V6, R161). Richard and

[3] Between age thirteen and seventeen, there was only one assault that occurred. Galloway said, "He picked me up walking on the road. It happened again." (V6, R157).

[4] Galloway calls the Appellant, "Erney." (V6, R144).

she were in his mother's home when he described the incident. She stated, "He was drinking a little. He was getting a little belligerent ... He said I murdered that girl in Florida and blamed it on my brother Erney ... he can serve the time better ... but he blamed it on Erney." (V6, R162). She did not see Richard much after that discussion. She said, "He wanted me to be scared of him." (V6, R163).

On cross-examination, she denied having a "boyfriend-girlfriend" relationship with Richard. (V6, R163). She knew Richard approximately three months when he told her he had murdered a fourteen-year-old girl. He told her this on more than one occasion. (V6, R165). In addition, Richard talked about using a gun before. He said, "I have killed before. I'm not ashamed to do it again." (V6, R168). Richard bragged about things he would do and things he had done. (V6, R170). Eventually, she and Martha Galloway discussed the fact that the Appellant was still incarcerated for the murder of Cynthia Driggers. (V6, R171-72). She did not tell local police what Richard had told her because, "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."[5] (V6, R173).

[5] Richard Hitchcock died in 1994. Richard “told” her about the 1976 murder of Cynthia Driggers in 1993 or 1994. She did not

Meacham learned of Richard Hitchcock's death by "reading it in the paper" in 1994. (V6, R177). She still did not believe he was deceased until she saw the death certificate. (V6, R178).

Brenda Reed is another sister of James Hitchcock. There was a total of seven siblings. (V6, R179). She lived with her other brother Richard until the age of fifteen. (V6, R179). Richard sexually abused from five years old until fourteen years of age. (V6, R180). He slapped her but never choked her. Although she tried to resist him, she "couldn't get away from him [because] he's too strong." (V6, R180). He was "not so much possessive" and she did not pay any attention whether or not he was jealous of other males. (V6, R181). She recalled speaking to Hitchcock's trial attorney, Charles Tabscott. (V6, R182).

Wanda Hitchcock Green, another sister, testified that Richard tried to sexually assault her, as well. (V6, R186). After their father died, Richard became sexually abusive to his younger siblings, but he could "only do the ones that way that were ... younger. He couldn't handle me like that." (V6, R187). Richard was possessive of his sisters "sexually" and tried to molest her several times over the years. When she resisted him, "Richard would slam me against the wall ... he would almost choke me to death." (V6, R187). On one occasion, Richard "was

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tell Martha (Hitchcock's sister) about Richard's confession to her until a decade later. (V6, R174).

trying to rape Martha and I caught him ... He ran my head through the window ... ” (V6, R188). At the age of fifteen, her mother sent her to live elsewhere. (V6, R189). After she was married, she still was in contact with Richard. (V6, R191). Had she been contacted at the time of Appellant's trial, she would not have revealed her treatment from her brother, Richard. She said, "... as far as I was concerned he (James Hitchcock) was guilty ... State of Florida said he was guilty and so I wouldn't have talked to 'em." (V6, R193). Richard told her that Appellant "only raped" the victim in this case and would not be executed for that. (V6, R195).

On cross-examination, Green said Richard and she "were pretty close after she married" because "I wasn't raped by him." (V6, R196). After Richard told her about the rape/murder, she "was going to confront him when he came back because he made a monthly visit but he never made it back." (V6, R198).

Judy Hitchcock Gamble is the niece of Appellant and Richard Hitchcock. (V6, R200). When she was approximately thirteen, Richard "was trying to mess with me and I kept asking him to leave me alone ... he told me if I didn't shut up same thing would happen to me that happened to Cindy." (V6, R201, 202).

On cross-examination, Gamble said that Richard was not violent during this attack; he was "just trying to hold me

down." (V6, R203). Subsequently, she told her father upon his return from a trip. (V6, R203).

Robert Kopec is an expert in microanalysis and a former supervisor in the microanalysis section of the FDLE crime laboratory.[6] (V6, R214). During his proffered testimony, he stated that Diana Bass, an FDLE hair analyst, "didn't really exhibit the level of knowledge that she should have had ... the very basic skills were missing ... evidence handling skills were very poor ... this is one of the first things you learn ..." (V6, R221). In addition, she had a "very poor understanding of the techniques used in microanalytical analysis of hair." (V6, R224). Ms. Bass exhibited a very low level of understanding in hair comparison. (V6, R228). Some of the techniques she used were outdated, "discarded twenty, thirty years ago as being virtually useless." (V6, R228).[7] Her proficiency tests were poor, she would fail to find a good comparison or included hairs that were not from a known sample and made an identification. The results would include a "false identification" or "false exclusion." (V6, R230-31).

[6] During his tenure, the crime laboratory was located in Sanford, Florida. (V6, R208).

[7] The witness observed Ms. Bass' working habits in 1978. (V6, R230).

On cross-examination of the proffered testimony, Kopec said he was hired by FDLE in May 1978. (V6, R233). The case load was extremely high at that time at the FDLE crime laboratory in Sanford. However, it was policy to handle one case at a time although there were thousands of cases backlogged. Diana Bass was the only analyst that could not handle multiple cases. (V6, R232). He evaluated other analysts, as well. (V6, R235-36). However, he started to focus on Bass' work in 1979. (V6, R236).[8]

On re-direct of his proffer, Kopec said he was not sure if there had been a review of cases that Bass had handled. (V6, R237). He reported his observations to FDLE supervisory personnel but did not go outside of the laboratory to report Ms. Bass' techniques. (V6, R237).

Steven Platt, employed with FDLE since 1995, was Diana Bass' supervisor for approximately two years, prior to Kopoc's employment. (V6, R239). In 1983, Bass and he were involved in a case where Bass' work was discredited.[9](V6, R239-40). During his proffered testimony, he stated that he did not recall telling prosecutors in the *Peek* case that Bass had her results questioned or that there was a problem with her work at that time. (V6, R245).

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[8] Hitchcock was convicted in 1977. *Hitchcock v. State*, 578 So. 2d 685, 687 (Fla. 1990).

[9] Anthony Ray Peek was the defendant. (V6, R241).

On cross-examination of Platt's proffered testimony, Platt said he was not sure if his testimony in the *Peek* case related to his laboratory work on the *Peek* case or Bass' proficiency work. (V6, R249). However, it would have been brought to light prior to the 1986 decision in Peek.[10]

Diana Bass, Hitchcock's next witness, was employed as a Criminalist in 1976 with the Sanford Crime Lab, which became the Florida Department of Law Enforcement.[11] (V6, R257, 259). During her proffered testimony, Bass stated that she left the crime lab due to lack of training - - "it was one of the reasons."[12] (R261). There was a period in time were there was a back log of cases over a year in length, possibly around 1976. (V6, R262). She believed she gained proficiency in her first two years of employment, but it did not progress any further after that time. (R262). Ultimately, she resigned from FDLE, "several times before it would stick" as "they 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." (V6, R269).

An Order denying Hitchcock's second amended motion to vacate was issued on October 27, 2003. (V12, R1117-31).

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[10] *Peek v. State*, 488 So. 2d 52 (Fla. 1986). (V6, R248).

[11] She was employed with FDLE from 1974 through 1978. (V6, R264).

[12] "Burn out" was one of the main reasons. (V6, R267-68).

Hitchcock timely filed a Notice of Appeal on November 21, 2003. (V12, R1132-34).

After a remand was ordered by this Court, an evidentiary hearing was held on November 15, 2005, (V4, SR62-91) and continued on December 7, 2005. (V5, SR92-176).

At the November 15, 2005 evidentiary hearing, James Ernest Hitchcock testified as follows:

Hitchcock was represented by Charles Tabscott at his 1977 trial. (V4, SR74). Hitchcock first met with Tabscott very briefly at his first appearance in court. A week later, he met with Tabscott in jail. (V4, SR74-5). Hitchcock remembered meeting with Tabscott twice in the jail. (V4, SR75). The first meeting lasted thirty minutes. (V4, SR75). He did not tell Tabscott that his confession to police was true. He did not want to speak to Tabscott about it any further at that time. (V4, SR75-6). Tabscott asked him about his family members and "people he felt that would have something good to say in my behalf." (V4, SR76). When they were done speaking, Tabscott left. He did not tell Hitchcock when he would return. (V4, SR76-7). Four months later, Tabscott returned to speak with him. It was two weeks before his trial was to start. (V4, SR77). Tabscott told Hitchcock, "he had made a deal with the State and the State would offer me a life sentence." Hitchcock told Tabscott he would not accept the deal, because "I wasn't guilty of the

crimes." Tabscott was very angry and upset. (V4, SR77). Hitchcock said he and Tabscott "never got along." When Hitchcock told him he was not guilty of these crimes, Tabscott said, "Well, tell me what you got to say." (V4, SR78). After Hitchcock told Tabscott his version of the events, Tabscott, "got up and started to walk out. He said I'm not dealing with this s - - - and walked over to the door and put his hand on it, and he stopped and came back and sat down." Tabscott told Hitchcock, "I will tell them what you said and we will see what they say." (V4, SR78). The next time Hitchcock saw Tabscott was in court at his murder trial. (V4, SR79). Tabscott did not provide any discovery materials to Hitchcock. (V4, SR79, 80). Tabscott told Hitchcock that the State "had a confession and he had seen it." Hitchcock and Tabscott never discussed witnesses that the State planned to call. (V4, SR80). Tabscott only asked Hitchcock about his family and friends. If he decided to take the stand, Tabscott told Hitchcock, "You get up on the stand. You tell them your version. They believe you or they don't." (V4, SR81). Tabscott did not tell Hitchcock about the results of any investigation he may have done. (V4, SR81).

Tabscott did not explain jury selection to Hitchcock. The people at the jail told him what to expect. (V4, SR82). Tabscott provided Hitchcock with a pad and pen. (V4, SR82). Tabscott did not discuss which jurors to select. (V4, SR82). There were two

jurors that Hitchcock did not want on his jury. (V4, SR83). Hitchcock wrote a note on his pad, but, Tabscott "just pushed it away." He tried to verbally tell Tabscott about his concerns, but Tabscott waved him off. (V4, SR83). Hitchcock did not try to inform the court of his concerns, nor could he hear what was going on during the jury selection process. (V4, SR84).

Tabscott did not communicate with Hitchcock during the trial. When Hitchcock wrote questions down on his pad, Tabscott pushed the pad away. (V4, SR84). When Hitchcock tried to whisper his concerns, Tabscott waved him off. Tabscott put Hitchcock's notes in his briefcase every day. Hitchcock never saw his notes after the trial ended. (V4, SR85). When Hitchcock's brother Richard was on the stand, Hitchcock wanted Tabscott to ask Richard what he did for a living. "They kept trying to point out that he was like an invalid or something." Richard was a mechanic at the time. (V4, SR85). Tabscott did not tell Hitchcock what questions he was going to ask witnesses nor did he prepare Hitchcock to testify. (V4, SR86).

Cross-examination of Hitchcock was conducted at the December 7, 2005, evidentiary hearing.

Hitchcock could not remember anyone visiting him at the jail on Tabscott's behalf in the time leading up to the trial. He did not remember talking to anyone about his case. (V5, SR96). Tabscott visited Hitchcock in jail after the guilt phase

had concluded. (V5, SR97). Tabscott informed him about the witnesses he planned to call at the sentencing phase. Tabscott did not tell him what they were going to say and they did not discuss any background information. (V5, SR98).

Ron Meadows, Cindy Driggers' cousin, lived close to her prior to her murder. (V5, SR99). Meadows attended Hitchcock's trial and saw Hitchcock interact with his attorney. (V5, SR100, 101-02). A court bailiff asked Meadows and his family members to move a few rows behind Hitchcock and his attorneys because, "They did not want us to hear what they were having to say." (V5, SR102).

Faye Jones is Cindy Driggers' and Ron Meadows'[13] aunt. (V5, SR105-06). Jones attended the trial "every day," as well as Hitchcock's first re-sentencing proceeding. (V5, SR107, 112). Because she was so angry, Jones directed her attention to Hitchcock and his attorneys during the trial. (V5, SR110). Hitchcock "frequently leaned over to talk to the defense attorney, and he wrote notes on a yellow pad of paper." Hitchcock's attorney would "answer him ... he would turn and talk, and he would look down at his pad of paper." (V5, SR111). She did not have any idea what the conversation between Hitchcock and his attorney was about. (V5, SR113).

[13] Ron Meadows was seventeen years old at the time of trial. (V5, SR112).

At the December 7, 2005, evidentiary hearing, Tabscott said he has been practicing law for thirty-five years. (V5, SR114). Initially, Tabscott defended personal injury cases, and represented insurance companies. (V5, SR115). Tabscott was appointed to represent Hitchcock in 1976. (V5, SR116). Although he would have had "quite a volume of notes in this case," he did not know where those notes are.. (V5, SR116).[14] One of the first things he learned as a defense lawyer was "to document the file and document the file well." (V5, SR116). At depositions, he wrote down "virtually everything." At hearings, he made notes. When he meets with clients, witnesses, and makes telephone calls, he always makes notes of those meetings. (V5, SR116). He made notes for preparation, arguments, research, questions he would ask, and opening and closing statements. All of his notes were put in the public defender's file. He last saw his notes on the Hitchcock case in 1977. (V5, SR117). Tabscott defended a number of misdemeanor and felony cases. (V5, SR118).

Tabscott recalled meeting with Hitchcock at the jail although he could not recall specific dates and times. It was likely that he would have met with Hitchcock more than two times. (V5, SR119). There was not a lot of time between the time of the murder and when the trial took place. At the time, he had

[14] CCRC and the Orange County Public Defender's Office both certified that neither entity has Tabscott's notes. (V4, SR66-68, 72; V6, 230-234).

a very light caseload at the Public Defender's office and devoted a lot of time to Hitchcock's case. (V5, SR120). He did not recall if he gave Hitchcock copies of any discovery materials, but would have "thoroughly [discussed] what the police reports and depositions had to say." (V5, SR121). Tabscott did not recall when he first met Hitchcock nor did he recall how much time he spent with him at the initial client interview. (V5, SR122-23).

Tabscott recalled that Hitchcock had confessed. He would have "without a doubt" discussed the confession with his client. (V5, SR123). The confession was a major part of the State's case. Hitchcock's testimony at trial answered what he said in the confession. (V5, SR124). Tabscott had two very experienced investigators assist him with this case. (V5, SR124). Prior to trial, Hitchcock told Tabscott that his confession was "not true," and that his brother, Richard Hitchcock, had committed the murder. (V5, SR125). Hitchcock took the blame for his brother because Richard "was a family man" and James felt he, himself, had lived "a pretty miserable life" and "he was ready to die." This was the defense's theory from the beginning of the trial. (V5, SR126). Tabscott did not recall if Hitchcock refused to discuss his confession with him. (V5, SR126). It was Tabscott's practice to ask his clients for the names of people

who could contribute, in a positive way, to the defense.[15] (V5, SR127). Tabscott would not have been abrupt or rude with any of his clients - - "That's just not my nature." He had a good relationship with Hitchcock. Hitchcock was "a fairly affable, pleasant client to deal with." (V5, SR128). They had a good attorney/client relationship. (V5, SR128). Tabscott did not recall anyone assisting him in the courtroom during the trial. (V5, SR129). He would never put any witness on the stand without knowing what they were going to say. After reviewing the record, Tabscott recalled an offer for a life sentence in exchange for a guilty plea. He is "absolutely certain" he discussed this deal with Hitchcock. (V5, SR135). Tabscott did not recall anything unusual about jury selection. (V5, SR130). He would consider his client's input with regard to jury selections. (V5, SR138). The trial judge gave Tabscott the opportunity to discuss jury selection with Hitchcock. (V5, SR139). Because Hitchcock "made the confession based on his despondency with life," Tabscott filed a motion for a psychiatric evaluation. (V5, SR140).

Tabscott did not recall collecting Hitchcock's notes at the end of each trial day. He would have considered any questions Hitchcock would have given him during the trial, with the exception of inadmissible or irrelevant questions. (V5, SR141,

[15] Seven of the nine witnesses called by the defense came from Hitchcock. (V5, SR127).

143). However, he did not recall Hitchcock asking him any questions during the trial. (V5, SR143). He did not have any memory of telling Hitchcock not to bother him, or to "be quiet." (V5, SR144). Tabscott filed a motion to suppress the confession and physical evidence. He and Hitchcock sat through the suppression hearing together. (V5, SR145). Throughout the trial, Tabscott asked the judge for a moment at the end of his questioning. This was his usual practice so that he could either consult with co-counsel (which he did not have in this case) or consult with his client. (V5, SR147-48).

Hitchcock's trial took place in a large courtroom. (V5, SR149). Tabscott was not concerned that people in the audience would hear his discussions or conversations with Hitchcock. (V5, SR150).

Tabscott did not recall any jury trials he had done prior to taking Hitchcock's case. (V5, SR154). He was very careful to document his files so that, "If I drop dead today somebody ought to be able to pick up that file ... [and] begin where I left off." (V5, SR155-56). Any notes he took would have been placed in the public defender's file. (V5, SR159, 165).[16]

[16] Hitchcock's counsel moved to strike Tabscott's entire testimony based on a violation of the rule of sequestration. Tabscott had been provided with Hitchcock's testimony from a previous evidentiary hearing. The trial court denied the motion to strike. (V5, SR163-64). This ruling is not an issue on appeal.

SUMMARY OF THE ARGUMENT

Hitchcock did not carry his burden of establishing deficient performance and resulting prejudice with respect to the guilt stage ineffective assistance of counsel claim. While Hitchcock complains about trial counsel, he has not demonstrated that counsel's preparation for trial was in any way deficient. With respect to the various "evidentiary" issues, there was no such thing as "reverse-*Williams* Rule" evidence at the time of Hitchcock's 1977 trial. Counsel cannot have been ineffective for not making an argument that did not exist. Likewise, the evidence that Hitchcock had struck his girlfriend was countered by her testimony that she had no reason to fear Hitchcock. The trial court's denial of relief should not be disturbed.

The collateral proceeding trial court denied relief on Hitchcock's "newly discovered evidence of innocence" claim, finding that the witnesses who testified were not credible. That finding is entitled to deference. To the extent that Hitchcock argues that the trial court should not have evaluated the credibility of the testifying witnesses, that argument is contrary to long-settled Florida law.

The *Brady* claim based upon the "unfavorable performance evaluation" given to an FDLE analyst several years after Hitchcock's trial was properly denied. The trial court followed the precedent of this Court in finding that that evaluation was

not *Brady* evidence. To the extent that Hitchcock raises *Frye* and *Giglio* components to this claim, he failed to carry his burden of proof with respect to the *Frye* claim -- the *Giglio* claim is raised for the first time on appeal from the denial of post-conviction relief, which is contrary to settled Florida law.

THE STANDARD OF REVIEW

Hitchcock's brief contains no individually-denominated argument with respect to the discrete claims raised on appeal from the denial of relief. However, it appears that he intends to present three claims: 1) a guilt stage ineffectiveness of counsel claim; 2) a *Brady/Giglio* claim, and 3) a "newly discovered evidence" (of innocence) claim.

Hitchcock asserts that each ruling of the trial court is reviewed *de novo.* The true facts are that ineffectiveness of counsel claims are reviewed *de novo*, while the *Brady/Giglio* claim and the "newly discovered evidence" claims are reviewed under the competent substantial evidence standard. In accordance with the *Rules of Appellate Procedure*, the applicable standard of review is discussed in the argument section, *infra*.

ARGUMENT

I. THE INEFFECTIVENESS OF COUNSEL CLAIM

On pages 4-22 of his brief, Hitchcock argues that he is entitled to relief based upon the purported ineffectiveness of

his attorney at his 1977 trial.[17] Whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo. Stephens v. State*, 748 So. 2d 1028 (1999) (requiring *de novo* review of ineffective assistance of counsel); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, *i.e.*, deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley*, 22 F.3d 1298, 1302 (11th Cir. 2000) (stating that although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying facts are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland v. Washington*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

The Legal Standard.

In order to establish a right to relief on an ineffective assistance of counsel claim, the defendant must meet the two-part standard announced in *Strickland v. Washington,* 466 U.S. 668 (1984). This Court has held:

> The standard from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), governs

[17] This claim was claim III in the second amended motion.

> this claim: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001) (*quoting Strickland*, 466 U.S. at 687). To establish deficiency, the defendant must prove that "counsel's representation was unreasonable under prevailing professional norms." Id. (*quoting Brown v. State,* 755 So. 2d 616, 628 (Fla. 2000) (*quoting Strickland,* 466 U.S. at 688-89)). To establish prejudice, the defendant "must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 965-66 (*quoting Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (*quoting Strickland*, 466 U.S. at 694)).

Farina v. State/McDonough, 31 Fla. L. Weekly S517, 520 (Fla. July 6, 2006). Unless the defendant can establish **both** deficient performance **and** prejudice, he has not carried his burden of proof, and is not entitled to relief. The law is settled that counsel is presumptively constitutionally effective, and the defendant has the burden of proof:

> There is a presumption that trial counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 690. A fair assessment of attorney performance requires that efforts be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *See Strickland*, 466 U.S. at 689. The defendant carries the burden to overcome the presumption of effective assistance and that, under the circumstances, the challenged action could be considered sound trial strategy. *See id*. at 689. Our

review of counsel's performance is highly deferential. *See id.*

Hertz v. State, 31 Fla. L. Weekly S408, 410 (Fla. June 22, 2006).

The Trial Court's Order.

In its March 29, 2006, order denying relief on the guilt stage and newly discovered evidence claims which were remanded for an evidentiary hearing, the trial court summarized the testimony of Hitchcock, trial counsel Charles Tabscott, and of two persons who were present during trial and observed Hitchcock conferring with counsel during the course of the proceedings. (V7, SR504-07).[18] The trial court credited the testimony of trial counsel Tabscott, and found that Hitchcock's testimony was not credible, or was conclusively refuted by the record. (V7, SR505). Specifically, the trial court found that Hitchcock's testimony about his meetings (or lack thereof) with counsel was not true, that trial counsel spent enough time with Hitchcock to believe that a psychiatric evaluation was appropriate, that the way in which counsel tried this case, from *voir dire* through the conclusion, showed that he was prepared for trial (and was prepared to present the defense that Richard was the "real killer"), and that of the nine defense witnesses called at trial, only two could have been developed without the direct

[18] For the convenience of the Court, a copy of that order is attached as Appendix A.

assistance of the defendant himself. Those findings are supported by competent substantial evidence, and this Court will not substitute its judgment for that of the trial court on factual matters and credibility issues.[19] *Hertz v. State*, 31 Fla. L. Weekly S408 (Fla. June 22, 2006); *Mungin v. State/McDonough*, 31 Fla. L. Weekly S215 (Fla. Apr. 6, 2006) (this Court defers to the factual findings of the trial court on ineffectiveness claims); *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997). The trial court properly denied relief on the ineffectiveness claim.

The Denial of Relief Should be Affirmed.

Despite the hyperbole of Hitchcock's brief, the most that Hitchcock has shown is that he is dissatisfied with his trial counsel. The "lack of preparation" claims do not establish any prejudice because Hitchcock has done nothing but complain about what counsel did -- he has not even attempted to show that additional evidence could have been developed if counsel had done something else.[20] Hitchcock has not carried his burden of proof.

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[19] In the words of this Court, "[t]his deference is a recognition of 'the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.' *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001)." *Hertz v. State*, 31 Fla. L. Weekly S408 (Fla. June 22, 2006).

[20] The State does not concede that counsel's performance was deficient in any way -- the fact that seven of the nine defense witnesses could only have been identified to counsel by the

With respect to the claim that trial counsel opened the door to the introduction of "prejudicial character evidence," the trial court found as follows:

> The State did introduce evidence that Defendant had hit his girlfriend, Connie Reed, but Ms. Reed denied that he had injured her or that she was frightened, saying "there was no reason to be afraid of him." *See* 1977 trial transcript, pages 824 and 830. The Court finds Defendant was not significantly prejudiced by the introduction of this evidence.

(V7, SR507). That finding should not be disturbed.

Much of Hitchcock's brief is devoted to arguing that trial counsel did not properly argue the admissibility of Richard Hitchcock's alleged sexual abuse of his sisters. According to Hitchcock, trial counsel should have argued that this evidence was admissible under the "reverse-*Williams* Rule." The problem with this theory, which Hitchcock ignores, is that there was no reverse-*Williams* Rule at the time of his 1977 trial:

> Although the question of the admissibility of "reverse *Williams* Rule" evidence by a defendant appears to be one of first impression for this Court, the Third District in *Moreno v. State*, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982), has permitted it on the basis that an accused may show his or her innocence by proof of the guilt of another. That view has been adopted by the First District in *Brown v. State*, 513 So. 2d 213, 215 (Fla. 1st DCA 1987), *dismissed*, 520 So. 2d 583 (Fla. 1988) . . .

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defendant establishes that there was no deficiency in the investigation.

Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). Trial counsel simply cannot have been ineffective for being unable to foresee developments in the law, and Hitchcock's claims of ineffectiveness fail.[21] As the Eleventh Circuit noted in *Pitts:*

> A counsel's pre-*Batson* failure to raise a *Batson*-type claim does not fall below reasonable standards of professional competence, and thus does not render counsel's assistance constitutionally ineffective. *See Poole v. United States*, 832 F.2d 561 (11th Cir.1987). While the ability to think creatively can be a great asset to trial lawyers, lawyers rarely, if ever, are required to be innovative to perform within the wide range of conduct that encompasses the reasonably effective representation mandated by the Constitution.

Pitts v. Cook, 923 F.2d 1568, 1574 (11th Cir. 1991). Hitchcock's trial counsel simply could not have been ineffective for "failing" to make a legal argument that was not accepted by this Court until 13 years after Hitchcock's trial.

II. THE "NEWLY DISCOVERED EVIDENCE" CLAIM

On pages 22-32 of his brief, Hitchcock argues that the trial court was wrong to deny relief based on the claim of "newly discovered evidence of innocence." Because this claim was denied after an evidentiary hearing, the standard of review applied by this Court is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on

[21] The first use of the phrase "reverse-*Williams* Rule" appears to be in 1982. *Diaz v. State*, 409 So. 2d 68, 69 (3rd DCA 1982).

questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998).

The Trial Court's Order.

In denying relief on this claim, the collateral proceeding trial court found that the testimony of Wandalene Green, Rossi Meacham and Judy Gamble, who claimed that Richard Hitchcock had confessed to the murder of Cindy Driggers, was not credible.[22] (V7, SR509). The Court further found that there were no facts to support the trustworthiness of the hearsay statements -- the witnesses were either friends or family members of the defendant, who could not help but be aware that Hitchcock had been sentenced to death (several times), but nonetheless made no effort at all to "correct" this "injustice" for years. As the trial court found, that silence alone cuts against the credibility of these witnesses. Under the controlling standard

[22] Brenda Reed testified that she was sexually assaulted by Richard Hitchcock, but knew nothing about the murder. While Hitchcock alleged that Richard had "confessed" to Bennie Reed, Winston Hitchcock and Connie Gayle Morgan, none of these witnesses testified at the hearing, and there has been a failure of proof with respect to that part of this claim.

of review, those credibility determinations are entitled to deference.

There is No Basis for Reversal.

In an attempt to evade the effect of the trial court's credibility determinations, Hitchcock argues that the trial court could not evaluate the **credibility** of the testifying witnesses, but instead is required to look only to whether the circumstances under which the out-of-court statements were made are "trustworthy." In support of this position, Hitchcock quotes the following statement from *Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001):

> Under Florida law, however, the credibility of an in-court witness who is testifying with regard to an out-of-court declaration against penal interest is not a matter that the trial court should consider in determining whether to admit the testimony concerning the out-of-court statement. *See Maugeri v. State*, 460 So. 2d 975, 979 (Fla. 3d DCA 1984); *see generally* Charles W. Ehrhardt, *Florida Evidence*, § 804.4 at 804-05 (1999). [citations in original].

However, Hitchcock has omitted the next sentence, which leaves no doubt that the credibility of the witness is still an issue:

> Instead, **it is the jury's duty to assess the credibility of the in-court witness who is testifying about the out-of-court statement.**

Carpenter v. State, 785 So. 2d at 1203. [emphasis added].[23] The finder of fact (judge or jury) is obligated to assess the credibility of the witnesses, and Hitchcock's argument to the contrary is contrary to the law and to common sense. *See, State v. Spaziano,* 692 So. 2d 174 (Fla. 1997) (trial judge in superior position to evaluate witness credibility). The collateral proceeding trial court followed Florida law exactly, and there is no basis for relief of any sort. Hitchcock's claims to the contrary are based upon a false legal premise which has no basis.

III. THE *BRADY* CLAIM

On pages 32-40 of his brief, Hitchcock argues that he is entitled to relief based on a *Brady* claim relating to the testimony of FDLE microanalyst Diana Bass.[24] Under settled law, a trial court's finding, after evaluating conflicting evidence, that *Brady* material has been disclosed is a factual finding that should be upheld as long as it is supported by competent, substantial evidence. *Way v. State*, 760 So. 2d 903, 911 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

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[23] *Carpenter* stands for the unremarkable proposition that the trial court does not make a preliminary determination of the credibility of the testifying Rule 804 witness. That decision did not do away with the credibility determination.

[24] This claim was raised as claim X in the post-conviction motion.

The Trial Court's Order.

In denying relief on this claim, the collateral proceeding trial court found (and Hitchcock admitted) that the "unfavorable [performance] evaluation" on which this claim is based did not occur until after the conclusion of Hitchcock's 1977 trial.[25] (V7, SR512). The trial court went on to find that there was no suppression of evidence, and therefore no *Brady* violation or basis upon which defense counsel could have objected to Bass's testimony. The trial court followed this Court's decision in *Preston*, where this Court held that the State's *Brady* obligation does not include "examining in depth the personnel files of proposed expert witnesses and divulging possible adverse comments to the defense." *Preston v. State*, 528 So. 2d 896, 898 (Fla. 1988) (no *Brady* violation with respect to Ms. Bass). Under the precedent of this Court, there is no *Brady* error, and no basis for relief.

The Secondary Issues.

In addition to the *Brady* claim (which is the primary focus of Hitchcock's brief), Hitchcock also claims that Ms. Bass's "incompetency" gives rise to *Frye, Giglio*, and "newly discovered

[25] Any issues related to the 1988 penalty phase proceeding are not a part of this proceeding. That sentence was set aside, anyway. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993). Hitchcock's attempt to blend the two proceedings is disingenuous, as well as being outside the scope of the relinquishment, which was strictly limited to the 1977 guilt stage.

evidence" claims. None of these "claims" are a basis for relief.

With respect to the *Frye* claim, Hitchcock has failed to carry his burden of proof. Despite having every opportunity to do so, Hitchcock presented no evidence at all during the remand hearing which tended to demonstrate that hair analysis is not generally accepted in the scientific community. Because that is so, Hitchcock did not carry his burden of proof. Moreover, there was no real basis for objection at the time of Hitchcock's trial, anyway. *Hall v. State*, 381 So. 2d 683, 690 (Fla. 1979) ("Results of the comparison between appellant's hair and the hairs removed from the clothing of Susan Rhoutt are likewise relevant and admissible as evidence of the guilt of the accused.") (rev'd on other grounds); *Jent v. State*, 408 So. 2d 1024 (Fla. 1981).

Insofar as the *Giglio* component is concerned, the claim contained in Hitchcock's brief to this Court was never raised below. Florida law is well-settled that claims cannot be raised for the first time on appeal from the denial of post-conviction relief. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Washington v. State/Moore*, 835 So. 2d 1083, 1087-1088 (Fla. 2002); *Finney v. State/Moore*, 831 So. 2d 651, 661 (Fla. 2002). Hitchcock cited *Giglio* twice in his motion -- once in a conclusory averment that there was a violation, and then in a

brief discussion of the burden of proof of a ***Giglio*** claim. (V10, R624, 626). Significantly, the "substance" of the averment was that "**[i]f** Diana Bass **did** 'dry'[26] lab the evidence in this case, as a member of the prosecution team, she knew the evidence against Mr. Hitchcock, specifically her own testimony [sic] was false." (V10, R624). That bare assertion is not sufficient to preserve the claim raised in brief (which seems to be that Ms. Bass lacked the skill to conduct hair analysis but testified anyway), and, further, there is nothing in the record to support the claim that Ms. Bass "dry labbed" the evidence. There is a failure of proof as to the claim contained in the motion, and the claim raised in the brief was neither presented nor argued below. This combination of procedural deficiencies forecloses this claim, and relief should be denied on those grounds.

With respect to the "newly discovered evidence" component of this claim, Hitchcock has failed to show that there was any deficiency in Ms. Bass's work in this case. In the absence of such a showing, which he did not even attempt, there is no basis for relief of any sort. The most that Hitchcock has shown is that, years after his trial, Ms. Bass' work was criticized by a supervisor. She was never disciplined, but was instead offered a

[26] Presumably, Hitchcock uses this slang term to refer to work that was not actually performed. He offered no proof of this accusation, and it has no place in his brief.

promotion. (R269). The fact that her work was criticized, with no showing that any error occurred in this case, is not of such a nature that it would probably produce an acquittal on retrial. *Jones v. State,* 591 So. 2d 911 (Fla. 1992). This Court's 1982 decision in this case, which came after *Hall* and *Jent* upheld the admission of hair analysis testimony, made no mention at all of the hair analysis testimony in this case.[27] Because that is so, it makes no sense to argue, as Hitchcock does, that Ms. Bass' performance evaluation would change the result. There is no basis for relief, and the trial court should be affirmed in all respects.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee submits that the denial of post-conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th Floor

[27] This case turned, in large part, on whether the jury believed Hitchcock's statement to law enforcement or his in-court testimony. There was no dispute that Hitchcock had sexual relations with the victim, and, for that reason, the significance of trace evidence is not great to begin with.

Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **James L. Driscoll, Jr.,** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of August, 2006.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL