**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC 03-2203**

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**JAMES E. HITCHCOCK**
**Appellant,**
**v.**
**STATE OF FLORIDA,**
**Appellee.**

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

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**DIRECT APPEAL**
**Following Denial of Postconviction after Relinquishment**
**(SUPPLEMENTAL)**

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## PRELIMINARY STATEMENT

This is an appeal of the Circuit Court's denial of Mr. Hitchcock's postconviction motion filed under Florida Rule of Criminal Procedure 3.851. Mr. Hitchcock filed an appeal. On May 3, 2005, after briefing and oral argument, this Court Relinquished jurisdiction to the Circuit Court for a determination of the merits of all claims which the Circuit Court had found procedurally barred.

The postconviction record on appeal, prior to relinquishment, is comprised of the twelve volume record, initially compiled by the clerk, successively paginated beginning with page one. References to the record include volume and page number and are of the form, e.g., (Vol. I PCR. 123). Mr. Hitchcock had one guilt phase trial and four penalty phases. References are made to these proceedings and are of the form, e.g., (Date Vol. # Page #). Date refers to the year the proceedings took place. For the 1977 trial the pages and volumes refer to the transcript page. To distinguish between the initial postconviction record and the record made after relinquishment, references to the relinquishment are designated RH and of the form (RH Page Number).

James Hitchcock, the Appellant now before this Court is referred to as such or as Mr. Hitchcock. To distinguish between Mr. Hitchcock and his brother, Richard Hitchcock is referred to

as Richard or Richard Hitchcock and not Mr. Hitchcock. Mr. Hitchcock's evidentiary hearing was presided over by the Honorable Reginald Whitehead.

## REQUEST FOR ORAL ARGUMENT

Mr. Hitchcock has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Hitchcock, through counsel, accordingly urges that the Court permit oral argument on the merits of the relinquishment issues.

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## SUPPLEMENTAL STATEMENT OF THE CASE

On May 3, 2005, this Court relinquished jurisdiction for 180 days to the Circuit Court for a determination of the merits of Mr. Hitchcock's guilt phase claims. The lower court set an evidentiary hearing for November 15, 2005. Before this hearing, the lower court heard two motions filed by the State. The first sought to depose Mr. Hitchcock. (RH 185). Mr. Hitchcock filed a response and objected at hearing. (RH 196-209). The lower court denied the State's attempt to violate Mr. Hitchcock's rights. (RH 217).

The second motion filed by the State sought access to 1977 trial counsel's file or to have previous and current counsel for Mr. Hitchcock certify non-possession. (RH 212). According to the State, trial counsel's notes were allegedly contained in the Public Defender's file, (RH 212), although the State admitted that current counsel for Mr. Hitchcock had previously delivered a CD-Rom of the Public Defender's records to the State.

The Public Defender, Robert Wesley, who had also served as Mr. Hitchcock's 1988 resentencing counsel, certified by e-mail and stated that the records in 1988 were "scant." *See* (RH 232). Current counsel filed a written Certification of Non-Possession of the 1977 Trial Attorney Notes over objection because the State was using trying to create a basis for denial, the loss of documents from this case, including Mr. Hitchcock's own notes

and State notes from the 1976-77 period, was attributable to the State's repeated constitutional violation and, that it was Mr. Hitchcock who was prejudiced because the notes would have shown that 1977 trial counsel was ineffective. (RH230-33). Mr. Hitchcock's written closing also addressed the trial attorney note issue in full. *See generally* (RH 348-53).

The first part of the relinquishment hearing took place on November 15, 2005. The defense only called Mr. Hitchcock. The lower court bifurcated the hearing and allowed the State to return on December 7, 2006, to cross Mr. Hitchcock. The State presented three witnesses, allegedly in rebuttal. At the hearing Mr. Hitchcock objected to the State's violation of the Rule of Sequestration with regards to trial counsel Charles Tabscott, and argued this point further regarding the other two State witnesses in written closing argument. (RH 163, 330-335). The State and Mr. Hitchcock filed written arguments and replies. (RH 238-500). Jurisdiction returned to this Court on February 1, 2006. On March 31, 2006, the lower court issued an order denying relief. (RH 501).

The relinquishment testimony is discussed below as it relates to the claims and appellate arguments. Mr. Hitchcock appeals the denial of relief on each claim and cumulatively. Mr. Hitchcock incorporates all previous arguments made in the Initial and Reply Briefs and abandons no arguments.

## SUMMARY OF SUPPLEMENTAL ARGUMENT

In the order denying relief the lower court complained that this Court failed to provide guidance and an explanation for relinquishment. (RH 501). All the guidance that the lower court needed should have come from the United States Constitution. Failing to follow that, Mr. Hitchcock was once again denied justice.

Mr. Hitchcock's 1977 trial was not a fair determination of the question of his guilt. The jury was misinformed and deprived of the truth in rendering the verdict for three reasons: first, trial counsel failed to represent Mr. Hitchcock effectively in violation of the Sixth Amendment to the United States Constitution; second, the State created a false impression of scientific certainty when it presented unreliable scientific evidence and introduced evidence in violation of the Due Process Clause of the United States Constitution; and third, in addition to being denied the truth because trial counsel failed to ensure its presentation, the jury did not hear that the man who murdered Cynthia Driggers, Richard Hitchcock, admitted to the murder. This brief addresses these areas of constitutional violation in order to achieve the one result required by justice - - a new and fair trial.

## STANDARD OF REVIEW

In reviewing a trial court's rulings of the nature

addressed herein this Court applies de novo review. *Stephens v. State*, 748 So.2d 1028, 1033 (Fla.1999). Regardless of the standard, Mr. Hitchcock prays that this Court do justice by granting a new trial.

**SUPPLEMENTAL ARGUMENT FOR NEW TRIAL**

James Hitchcock is actually innocent. His conviction and death sentence are contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. There can be only one just result following postconviction, a new trial. Accordingly, this Court should reverse.

At the core of this case are two conflicting versions of the events of July 31, 1976. The first is the version that James Hitchcock told law enforcement during custodial interrogation on August 4, 1976. After being held in custody, desperate and suicidal, James Hitchcock falsely confessed to the murder of Cynthia Driggers. (1977 VOL. V R. 772). James Hitchcock admitted to the crime to protect his brother Richard and to aid in his own suicide.

As seen in Mr. Hitchcock's case, false confessions are one of the leading causes of false convictions. Either because defense counsel fails to adequately challenge a false confession or the false confession appears to be truthful, false confessions lead to injustice. Postconviction exonerations have demonstrated that innocent people falsely confess. (See

discussion at RH. 309-14 discussing "*The True Nature of False Confessions and Mr. Hitchcock's Specifically*."). Mr. Hitchcock's false confession was selectively recorded and contained no information that only the perpetrator could have known. In sum, and fully developed in closing argument, there was nothing in Mr. Hitchcock's false confession that guaranteed its truthfulness. *See* (RH 309-14).

At trial, James Hitchcock swore an oath and told the jury exactly what happened on July 31, 1976. Mr. Hitchcock came back to the house he was staying and had consensual sexual relations with the victim. The medical examiner in this case never testified that there was anything inconsistent with consensual relations. *See* (VOL V R. 519). This was indeed a crime, but not the one for which the State prosecuted James Hitchcock. (In 1977 consensual intercourse with a minor was a Second Degree Felony punishable by 10 years prison. *See* Section 794.05 (1971)).

Mr. Hitchcock told the jury exactly how Richard murdered the victim. After the consensual sexual relations, Richard came into the room and saw James and the victim lying in bed. Richard became enraged and dragged the victim outside the house. While outside Richard Hitchcock choked the victim. James Hitchcock tried to break Richard's grip around the victim's neck but it was too late, the victim was dead and Richard was guilty of

murder. (1977 VOL. V R. 760-65).

In postconviction, the truth about Richard Hitchcock and his confession to the murder have come to light. The State's veil of false scientific evidence has been lifted and all that remains are the two conflicting statements. The lower court failed to consider the nature of the evidence as it stands today. This Court should not.

**MR. HITCHCOCK'S TESTIMONY AND THE OTHER RELINQUISHMENT TESTIMONY**

On November 15, 2005, Mr. Hitchcock testified on his own behalf. On December 7, 2005, the State cross-examined Mr. Hitchcock and called three witnesses; Charles Tabscott the 1977 trial attorney, Faye Jones and Ronald Meadows. The lower court's order mistakenly stated that Mr. Hitchcock testified further and called the State's witnesses. (RH 501). From this opening misapprehension of the essential nature of the proceedings, the lower court's order continued to make errors of logic, fairness and discernment on the path to an unjust denial of relief. On this path the lower court's order failed to consider a good portion of Mr. Hitchcock's evidence and argument and merely ratified the State's argument without the level of judicial scrutiny that this Court demanded.

Mr. Hitchcock's relinquishment testimony was limited to the interaction between himself and his 1977 trial attorney. Mr. Hitchcock's testimony showed that counsel failed to expend the

quality and the quantity of time necessary to discharge the significant duties that counsel had in a death penalty case.

Mr. Hitchcock recalled only two jail visits at which any substantive matters were discussed prior to the guilt phase. (RH 75). At the first, about a week after first appearance, trial counsel and Mr. Hitchcock did not discuss the facts concerning the murder or Mr. Hitchcock's false confession. (RH 76). By his own admission Mr. Hitchcock was not ready to discuss these aspects of his case, (RH 76), undoubtedly because he was still overwhelmed, suicidal, and covering for Richard. Mr. Hitchcock never told trial counsel that he was guilty, *see*(RH 76), thus the operative facts under which trial counsel prepared a defense were not limited. Trial counsel never informed Mr. Hitchcock that this first meeting would be Mr. Hitchcock's only opportunity to consult with counsel and assured Mr. Hitchcock that counsel would return to speak to him. (RH 76).

The second and last attorney-client meeting at the jail was three or four months after the first meeting. (RH 77). Trial counsel immediately told Mr. Hitchcock "that he made a deal with the State" . . . for. . . "a life sentence." (RH 77). Mr. Hitchcock told trial counsel that he could not accept the plea deal because he was not guilty (RH 77). Trial counsel became angry because Mr. Hitchcock wanted to exercise his right to trial. (RH 77-78). When trial counsel finally asked Mr.

Hitchcock what he had to say, Mr. Hitchcock told trial counsel the facts as he essentially testified to at the 1977 trial. (RH 78). Rather than obtain further information for a defense, trial counsel started to leave the interview room, saying "I am not dealing with this shit." (RH 78). However, trial counsel remained, asked Mr. Hitchcock a few more questions and told Mr. Hitchcock that he would "'tell [the jury] what [Mr. Hitchcock] said and we'll see what they say.'" (RH.78). Trial counsel never visited Mr. Hitchcock again at the jail until after Mr. Hitchcock was convicted. (RH. 79).

This was not the meaningful attorney-client interaction required by the Sixth Amendment in a death case. Mr. Hitchcock should have been at the center of any trial preparation but instead was treated by trial counsel as an afterthought. Trial counsel never sought Mr. Hitchcock's input and never provided Mr. Hitchcock with the opportunity to review the evidence against him in order to aid trial counsel in the preparation of a defense.

Throughout pretrial, trial counsel failed to keep Mr. Hitchcock informed about the case and seek Mr. Hitchcock's input. Before deposing State witnesses trial counsel never sought Mr. Hitchcock's input on possible areas of inquiry for further investigation. (RH 80). Trial counsel never gave Mr. Hitchcock any of the relevant documents that someone facing

trial for first degree murder should review; no depositions, no police reports, no defense investigative reports. (RH 79-80). Trial counsel also never discussed with Mr. Hitchcock the substance of such items. (RH 80-81).

Trial counsel never discussed with Mr. Hitchcock which witnesses counsel should call at trial, or, the testimony of a very important witnesses, James Hitchcock himself. (RH 85-86). Trial counsel's preparation of his own client consisted of telling Mr. Hitchcock "You get up on the stand, you tell your version, they believe you or they don't." (RH 81). Effective counsel would have reviewed Mr. Hitchcock's testimony, counseled him on avoiding unnecessary and prejudicial responses, and constructed a defense from Mr. Hitchcock's account.

Trial counsel's representation and interaction with Mr. Hitchcock did not improve at the trial. Trial counsel failed to explain the jury selection process to Mr. Hitchcock whose scant understanding came from "the people at the jail." (RH 82). Mr. Hitchcock did have concerns about two of the selected jurors but trial counsel rebuked him when he tried to express his concerns verbally and in writing. (RH 83). (Because of page limits Mr. Hitchcock lacks the space for a full discussion of jury selection. *See* (RH 408-11), showing how Mr. Hitchcock's right to due process and the effective assistance of counsel were denied in jury selection and refuting the State's written

peremptory only argument).

At trial, counsel provided a pad and pen to Mr. Hitchcock. (RH 83-84). Mr. Hitchcock wrote questions down on the pad and tried to hand the pad to trial counsel. (RH 84). Repeatedly, trial counsel rebuked Mr. Hitchcock by raising his hand or by pushing the pad away when he attempted to offer input. (RH 84). The same was true when Mr. Hitchcock tried to communicate by whisper; once again Mr. Hitchcock received the "hand deal." (RH 85). Importantly, Mr. Hitchcock recalled that he tried to inform trial counsel that Richard worked as a mechanic to refute the State's false impression that Richard was an invalid. (RH 85).

The lower court misapprehended the purpose and import of Mr. Hitchcock's testimony. Mr. Hitchcock's testimony was offered to show how trial counsel's ineffectiveness happened; it was not the ineffectiveness itself. It is axiomatic that defense counsel has a duty to listen to a client in order to formulate a defense and to avoid convicting the client through defense counsel's own actions, but, the point here was never that there was no interaction at all.

Rather than address the actual postconviction claims, the lower court accepted the State's invitation to treat Mr. Hitchcock's recollections as claims in their own right and then find that Mr. Hitchcock's recollections were refuted by the

record. The lower court's findings were particularly erroneous by creating false issues for determination and then deciding those issues under an unfair standard of adjudication. The central thread woven through the court's order on Claim III was that if Mr. Hitchcock could be perceived as not remembering something his claim should be denied. Mr. Hitchcock, unlike his memory-addled trial attorney who could only testify in generalities, did remember a great deal of their interaction. He was not, however, required to pass a memory test in order to prevail.

The bullet point reasons for the lower court's order denying Claim III, (RH 505-507), were speculative and merely a ratification of the State's invalid arguments. Mr. Hitchcock's motion hearing presence did not refute trial counsel's lack of meaningful interaction because a motion hearing was not the time to prepare for trial. Indeed, trial counsel was so unprepared for the motion hearing that trial counsel had to essentially conduct a second motion hearing during the trial to overcome the inadequacy of the first. *See* 1977 R. 670-74 for the questions and RH. 324-29 for further argument.

The fact that trial counsel filed a motion for a psychiatric evaluation was similarly irrelevant to the ineffectiveness issues. Even trial counsel admitted that this was standard in a death case. (RH 139-40). While Mr. Hitchcock,

according to the State's hearsay evidence, met with Drs. Herrera and Kirkland, this was hardly at issue at the hearing. Moreover, while the report was incompetent evidence for anything other than that evaluations occurred, the lower court's reasoning was not even supported by the text of the document. The full line of questioning was as follows:

> **State:** Now, in the period from your arrest up to the 1977 trial, did anyone visit you on Mr. Tabscott's behalf?
> **Mr. Hitchcock:** Not that I remember.
> **State:** Did you ever talk to anybody else during that period of time about the circumstances that led to your arrest.
> **Mr. Hitchcock:** I can't remember talking to anyone.
> **State:** Did you describe the events surrounding the commission of the offense to anybody else?
> **Mr. Hitchcock:** Not that I remember.

(RH 96).

The above does not support the lower court's finding that "Mr. Hitchcock's claim that he never discussed the facts of the case with anyone else" was refuted. (RH 506). The State's questions were ambiguous[1]; Mr. Hitchcock did not claim that he never discussed the facts of the case with anyone, only that he could not remember doing so. As part of a competent and substantial finding of fact the lower court should not have attributed claims to Mr. Hitchcock that he did not make. By doing so, the lower court abandoned its role as the neutral fact finder and joined the State in creating reasons for denial from

[1] Had Mr. Hitchcock been asked specifically whether he spoke to court ordered mental health professionals his answer would have been yes although he spoke to both for very short periods.

whole cloth. Moreover, after 30 years on death row it was patently unfair for the lower court to require that Mr. Hitchcock have perfect recall of every single nuance that the State hid behind its ambiguous questioning when trial counsel recalled virtually no specifics from a case in which his 20-year-old-sixth-grade-educated client was sentenced to death.

That trial counsel reserved opening statement proved nothing, especially not that counsel had an awareness of "what the Defendant's testimony would be." (RH 506). Of course trial counsel knew generally what Mr. Hitchcock's testimony would be because Mr. Hitchcock told him at the second jail attorney-client meeting that Richard committed the murder. *See* (RH 78). This was hardly the same as conferring with Mr. Hitchcock in a meaningful way and preparing a defense accordingly. The lower court's conclusions on voir dire, cross of Richard, counsel's taking a few minutes after questioning, and the proffer under an improper legal theory, are likewise unavailing and unworthy of deference from this Court.

Lastly, the lower court relied on the testimony of two witnesses, Ronald Meadows and Faye Jones who could not have conceivably perceived the nature of the interaction between Mr. Hitchcock and trial counsel and were arguably called in violation of the Rule of Sequestration, as was the 1977 trial attorney. *See* (RH 345-46 and the argument contained therein).

The lower court's unexplained reliance on the testimony of Mr. Meadows and Ms. Jones was neither fair nor based in fact. Ignored, though argued in closing, both witnesses' perception of Mr. Hitchcock's attempts to interact with trial counsel would have been limited. Neither witness would have been at the jail or able to hear any attorney-client conversation. Of particular note was the lower court's failure to address the fact that Mr. Meadows was talking about the 1988 resentencing at which Mr. Hitchcock had more than one attorney, *See* (RH 344-45 containing excerpts from the 1988 proceedings), and Ms. Jones' recollection was guided by "anger." (RH 110). Even if these witnesses saw some attorney-client interaction this hardly constituted evidence that Mr. Hitchcock received the effective assistance of counsel. The false conviction and the trial record clearly showed that Mr. Hitchcock did not.

Mr. Hitchcock's testimony was evidence of ineffectiveness but not the ineffectiveness itself. Certainly, trial counsel could have been curt and unconcerned towards Mr. Hitchcock if he had provided effective representation. The cause of the ineffectiveness was trial counsel's failure to spend meaningful time with Mr. Hitchcock in preparation of a defense. The effect was that Mr. Hitchcock was convicted of a crime for which he was innocent. Trial counsel's treatment of Mr. Hitchcock assured that with all but the best advocates Mr. Hitchcock would be

found guilty. The examples listed by the lower court did not show that counsel was effective, only that counsel had enough skill and experience to create a trial record in the form of a trial. The appearance of counsel is not the counsel of which the Sixth Amendment speaks.

The lower court's order only decided the most minute segment of Claim III in defiance of this Court's relinquishment order. As an afterthought, the lower court found that Mr. Hitchcock "was not significantly prejudiced by the introduction of [evidence the Defendant hit his girlfriend]." (RH 507). This was the only real aspect of Claim III the lower court decided. Under *Strickland v. Washington*, there are two prongs of an ineffective assistance claim - - deficient performance and prejudice. 466 U.S. 668, 687 (1984) The lower court only reviewed a fraction of the facts in support of this Claim under the prejudice prong which it applied incorrectly The standard is prejudice not significant prejudice. Moreover, the lower court never addressed any of the ineffective assistance of counsel claims in the context of the 1977 trial and postconviction as a whole.

Even under Claim III alone, trial counsel's ineffectiveness was far more expansive and offensive than the lower court's order addressed. Based on the Order, the unacquainted could believe that Mr. Hitchcock raised a general postconviction claim

that trial counsel merely failed to object to an uncharged domestic battery. Under Claim III Mr. Hitchcock pled and proved that trial counsel was ineffective, not just for the minimized reasons that lower court addressed, but for reasons that rendered the entire trial unfair.

First, Mr. Hitchcock's attorney did not just let an uncharged battery find its way into the proceedings. Rather, trial counsel, through a series of egregious blunders, opened the door through which the State was able to introduce harmful character evidence and introduced further evidence of this nature himself. This was deficient. *Strickland*. The questions and events were fully detailed in Mr. Hitchcock's written closing, (RH 360-69), and in the Initial Brief under Argument III. In a case in which the jury had to decide between Mr. Hitchcock's two versions of events, the introduction of this evidence assured that Mr. Hitchcock's truthful trial testimony would not be believed. Trial counsel should have avoided harming his own client, but because of his lack of meaningful interaction with Mr. Hitchcock, trial counsel simply could not avoid prejudicing him. *Strickland*.

Second, trial counsel deficiently failed to make a proper argument that similar fact evidence about Richard Hitchcock was admissible. Beyond this evidence's importance in determining whether to grant postconviction relief as a whole, this gross

failure on the part of trial counsel was a further denial of the effective assistance of counsel.

The jury that falsely convicted Mr. Hitchcock was denied admissible and compelling evidence of Mr. Hitchcock's innocence. Trial Counsel was ineffective for failing to present the available similar fact evidence of Richard Hitchcock's violent sexual attacks, sexual possessiveness, and choking, under a proper legal theory. The lower court failed to decide this aspect of the Claim as this Court ordered.

Trial counsel attempted to admit evidence of Richard's character solely to show Richard's propensity to commit violence. (VOL. V PCR. 129). This was clearly not a proper argument for admissibility. On direct appeal, this Court held the specific acts of Richard Hitchcock were properly excluded because "it could only have been relevant to show Richard Hitchcock's bad acts and violent propensities and thus was properly excluded for impeachment purposes." *Hitchcock v. State*, 413 So. 2d 741, 743 (Fla. 1982). This Court also stated what trial counsel should have known: "The person seeking admission of testimony must demonstrate why sought after testimony is relevant . Hitchcock has presented nothing to show that he made a clear offer of proof which would overcome the state's objections." *Id*. (Internal quotations omitted). The responsibility for demonstrating that any evidence regarding

Richard Hitchcock was admissible was trial counsel's. Trial counsel failed to demonstrate why the sought after testimony was admissible. Had trial counsel conducted an adequate investigation counsel would have understood the importance and scope of this evidence. Had counsel made a proper argument, the jury would have heard important and admissible similar fact evidence that would have created a reasonable doubt.

Indeed, as presented in postconviction, this evidence was compelling. Martha Hitchcock Galloway and Brenda Reed, James and Richard's sisters, testified at both the 1977 trial and at the 2003 hearing. At the 2003 evidentiary hearing, Mrs. Galloway testified in detail about a number of sexually violent attacks she suffered at the hands of Richard from about age eight to seventeen. (VOL. VI PCR. 144). Richard's attacks sexually violated young Martha and left bruises around her throat and body. (VOL. VI PCR. 144-46). Even family members could not stop Richard who "threw [another sister] plumb through a window" when that sister tried to aid young Martha. (VOL. VI PCR. 145).

Mrs. Galloway described Richard's reaction to her futile resistance: "[i]t wouldn't faze Richard a bit to take, just knock one of us plumb across the room, Richard was so obsessed with sex." (VOL. VI PCR 146). Even a simple no or asking Richard to get away from her would cause Richard to choke

Martha. The worst came when Richard suspected that Martha might have been interested in boys her own age because that "wasn't allowed. That made Richard real violent if you messed with anybody else," and once, even led to a bloody beating with a switch. (VOL. VI PCR 147). Mrs. Galloway almost escaped Richard's violent sexual attacks when she married. Richard did not like that Mrs. Galloway married and when Richard saw Mrs. Galloway on the way to her mother's house, he raped her one last time and almost choked her to death. (VOL. VI PCR 157).

Repeatedly, Richard Hitchcock also sexually violated and violently attacked Brenda Hitchcock Reed. While Ms. Reed did not find Richard possessive, (VOL. PCR VI 181), having not paid much attention to Richard's jealousy about the women in the family, Ms. Reed lacked the sophistication and comprehension of her older sisters. She did, however, remember that Richard slapped her and would hold her down to accomplish his sexual abuse. (VOL. VI PCR. 180).

The lower court should have also considered the testimony of Wanda Green and Judy Gambale in deciding this claim and as newly discovered evidence, but having chosen to ignore this issue almost entirely, never did so. Their testimony was newly discovered in postconviction, pled in Claim IX, and corroborated the testimony of Mrs. Galloway and Ms. Reed.

Mrs. Galloway and Ms. Reed testified in 1977 and were available for further testimony. Having failed to spend the time to investigate the case, and then do so effectively, counsel failed to understand the significance of the information that Martha Galloway tried to convey to trial counsel about Richard's violent sexual attacks. Rather than listen and ask further questions to put forth a theory of admissibility, trial counsel told Mrs. Galloway that "Richard was not on trial [James Hitchcock] was. [He] didn't need to hear nothing about Richard. [He] needed to know about [James Hitchcock] there." (VOL. VI PCR 149). Clearly, this was consistent with an attorney who did not understand the relationship of this evidence to a just verdict.

At the first evidentiary hearing trial counsel was asked to articulate his defense. (VOL. V PCR. 128). Trial counsel stated that it was that "James Hitchcock didn't do it, his brother did." (VOL. V PCR. 128). When asked what his evidence was to establish that defense, trial counsel answered "It would have been Mr. Hitchcock, the defendant's testimony himself, and then the other witnesses that we attempted to call to show Richard would have a **propensity** to do this type of thing." (VOL. V PCR. 129)(Emphasis added). If trial counsel's defense was to show Richard's "propensity to do this type of thing" then any argument he made for the admission of testimony about "this type

of thing," on or off the record was properly denied. Propensity to commit an act was indeed specifically barred by Section 90.404(2)(a), however, because trial counsel failed to effectively investigate this case, it was the only argument he could make.

Under the ***Williams*** rule, similar fact evidence is generally admissible, if the evidence is "relevant to prove the a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of accident." ***Crump v. State***, 622 So. 2d 963, 967 (Fla. 1993). Just like with the members of his family presented at the evidentiary hearing, Richard Hitchcock saw the victim in this case as his sexual possession. When Richard saw the victim in a post-relational situation with James Hitchcock, Richard became enraged. Once enraged, as seen with his other family members, Richard choked the victim, although this time to death. Had the reverse been true and James Hitchcock had committed repeated acts of enraged, jealous, choking, the State certainly would have been entitled to present this evidence as ***Williams*** rule evidence. A fair trial required no less for James Hitchcock but he was denied this very basic evidence because trial counsel failed to effectively develop this evidence pre-trial and put forth a proper theory for admissibility.

Accordingly, Mr. Hitchcock unquestionably proved both

prongs of ineffectiveness under Claim III. Counsel opened the door for harmful testimony and prejudiced his own Client. Counsel also failed to conduct a meaningful investigation and present compelling similar fact evidence under a proper theory for admission. This Court should reverse the lower court's denial of relief because Mr. Hitchcock is entitled to a trial at which the jury hears the whole truth untainted by counsel's ineffectiveness.

**NEWLY DISCOVERED EVIDENDCE**

Mr. Hitchcock is actually innocent and deserves a new trial under *Jones v. State*, 591 So. 2d 911 (Fla. 1992). The newly discovered evidence is threefold: One, the newly discovered similar fact evidence that Richard Hitchcock was sexually possessive, choked Wanda Hitchcock Green and attacked Judy Gambale. Two, Richard confessed the murder to Wanda Green and Rossie Meacham. Three, discussed below, hair analyst Diana Bass lacked the competency to properly test hair and falsely excluded Richard and included James Hitchcock. Failing to properly consider the postconviction evidence in its entirety, the lower court again failed to do justice and denied relief on Claim IX.

To convict an individual of any crime, let alone a capital one, the State has the burden of proving the accused's guilt beyond and to the exclusion of every reasonable doubt. As a preliminary matter, respect for this basic principle was absent

from the entirety of the lower court's denial of relief. As a conclusion, the evidence as it stands today overwhelmingly shows that there is a reasonable doubt whether James Hitchcock's is guilty.

In postconviction, Mr. Hitchcock has developed evidence of Richard Hitchcock's guilt of such quality that if Richard were prosecuted on the same evidence this Court would uphold its admissibility on appeal. If Richard Hitchcock were convicted, this Court would find the evidence sufficient to sustain the verdict. Mr. Hitchcock, however, never had to prove Richard's guilt beyond a reasonable doubt to prevail in postconviction. Mr. Hitchcock asks this Court to consider that if the roles were reversed, this Court would have found that the postconviction evidence was both admissible and sufficient. A jury, however, would only have to find that it created a reasonable doubt for the outcome to be different.

Indeed, the postconviction evidence was compelling. Wandalene Hitchcock Green, in addition to testifying to Richard's confession, recounted a number of jealousy fueled chokings at the hands of Richard. Ms. Green stated:

> Richard was very abusive after my dad died. I was eleven years old and he always tried to put his hands on me. Always I would fight back so he couldn't do me that way. He only he can only do the ones 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 (sic raped) by him
> Q. Would it be fair to say that he was possessive of them sexually?
> A. Yes, he was.

(VOL. VI PCR 187).

While Richard may never have been able to rape Wanda he did choke her repeatedly and often specifically for showing an interest in males other than Richard. (VOL. VI PCR 187-90).

Richard also violently attacked Judy Gambale who, in 2003, told the lower court:

> 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 the 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. . . . He was messing with my breast and my lower parts of my body.

(VOL. VI PCR. 201-02)

In addition to the newly discovered similar fact evidence the lower court was also presented with newly discovered evidence that Richard Hitchcock confessed the murder to Wanda Hitchcock Green and Rossi Meacham. Ms. Green would have refused to talk to Mr. Hitchcock's 1977 trial counsel because she believed if the State accused somebody it meant that the accused was guilty. (VOL. PCR. VI 193-94).

Her reluctance disappeared after she heard Richard confess to the murder. Ms. Green sat with Richard Hitchcock at her mother's table when Richard revealed his guilt. Wanda Green stated at the 2003 hearing:

> [W]e were sitting at the kitchen table talking . . . I'd told him that it's going to be rough on my mama when they execute Erney [the defendant]. 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.
>
> He said - - I said no, they're going to execute him for the murder. And he said that they ain't going to execute him for rape. And in other word he told me that he was kneeling right there, that Erney only raped.
>
> 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 that 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.

(VOL VI PCR. 194-95).

The lower court never really considered the strength of the Ms. Green's testimony and instead relied on a void order from 1997 and a misapprehension of this Court's decision in *Hitchcock v. State*, 755 So. 2d 638, 645 (Fla. 2000). Nothing in the relinquishment order points to anything that remotely refutes the truthfulness of Ms. Green's testimony about Richard Hitchcock's confession based on the 2003 testimony itself.

Rossi Bell Meacham was an acquaintance of Richard Hitchcock and knew some of the Hitchcock family from Arkansas. (VOL. VI PCR. 160). Ms. Meacham was an important witness because Richard Hitchcock revealed to her the dark secret which he never revealed to the jury- - that he was the victim's real killer. Ms. Meacham was discovered through the investigative work of CCRC-M and was previously unknown. Ms. Meacham met Richard in the early nineties before Richard died. (VOL. VI PCR. 160-61). Ms. Meacham was called to support the claim of newly discovered evidence as was pled in the amendment to Claim IX. *See* (VOL. XI PCR. 764-770, 836). She was also called to corroborate the other evidence of Richard's guilt in this case and Mr. Hitchcock's other witnesses' testimony.

Ms. Meacham told the truth and recounted:

> 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 - - getting he was drinking a little. He was getting a little belligerent. He said yeah, you wouldn't know the things 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 time better, but he blamed it on Erney.

(VOL. VI PCR. 162).

Even worse then simply recounting such evilness, Richard went so far as to brag about it to Ms. Meacham. When asked by Ms. Meacham how he could do such a thing Richard said "I can do

it and I got by with it." (VOL. VI PCR. 162). After that Ms. Meacham stopped going over to Mr. Hitchcock's mother's house as much because Richard wanted her to be scared of him and indeed she was scared of him. (VOL. VI PCR. 163). This did not mean that Richard was untruthful or that Ms. Meacham lied, only that contrary to the lower court's mischaracterization this was why she did not call the police. *See* (RH 509).

There were two matters which the lower court was required to address: whether Richard's confession would be admissible under the declaration against interest exception and whether the newly discovered evidence required a new trial. The lower court blurred the two questions and in doing so denied Mr. Hitchcock the relief to which he was entitled.

On the question of admissibility the lower court improperly made a credibility determination to deny Claim IX. The declaration against interest exception is controlled by Section 90.404,(2)(c), Florida Statutes, which provides that the following is not excluded as hearsay if the declarant is unavailable as a witness:

> (c) Statement against interest.--A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declaring to liability or to render invalid a claim by the declaring against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declaring to criminal liability and offered to

> exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Under such, Richard clearly was unavailable since he had been dead since 1994. His statements were clearly against interest in admitting to capital murder. Lastly the statements must have corroborating circumstances that show the trustworthiness of statement.

> 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.

*Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001).

In this case, precisely what *Carpenter* states a trial court should not do was precisely the basis upon which the lower court denied this Claim. The credibility of Wanda Green and Rossi Meacham was never at issue. The "corroborating circumstances" to "show the trustworthiness of the statement" refers to the circumstances under which Richard made the statements, not whether the lower court found the witnesses credible.

Unlike James Hitchcock's false confession, Richard Hitchcock's true confession was not the result of law enforcement's interrogation in a police interview room. Richard finally admitted guilt, to two people, in the safety of his mother's kitchen. These circumstances could not be more

trustworthy. Had it been James Hitchcock who confessed to murder at his mother's table, certainly this Court would find it admissible. Moreover, each witness was consistent with one another and with the testimony of James Hitchcock at the 1977 trial.

While this Court routinely upholds convictions based on jailhouse snitches[2], and the State Attorney's Office that prosecuted Mr. Hitchcock routinely uses such testimony[3], none of the concerns about jailhouse snitches were present in this case. While both witnesses had a concern not to see an innocent man executed, neither one received any consideration from Mr. Hitchcock for their testimony or raised any of the concerns inherent in snitch testimony.

Richard's sexual possessiveness and choking, whether newly discovered or not admitted because of trial counsel's ineffectiveness, were admissible under Section 404(2)(a). In *Mclean v. State*, -So.2d-, 2006 WL 1837909 (Fla. 2006), this Court found that the admission of a prior sexual wrongs, crimes or acts, even without the similarity required under the *Williams* Rule, Section 90.404(2)(b), Florida Statutes, does not violate due process when applied in a case in which the identity of the defendant is not an issue and the provision is used to admit

[2] See *Guzman v. State*, 2006 WL 1766765 *6 (Fla. 2006) and *Mansfield v. State*, 758 So.2d 636,645 (Fla. 2006).
[3] *See Mansfield*.

evidence to corroborate the alleged victim's testimony. *Id.* As with the child molester in *Mclean*, Richard Hitchcock's choking and raping of his family members, while meeting the standard for the admission under the *Williams* rule, is definitely of the same quality or better, and therefore should be admissible in its own right. If the State can use prior molestation to obtain a life sentence, Mr. Hitchcock under any purportedly fair system can offer the true perpetrator's similar acts to save his own life.

The lower court again interjected its own belief, prejudice and bias in determining whether the *Jones* standard was met. In *Jones* this Court held that to obtain relief, "newly discovered evidence must be of such a nature that it would probably produce an acquittal upon retrial." *Jones* at 915. The question that should have been decided by the lower court was whether the newly discovered evidence was of such a nature that it would ***probably*** produce a reasonable doubt in the mind of at least one juror. In a re-trial the State would still have the burden of proving its case beyond a reasonable doubt. This evidence was surely of the nature that it probably would produce a reasonable doubt. A confession to murder, combined with the similar fact evidence of sexually possessive choking, and without the false scientific certainty of Diana Bass' testimony, probably would create a reasonable doubt. Indeed, as discussed above, this evidence is of such a nature this Court would sustain a

conviction based on evidence of such a nature.

Most importantly, no purportedly fair system would deny an accused the opportunity to present the evidence discussed above. The Supreme Court recently reconfirmed the fundamental principal that the Constitution demands a meaningful opportunity to present a defense and stated:

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

*Holmes v. South Carolina*, 126 S.Ct. 1727, 1731 (2006); internal citations and quotation marks omitted.

The Court then discussed its cases which "contain[ed] several illustrations of 'arbitrary' rules, i.e., rules that excluded important defense evidence but that did not serve any legitimate interests." *Id*. at 1731. Accordingly, if there was no legitimate interest in preventing the State from introducing prior child molestation in *Mclean*, there is no legitimate interest in preventing Mr. Hitchcock from presenting Richard's confession and similar fact evidence at retrial. The exclusion of James Hitchcock's evidence when it would not be excluded for

the State would be arbitrary and serve no legitimate purpose.

As the Court stated in conclusion in *Holmes*, "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id*. at 1735. The point in Mr. Hitchcock's case is that the jury only heard the full strength of the State's side and never heard the full strength of Mr. Hitchcock's because of ineffective assistance of counsel and State misconduct. Since trial, Mr. Hitchcock's side has only become stronger with the newly discovered evidence of Richard's confession and the other similar fact evidence witnesses who could not have been called at the 1977 trial. There simply is no legitimate reason why all of the evidence developed in postconviction would not be admissible. Indeed, the Constitution demands that it should be.

The lower court's decision on Claim IX was legally incorrect, not based on substantial evidence and unfair. Claim IX, especially when considered in conjunction with the entirety of postconviction, presented a compelling case of Mr. Hitchcock's actual innocence. It remains a gross injustice that Mr. Hitchcock is incarcerated and the State seeks his death. This Court should reverse.

**HAIR ANALYSIS AND DIANA BASS**

The lower court also should have granted relief on Claim X,

separately or in conjunction with the entirety of postconviction. At the very least, the evidence presented under this Claim negates a material aspect of the evidence the State relied upon to convict Mr. Hitchcock falsely. At the 1977 trial the State produced a false sense of scientific certainty that forensic hair evidence inculpated James Hitchcock and exculpated Richard Hitchcock. Along with the simple unreliability of the testimony, postconviction has shown multifaceted constitutional violations and the need for a new reliable trial to satisfy the mandates of the Constitution.

The State used hair analyst Diana Bass to obtain a false conviction. Diana Bass lacked the skill, training and care necessary to conduct hair analysis. Robert Kopec, testified to this at the 2003 hearing and in doing so established that the jury's reliance on the allegedly scientific evidence was in error and caused by the State.

Mr. Kopec was a well qualified expert in the area of hair analysis and microscopy and also Diana Bass' former supervisor. (VOL. VI PCR. 207-08,214). What he observed when he became responsible for the supervision of Diana Bass was:

- Diana Bass had three years with the crime lab but failed to exhibit the very basic skills of a first year analyst.
- Did not understand the importance of the integrity of microanalytical evidence
- Exhibited poor evidence handling skills, left out evidence which was likely to cause false results

through contamination and used poor technique

(VOL. VI PCR. 221-24).

The very nature of hair, its fineness, showed that Ms. Bass could falsely include someone through hair analysis because she mixed up the samples. Mr. Kopec affirmed this and stated:

> [w]ith 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 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.

(VOL. VI PCR. 227).

Even Diana Bass' own testimony supported Mr. Hitchcock's position. Ms. Bass testified that one reason she left her position at the lab was she needed more training than what was offered at the lab, which had discouraged Ms. Bass from obtaining further training because of her case load. (VOL. VI PCR. 261). Ms. Bass was unsure of the dates but she did experience backlogs and at one point a quota system was imposed. Ms. Bass also testified that she had improved as a hair analyst and was at her best when she left in 1978. (VOL. VI PCR. 263).

Despite the overwhelming nature of the evidence on this matter the lower court denied relief. (RH 511). In order to reach a denial the lower court strained logic, ignored facts and ignored the larger context of this evidence. In doing so the

lower court pared the multifaceted claim to almost entirely a *Brady* claim then failed to consider that for purposes of this entire claim Diana Bass was the State. *See Gorham v. State,* 597 So.2d 782, 784 (Fla. 1992); *Brady v. Maryland* 373 U.S. 83 (1963). The lower court was then able to quickly dismiss the *Brady* claim because, in the court's view, the true level of Ms. Bass' incompetence came to light gradually rather than at once. See (RH 511-13).

For *Brady*, Diana Bass possessed evidence favorable to Mr. Hitchcock, specifically that Richard's hair was contained in all the crime scene hair evidence, which she failed to discover through proper hair examination. Moreover, because of her lack of evidence handling skills, the defense was denied important impeaching evidence about her skills. Ultimately the jury was left with the false impression that only James Hitchcock's hair was present because Diana Bass lacked the skills to accurately exclude Richard. It should be remembered that the State has continually argued that DNA testing would be irrelevant because the victim, Richard and James Hitchcock all lived in the same house. Accordingly, it was suspect that Diana Bass found no match between the known hair of Richard Hitchcock and the unknown samples from the crime scene.

Diana Bass, at least inadvertently, suppressed the evidence of the presence of Richard's hair at the crime scene because of

her lack of ability to test the hair evidence and to maintain the evidence's integrity. The prejudice was indeed overwhelming, the State's evidence was cloaked in a false sense of scientific certainty, and the jury which would have had a reasonable doubt concerning Mr. Hitchcock's conflicting account of the events in question had none.

Not possessing the skill to test hair and nevertheless testifying under the false cloak of scientific certainty also violated *Giglio*. The State violates a defendant's due process rights to a fair trial under the Fourteenth Amendment when the State either knowingly presents or fails to correct material false statements. *Giglio v. United States*, 405 U.S. 150 (1972). Here, the testimony was false. Diana Bass lacked the competence to present hair evidence with even a modicum of scientific certainty. She also conducted hair analysis in a lab that lacked the methodology to conduct reliable scientific hair analysis. The State, specifically Diana Bass, never brought this truth to jury or to the defense.

There can be no question about the materiality of the postconviction disclosures about Diana Bass. The false testimony that the State presented was so material that the State misled the 1988 resentencing court about the availability of Diana Bass in order to use her testimony to obtain a death sentence. This Court found in *Hitchcock v. State*, that "[a]t the

time of resentencing, the hair analyst no longer worked for the State, and the State advised the court that a diligent search had failed to locate her." 578 So. 2d 685, 691 (Fla.1990). The 2003 hearing showed that the prosecution misinformed the resentencing court on Diana Bass' unavailability. Steven Platt, the serologist, was questioned and replied:

> Q: Did at any point you in fact tell [the] prosecutors that you had found Diana Bass?
> A: I recall probably leaving a telephone message to the effect that I thought she was in Saint Augustine, Florida at the time.
> Q: Was this before the trial?
> A: Before the hearing, yes. (VOL. VI PCR. 247).

*See also* copies of phone messages contained in Mr. Hitchcock's letter in (VOL. XII 1099-1116). That the prosecution would misinform the court in order to read in the testimony without the impeachment that came to light in the 1980's shows that this evidence was material. *See Peek v. State*, 488 So. 2d 52, 53 (Fla. 1986).

Of course the prejudice of Ms. Bass' testimony could have been avoided had trial counsel been effective. The 1977 testimony of Diana Bass was excludable from evidence under *Frye* and, if the State were correct about the presence of hair on anyone in the house, relevancy. The failure to properly challenge the admissibility of Diana Bass' "expert opinion" was the failure of Mr. Hitchcock's trial attorney.

In *Stokes v. State*, 548 So. 2d 188, 193 (Fla. 1989), this

Court stated that scientific evidence must have "attained sufficient scientific . . . accuracy . . . [and] general recognition as being capable of definite and certain interpretation." (*quoting Frye v. United States*, 293 Fed 1013, 1014 (D.C. Cir. 1923); as quoted in Erhardt, Florida Evidence Section 702.3 (2000 Edition). The testimony of Diana Bass had none of the above because under the best scenario she was incompetent to test with "scientific accuracy" and to provide results that were capable of "definite and certain interpretation." Trial counsel's performance was deficient in failing to challenge the admission of Diana Bass' evidence under *Frye*, and on relevancy. The prejudice, as discussed above, was overwhelming. *Strickland, supra*.

Lastly, because the extent and full nature of Diana Bass' incompetency did not come to light until after the 1977 conviction, postconviction revelations concerning Ms. Bass are newly discovered evidence that warrants a new trial, separately or in combination with all the other newly discovered evidence in this case. *See Jones v. State*, 591 So. 2d 911 (Fla. 1992) and discussion above. Though it was known to the State in 1988, the evidence was unknown to the trial court, Mr. Hitchcock and his counsel at the time of 1977 trial.

The Diana Bass evidence could not have been brought to light sooner because the State had misinformed the court in 1988

that Ms. Bass was unavailable and failed to disclose Diana Bass' incompetency to Mr. Hitchcock. With effective assistance of counsel, the newly discovered evidence of Diana Bass would probably lead to a jury verdict of not guilty because the State's case would not be cloaked in false scientific certainty if the hair analysis were impeached or excluded.

The 1977 hair analysis evidence was a substantial part of the State's case but in postconviction it is a part that should be excluded from this Court's decisions on matters which consider the evidence against Mr. Hitchcock and the possibility of a different outcome. The admission of this evidence itself, however, denied Mr. Hitchcock important rights under the United States Constitution and rendered the results in his case unworthy of confidence. Accordingly, this Court should reverse.

**CONCLUSION AND CUMULATIVE EVIDENCE**

Error has cumulatively infected Mr. Hitchcock's case from the very beginning. "'While isolated incidents of [error] may or may not warrant a [reversal], in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive" the defendant a fair trial.'" *Penalver v. State*, 926 So.2d 1118, 1138 (Fla. 2006); *citing Nowitzke v. State*, 572 So.2d 1346, 1350 (Fla.1990).

Mr. Hitchcock has never received what the Constitution promises. Proven under Claim II, he was denied the effective

assistance of counsel to protect his right to a trial free from unfairly prejudicial victim status evidence. Proven under Claim III, he was denied the effective assistance of counsel when counsel failed to meaningfully prepare the case and interact with Mr. Hitchcock, and went so far as to actively prejudice his own client. Proven under Claim XII, he was denied due process and effective counsel in jury selection and the right to test the forensic evidence under Claim VII. Proven under Claim X he was denied due process, effective assistance of counsel and exculpatory evidence. Add the newly discovered evidence under Claim IX, which is not merely an issue but an opportunity for this Court to assure that justice is done, and this Court's decision is clear.

All that remains of the State's case following postconviction are the two conflicting statements of James Hitchcock. When the truthful account Mr. Hitchcock gave at the 1977 trial is considered in relation to the evidence that shows Richard Hitchcock's guilt, it is clear that this Court should grant a new trial.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Initial Brief has been furnished by United States mail to all counsel of record on this 18th day of July 2006.


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