IN THE SUPREME COURT OF FLORIDA

JAMES HITCHCOCK,
Appellant,

v. **CASE NO. SC03-2203**
STATE OF FLORIDA,
Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 21

ARGUMENTS

I. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY FOUND THE GUILT STAGE CLAIMS PROCEDURALLY BARRED. . . 22

II. THE "FAILURE TO OBJECT" INEFFECTIVENESS CLAIM. . . 24

III. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY FOUND THE "INEFFECTIVE ASSISTANCE FOR FAILURE TO PREPARE FOR THE GUILT PHASE" CLAIM TO BE PROCEDURALLY BARRED. 26

IV. THE "INEFFECTIVENESS AT RESENTENCING" CLAIM. . . . 27

V. THE "DESTRUCTION OF EVIDENCE" CLAIM. 33

VI. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY DENIED RELIEF ON THE *CALDWELL* CLAIM ON THE ALTERNATIVE GROUNDS OF PROCEDURAL BAR AND LACK OF MERIT. 34

VII. THE CIRCUIT COURT PROPERLY DENIED RELIEF ON THE "NEW EVIDENCE" CLAIM. 36

VIII. THE "*BRADY*" CLAIM IS UNTIMELY, AND IS PROCEDURALLY BARRED FOR THAT REASON. 39

IX. THE TRIAL COURT PROPERLY DENIED RELIEF ON HITCHCOCK'S CLAIM CONCERNING THE "DURING THE COURSE OF AN ENUMERATED FELONY" AGGRAVATING CIRCUMSTANCE. . . . 41

X. THE "ABSENCE FROM BENCH CONFERENCES" CLAIM. 43

XI. THE *RING V. ARIZONA* CLAIM IS PROCEDURALLY BARRED AND, ALTERNATIVELY, MERITLESS. 45

CONCLUSION 47

CERTIFICATE OF SERVICE 48

CERTIFICATE OF COMPLIANCE 48

TABLE OF AUTHORITIES
CASES

Apprendi v. New Jersey,
530 U.S. 466 (2000) 45

Archer v. State,
673 So. 2d 17 (Fla. 1996) 35

Arizona v. Youngblood,
488 U.S. 51 (1988) 34

Armstrong v. State,
642 So. 2d 730 (Fla. 1994), *cert. denied,*
514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995) 45

Atkins v. Singletary,
965 F.2d 952 (11th Cir. 1992) 32

Bogle v. State,
655 So. 2d 1103 (Fla. 1995) 43

Bottoson v. Moore,
833 So. 2d 693 (Fla. 2002) 46

Boyett v. State,
688 So. 2d 308 (Fla. 1996) 45

Brady v. Maryland,
373 U.S. 83 (1963) 39

Burns v. State,
699 So. 2d 646 (Fla. 1997) 35

Byrd v. Hasty,
142 F.3d 1395 (11th Cir. 1998) 25, 28

Cade v. Haley,
222 F.3d 1298 (11th Cir. 2000) 25

Caldwell. Thomas v. State,

838 So. 2d 535 (Fla. 2003) 35, 36

Caldwell v. Mississippi,
472 U.S. 320 (1985) 21, 34

Combs v. State,
525 So. 2d 853 (Fla. 1988) 35

Coney v. State,
653 So. 2d 1009 (Fla. 1995), *cert. denied,*
516 U.S. 921, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) 44, 45

Dailey v. State,
659 So. 2d 246 (Fla. 1995) 43

Dillbeck v. State,
29 Fla. L. Weekly S437 (Fla. Aug. 26, 2004) . . . 46

Douglas v. State,
878 So. 2d 1246 (Fla. 2004) 47

Downs v. State,
740 So. 2d 506 (Fla. 1999) 23

Dugger v. Adams,
489 U.S. 401 (1989) 35

Floyd v. State,
850 So. 2d 383 (Fla. 2002) 35

Francis v. State,
413 So. 2d 1175 (Fla. 1982) 44

Gamble v. State,
877 So. 2d 706 (Fla. 2004) 47

Globe v. State,
877 So. 2d 663 (Fla. 2004) 47

Grossman v. State,
525 So. 2d 833 (Fla. 1988), *cert. denied*,
489 U.S. 1071 (1989) 35

Gudinas v. State,

693 So. 2d 953 (Fla. 1997) 32, 43

Gudinas v. State,
879 So. 2d 616 (Fla. 2004) 47

Guzman v. State,
868 So. 2d 498 (Fla. 2003) 27, 34

Hamilton v. State,
875 So. 2d 586 (Fla. 2004) 46

Henyard v. State,
29 Fla. L. Weekly S271 (Fla. May 27, 2004) 46

Hernandez-Alberto v. State,
29 Fla. L. Weekly S 521, 525 (Fla. Sept. 23, 2004) . . 46

Hitchcock v. Florida,
459 U.S. 960 (1982) 23

Hitchcock v. State,
578 So. 2d 685 (Fla. 1990) 9

Hitchcock v. State,
755 So. 2d 638 (Fla. 2000) 24, 36, 38, 46

Hitchcock v. State,
866 So. 2d 23 (Fla. 2004) 34

Howell v. State,
877 So. 2d 697 (Fla. 2004) 47

Hutchinson v. State,
29 Fla. L. Weekly S337 (Fla. July 8, 2004) 46

Jackson v. Crosby,
375 F.3d 1291 (11th Cir. 2004) 39

Jones v. State,
591 So. 2d 911 (Fla. 1991) 38

Kimbrough v. State,
29 Fla. L. Weekly S323 (Fla. July 1, 2004) 46

King v. Moore,
831 So. 2d 143 (Fla. 2002) 46

Patton v. State,
878 So. 2d 368 (Fla. 2004) 47

Peek v. State,
488 So. 2d 52 (Fla. 1986) 9, 40

Peterka v. State/Crosby,
2004 LEXIS 1554 (Fla. Sept. 30, 2004) 46

Pietri v. State,
29 Fla. L. Weekly S440 (Fla. Aug. 26, 2004) 46

Poole v. State,
704 So. 2d 1375 (Fla. 1998) 26

Power v. State,
29 Fla. L. Weekly S207 (Fla. May 6, 2004) 47

Preston v. State,
528 So. 2d 896 (Fla. 1988) 40, 41

Reed v. State,
875 So. 2d 415 (Fla. 2004) 47

Ring v. Arizona,
536 U.S. 584 (2002) 22, 23, 24, 36, 46

Robinson v. State,
574 So. 2d 108 (Fla. 1991) 43

Robinson v. State,
865 So. 2d 1259 (Fla. 2004) 36, 47

Rogers v. Zant,
13 F.3d 384 (11th Cir. 1994) 32

Sims v. State,
754 So. 2d 657 (Fla. 2000) 25

Sireci v. State,
773 So. 2d 34 (Fla. 2000) 23, 27

Sochor v. State,
29 Fla. L. Weekly S363 (Fla. July 8, 2004) 46

Sochor v. State,
619 So. 2d 285 (Fla. 1993) 35

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 25, 28

Stewart v. Crosby,
880 So. 2d 529 (Fla. 2004) 47

Strickland v. Washington,
466 U.S. 668 (1984) 21, 25, 26, 31, 32, 33

Teffeteller v. Dugger,
734 So. 2d 1009 (Fla. 1999) 35

Waters v. Thomas,
46 F.2d 1506 (11th Cir. 1995) 33

White v. Singletary,
972 F.2d 1218 (11th Cir. 1992) 33

Windom v. State,
29 Fla. L. Weekly S191 (Fla. May 6, 2004) 47

Zeigler v. State,
632 So. 2d 48 (Fla. 1993) 23, 27

MISCELLANEOUS

Florida Rule of Criminal Procedure Rule 3.851 47

Florida Rule of Criminal Procedure Rule 3.851(d)(2) 24

Florida Rule of Criminal Procedure 3.853 . . . . . 34, 37, 44

Florida State Stat. §794.011(4)(c) 26

THE EVIDENTIARY HEARING FACTS

Hitchcock filed a second amended motion to vacate judgement of conviction and sentence with special request for leave to amend on November 30, 2001. (R565-639). The State filed a response on February 5, 2002. (R731-33). An evidentiary hearing was held before the Honorable Reginald K. Whitehead, Circuit Court Judge for the Ninth Judicial Circuit of Florida, in and for Orange County, on April 7-10, 2003, (R55-436) and May 8, 2003. (R437-564). An Order denying Hitchcock's second amended motion to vacate was issued on October 27, 2003. (R1117-31). Hitchcock timely filed a Notice of Appeal on November 21, 2003. (R1132-34).

Hitchcock's first witness was Kelly Sims, one of Hitchcock's re-sentencing attorneys.[1] (R60-1). Sims took this case *pro bono*, and Patricia Cashman handled all the mitigation. (R61). Ms. Cashman kept him posted via email and faxes, his job was to assist during the hearing. (R61). Although he had input, "ultimately it was the office (Public Defender) and not mine." (R62). Although the defense hired Dr. Toomer, Sims did not

[1]Sims, currently in private practice, was formerly with the Public Defender's Office. Patricia Cashman, Hitchcock's other re-sentencing attorney, was still employed with that office. (R61).

remember "being impressed with his delivery." (R63).

The Public Defender's Office had an investigator assigned to every capital case. The investigator would gather any and all information about a defendant's background that included mental heath, "any mental health records from any source whatsoever," including family and friends. (R64). This information was given to the lead attorney who subsequently contacted potential experts about hiring them to see "if they could do anything for the case." A special defense meeting would be held once a month. Those present at this meeting included the investigator, the financial officer for the Public Defender's Office, other capital investigators working on an active case, Chief Assistant Public Defender, and the Public Defender, as well. In addition, other members of the capital defense team were present.(R65). The group discussed the "positives and negatives" of the case and would ask for funding to hire witnesses.[2] (R65). The Public Defender's Office "was very open to spending money to try to save people's lives." (R66). Sims co-counsel, Patricia Cashman, "was very thorough and always prepared ..." (R67). The defense team did not use a previous expert, Dr. Elizabeth McMann, at the 1996 re-sentencing. (R69). Dr. McMann had not "handled Mr.

[2]At that time, the Public Defender's Office had their own funding; they did not have a Court Order requesting money. (R66).

Ashton's cross examination [at the 1993 re-sentencing] very well." He did not remember any other reasons for not using Dr. McMann at the 1996 re-sentencing. (R70). He did not recall speaking to Dr. Toomer prior to the re-sentencing nor did he recall reviewing a deposition. (R74, 76).

On cross-examination, Sims said he had been involved with Hitchcock's 1993 re-sentencing and was familiar with his background and mental health status. (R86-7). There was expert testimony at the 1993 re-sentencing hearing that Hitchcock was "a classic pedophile." (R91).[3] He agreed it was important to maintain credibility with the jury when arguing a mental status defense. (R95). Sims did not present any evidence at the 1996 re-sentencing that Hitchcock was innocent of the murder in this case. (R99).

Charles Tabscott represented Hitchcock at his murder trial. (R102-03). Without the benefit of reviewing the trial record, he did not specifically recall how he prepared for this case. (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. (R113). He did not recall anything about his

[3]The Florida Supreme Court ruled that evidence of pedophilia was improper due to the granting of a new penalty phase. (R98).

preparation in this case that he would have done differently. (R114). Hitchcock told him that his brother, Richard, was the murderer. (R116). Although Mr. Tabscott no specific recollection of speaking with family members regarding Richard Hitchcock's violent tendencies, he would have used that testimony at trial. (R117). He did not recall questioning Richard Hitchcock about his involvement, if any, in this case. (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." (R129). The trial record reflected that Tabscott questioned Hitchcock family members regarding Richard's violence toward others. (R133).

Martha Galloway is Hitchcock's sister. (R143). Her older brother, Richard, molested her from the age of eight to seventeen.[4] (R144, 145). These assaults occurred before James Hitchcock's murder trial took place. (R144-45). Richard became jealous and enraged when she became interested in boys. (R147). She had told Hitchcock's trial attorney, Charles Tabscott, that Richard had abused her and had been violent. (R148). Tabscott told her, "... Richard wasn't on trial ... we didn't need to

[4]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." (R157).

hear nothing about Richard. We need to know about Erney ..."[5] (R149). During a court proceeding in 1988, she explained how Richard had abused her, but, "not to the extent they really needed to know for this trial."

(R149). Richard was possessive over young girls. (R150).

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

Rossie Meacham, an acquaintance of the Hitchcock siblings, did not know the Appellant. (R160). On one occasion, Richard discussed a murder that had occurred. (R161). She and Richard 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." (R162). She did not see Richard much after that discussion. She said, "He wanted me to be scared of him." (R163).

On cross-examination, she denied having a "boyfriend-girlfriend" relationship with Richard. (R163). She had known

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

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. (R165). In addition, Richard talked about using a gun before. He said, "I have killed before. I'm not ashamed to do it again." (R168). Richard bragged about things he would do and things he had done. (R170). Eventually, she and Martha Galloway discussed the fact that the Appellant was still incarcerated for the murder of Cynthia Driggers. (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."[6] (R173).

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

Brenda Reed is another sister of James Hitchcock. There was a total of seven siblings.(R179). She lived with her other brother Richard until the age of fifteen. (R179). Richard sexually abused her from age five until fourteen. (R180). He slapped her but never choked her. Although she tried to resist

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[6]Richard Hitchcock died in 1994. Richard told her about the 1976 murder of Cynthia Driggers in 1993 or 1994. She did not tell Martha (Hitchcock's sister) about Richard's confession to her until a decade later. (R174).

him, she "couldn't get away from him [because] he's too strong." (R180). He was "not so much possessive" and she did not pay any attention to whether or not he was jealous of other males. (R181). She recalled speaking to Hitchcock's trial attorney, Charles Tabscott. (R182).

Wanda Hitchcock Green, another sister, testified that Richard tried to sexually assault her, as well. (R186). After their father died, Richard became sexually abusive toward his younger siblings, but he could "only do the ones that way that were ... younger. He couldn't handle me like that." (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." (R187). On one occasion, Richard "was trying to rape Martha and I caught him ... He ran my head through the window ... (R188). At the age of fifteen, her mother sent her to live elsewhere. (R189). After she was married, she still was in contact with Richard. (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." (R193). Richard told her that Appellant "only raped" the victim

in this case and would not be executed for that. (R195).

On cross-examination, Green said she and Richard "were pretty close after he married" because "I wasn't raped by him." (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." (R198).

Judy Hitchcock Gamble is the niece of Appellant and Richard Hitchcock. (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." (R201, 202).

On cross-examination, Gamble said that Richard was not violent during this attack, he was "just trying to hold me down." (R203).

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

Robert Kopec is an expert in microanalysis and a former supervisor in the microanalysis section of the FDLE crime laboratory.[7] (R214). During his proffered testimony, he stated that Diana Bass, an FDLE hair analyst, "didn't really exhibit

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

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 ..." (R221). In addition, she had a "very poor understanding of the techniques used in microanalytical analysis of hair." (R224). Ms. Bass exhibited a very low level of understanding in hair comparison. (R228). Some of the techniques she used were outdated, "discarded twenty, thirty years ago as being virtually useless." (R228).[8] 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." (R230-31).

On cross-examination of the proffered testimony, Kopec said he was hired by FDLE in May 1978. (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. (R232). He evaluated other analysts, as well. (R235-36).

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

However, he started to focus on Bass' work in 1979. (R236).[9]

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

Steven Platt, employed with FDLE since 1995, was Diana Bass' supervisor for approximately two years, prior to Kopoc's employment. (R239). In 1983, Bass and he were involved in a case where Bass' work was discredited.[10](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. (R245).

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. (R249). However, it would have been brought to light prior to the 1986 decision in *Peek.*[11]

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

[10]Anthony Ray Peek was the defendant. (R241).

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

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.[12] (R257, 259). During her proffered testimony, Bass stated that one of the reasons she left the crime lab was due to lack of training.[13] (R261). There was a period in time were there was a back log of cases over a year in length, possibly around 1976. (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 voluntarily 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." (R269).

Dr. Jethro Toomer is a clinical psychologist. (R286). In 1996, he evaluated James Hitchcock and administered psychological testing. (R289). He relayed to Hitchcock's counsel, Patricia Cashman, that Hitchcock met the statutory mitigator of "under extreme emotional mental disturbance." (R292). In addition, Hitchcock exhibited signs that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially

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[12]She was employed with FDLE from 1974 through 1978. (R264).

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

impaired. (R294). He anticipated testifying as to these mitigators, as well as overall psychological function, at the 1996 penalty phase. (R295). The psychological tests that Dr. Toomer conducted showed Hitchcock had a "borderline personality disorder" and he was incapable of "developing the appropriate mechanisms for adaptive functioning." (R296). Further, "Borderline personality disorder is life long." (R297). The Hitchcock family exhibited signs of dysfunction in "unpredictability, chaos, ..." (R298-99). Hitchcock observed abuse through his alcoholic step-father. (R299). One of the major characteristic deficits of "personality disorder" is "impulsivity." (R301). Hitchcock left home at an early age, between thirteen and seventeen years of age, and "was just kind of roaming around from place to place." (R302-03). Hitchcock's mental disturbance has existed for most of his life. (R303). His family indicated that he cared about them. He tried to work to provide for them but was unsuccessful. "There was not this lack of conscious if you will, or sociopathy you find in individuals who have been diagnosed as suffering antisocial personality disorder."(R304). The MMPI test results indicated a borderline personality disorder. Dr. Toomer testified:

> Individuals with this profile have not developed internal controls. Further, because of the early onset of trauma, the individual doesn't develop the necessary and appropriate internal controls for

> functioning. And so as individuals develop chronologically they still remain at a much younger level of development emotionally, cognitively and developmentally ...

(R311, 312). He could not determine if Hitchcock had any organic deficit or brain damage. He said, "there were some soft signs which meant there was some indication that suggested there might be some underlying organically based deficit." (R316). He did not have any specific recall that he discussed this with Hitchcock's defense attorneys, but "all that information would have [been] shared as part of the results of the evaluation conducted." (R317).

On cross-examination, Dr. Toomer agreed that there were three primary components in his assessment of Hitchcock: 1) clinical review, 2) testing, and 3) history review. (R321). He spoke with family members and reviewed various documents pertaining to significant periods of his life. (R321).

Dr. Toomer said Hitchcock's personality disorder is a major mental illness. (R326). He testified in the 1996 re-sentencing that Hitchcock suffered from a personality disorder. (R349). He did not recall if he recommended this diagnosis to Patricia Cashman, Hitchcock's 1996 re-sentencing attorney. (R350).

Dr. Henry Dee is a clinical psychologist and neuropsychologist. (R352). He evaluated James Hitchcock in November 2001. (R354). Tests dealing with general mental

functioning and memory "were essentially normal, slightly above average actually."

(R357). Dr. Dee used various tests to determine frontal brain damage. These tests included the Halstead and Reitan Battery and Wisconsin Card Test. (R356). Hitchcock failed both of these tests. (R364). Hitchcock's frontal lobe damage may have been present "for many many years." (R369). Dr. Dee was not aware of any events that happened to Hitchcock "that would explain the kind of damage we're looking at." (R369). There was no evidence of head trauma, neurological disease, stroke, or tumor to explain his deficits. (R369).

On cross-examination, Dr. Dee agreed there is often quite a bit of criminal history when brain damage is suspected.[14] (R376).

Dr. Dee was not aware that Hitchcock initially confessed to law enforcement. (R377). There was no indication of any impulsive violence towed anyone else prior to what happened to Cindy Driggers. Patients with frontal lobe disease are not "driven to violence." (R380). There were two instances of "DR's" in

[14]Prior to this murder, Hitchcock, at the age of seventeen, had been incarcerated for a spree of burglaries that occurred within an hour's time. He was approximately twenty years old at the time he went to prison in this case. (R341).

Hitchcock's prison records.[15] (R385). The lack of "DR's" "is very rare." (R389).

The State called Patricia Cashman, Hitchcock's 1996 resentencing attorney, as its first witness.[16] (R396, 406). She represented Hitchcock (along with Kelly Sims) at his 1992 resentencing. Sims, appearing *pro bono*, was co-counsel at the 1996 proceedings, as well. (R407). She became familiar with Hitchcock's family members and sent investigators to Arkansas to interview them. (R409). She became aware of a letter written by Hitchcock to his mother around the time of the 1988 re-sentencing proceedings. (R410). The defense team was concerned about the letter, "about the jury's viewpoint of the letter. Whether there was a way to suppress it ... There were a number of different issues that we addressed other than just the fact that it was an admission." (R414-15). Subsequently, she had a telephone conversation with a handwriting expert and decided not to call him to attack to authenticity of the inculpatory letter. (R421).

Dr. Bill Mosman, Ph.D., a licensed psychologist, evaluated Hitchcock. (R441, 446). He reviewed all of the defense's files,

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[15]"DR" stands for disciplinary review. (R388).

[16]Hitchcock's other resentencing proceedings occurred in 1988 and 1992. (R407).

including depositions, trial testimony, hearings, motions, orders, and interview notes. In addition, he reviewed all of the doctors' reports, jail records, Department of Corrections records, raw data from Dr. Toomer, and police investigative reports and interviews. (R446-47). He spent two days interviewing and testing Hitchcock. (R447). He stated that three things should have been done prior to the 1996 re-sentencing hearing: 1) conduct a complete neuropsychological evaluation, 2) conduct neuroimaging, and 3) review the spread of scores (from the testing)and identify what areas of the brain or functional areas that would relate to the crime. (R451-52).

On cross-examination, Dr. Mosman agreed that the psychological evaluation conducted by Dr. Toomer on Hitchcock was appropriate. (R458). Testing done by Dr. Toomer and Dr. Mosman indicated scores at or above the general population.[17] (R461). Hitchcock has been in a controlled setting for most of his life, including some time spent in the Arkansas Department of Corrections. He had not been released that long when he was in violation of parole and reincarcerated in Florida for this case. (R464). Hitchcock has made a "fairly good, stable adjustment" to prison life. (R466). He agreed this supported a

[17]Dr. Toomer obtained a verbal score of 110 and a performance score of 104. (R460). Dr. Mosman obtained a verbal score of 115 and a performance score of 102. (R461).

mitigation of ability to rehabilitate in an incarcerative setting. (R467). In addition, Hitchcock taught some of his fellow inmates how to read. (R468). He has a wide support system that he regularly communicates with, including writing to people outside of the country. (R468-69). There were no indications that Hitchcock is capable of engaging in deception. (R479). Hitchcock told Dr. Mosman that he confessed in order to shield his brother, Richard. (R479). He does not suffer, "and has never suffered," from any delusions. He does not suffer from any thought disorders. (R432). Hitchcock suffers from a personality disorder. (R483). He knew his brother Richard had sexually abused their sisters. (R493).

Dr. Toomer told Dr. Mosman that scores on Hitchcock's tests indicated brain damage. (R495).

The State called Dr. Harry McClaren, Ph.D., a psychologist specializing in forensic psychology. (R506-07). He evaluated Hitchcock in March and April 2003. He reviewed all the reports that led to his arrest, prison records, court proceedings, and depositions of people that knew him and observed his throughout life. (R510). He interviewed several members of the victim's family, including two people that told him, they also were victimized by Hitchcock. (R511). Additionally, he reviewed medical records of one of the other victims, psychiatric records

and a letter written by Hitchcock himself, confessing his crimes to his mother, prior to his trial. (R511, 512). He reviewed the depositions of other mental health experts.[18] (R512). He read the autopsy report, and statements taken by police, including Hitchcock's confession. (R512-13). He reviewed the Department of Corrections records that included "a normal EEG and also a normal neurological evaluation."[19] (R513).

Dr. McClaren administered the WAIS-III, MMPI-II, and the Millon Clinical Multiaxial Inventory-III. He concluded there was a "borderline finding on the histrionic personality scale" and that Hitchcock produced a valid MMPI-II. (R514-15). No one gave him any information that Hitchcock was of "deficient intellect." (R516). His tests indicated "higher than average" by those that tested him. (R516-17). Members of the victim's family described him as "scary, mean, aggressive." (R517). Hitchcock has relatively few disciplinary reports compared to others in prison. He has not received a "DR" since 1993. This indicates "pretty good coping, pretty good control of himself. Probably excellent control in the last nine or ten years." (R518). A

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[18]Dr. Betty McMann, a neuropsychologist,(R513), Dr. Henry Dee, Dr. Jordan and Dr. Jethro Toomer all previously evaluated Hitchcock. He spoke with Dr. Mosman regarding the technical issues involved in the testing. (R512).

[19]The EEG was dated 1988, and the neurological report was dated 1984. (R514).

person with a brain injury would have more disciplinary reports "due to impulsivity associated with organicity, especially if it's a frontal lobe kind of deficit." (R519).

Dr. McClaren reviewed a letter written by a former warden for Florida State Prison, Richard Dugger. Dugger had responded to a letter he received from a woman who had sent Hitchcock money for bus fare.(R517). Dugger informed her that she had been "deceived" by Hitchcock, that he was on death row for first degree murder, would not be released any time soon, and her money could not be recovered. (R519-20).

Dr. McClaren did not see any impairment index in any of the materials he reviewed. (R522). On the WAIS-III (intelligence test), Hitchcock scored a verbal IQ of 105, a performance IQ of 92, full scale of 100. (R523). Hitchcock is not mentally retarded and falls within the average range. (R523-24). The MMPI-II, which is "either the first or second most often used psychological test in the world," is a test of personality and psychopathology. (R525). It is used to "diagnose, to plan treatment, measure changes in people, understand test-taking approaches, detect psychosis, detect malingering." (R525). The Millon Clinical Multiaxial Inventory indicated Hitchcock had a "histrionic" personality.(R526, 527). Dr. McClaren concluded that Hitchcock "is a man of at least average intellect ... is

not psychotic ... is not depressed at this time ... has been diagnosed with depression while in prison, especially after he came back from his first resentencing unsuccessful ... last diagnosis by the Department of Corrections was no mental illness ... according to the psychologist specialist on death row who monitors death row inmates ... has statistically significant split in verbal and performance IQ ... huge number of the population ... that have this degree of split or greater ... about ten percent ..." (R528-29).

As far as any diagnoses under the DSM-IV-TR,[20] Dr. McClaren "would give him the diagnoses of AXIS-I, alcohol abuse ... may have been prone to abuse cannabis ... alcohol was a more frequent thing ... He did tell me that at the time of this that he was in control of himself ... he didn't feel that he was under any a particular stress ... I thought that he clearly met the criteria for the antisocial personality disorder, which is a pervasive pattern of violating the rights of others with on onset ... before age 15 ... some evidence of a conduct disorder ..." (R529-30). During his teenage years, he was in prison for stealing, burglary, and theft. After his release, he was charged

[20]American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

with this crime. "He clearly has been deceptive at times." In addition to the homicide in this case, there were other reported assaults. (R531). He satisfied the criteria for "repeated aggressiveness, deceptiveness, repeated behavior, grounds for arrest since age 15." (R531-32). He did not meet the criteria for borderline personality disorder, or for histrionic or narcissistic personality. (R532). He has been treated for some form of lung disease, meeting some of the criteria for AXIS-III. (R534). Hitchcock is "coping very adequately with his environment at this point." (R535). At he time of the crime, Hitchcock told Dr. McClaren "he wasn't under any particular stress ... ready to get unemployment ... didn't feel like things were that bad ... definitely in control of himself at that time ... wasn't under the influence of anyone." (R535-36). The Trailsmaking Test, A and B, which determines brain dysfunction, was normal, "maybe even relatively good." (R538-39). There was no indication that Hitchcock had a learning disability. (R542).

On cross-examination, Dr. McClaren said the 13-point difference between Hitchcock's verbal score and performance IQ on the WAIS-III test, indicated that a possible explanation for that split could be brain damage. (R543). In the Bender test that was administered by Dr. Toomer, (which indicated some signs of brain dysfunction), Dr. McClaren found "some very minor

distortions." (R545). Although death row is an extremely structured environment, he did not believe that it would limit an inmate's impulsive behavior if he was prone to do so. (R548).

Dr. McClaren was aware that Hitchcock had previously passed a polygraph test. (R553). However, Dr. McClaren found Hitchcock's rendition of the night of the events resulting in this crime to be "pretty incredible." The possibility that Hitchcock might have some degree of brain damage that contributed to his actions in this crime were outweighed by other explanations. These included "not wanting to be sent back to prison in Arkansas, not wanting to be caught, to be under the influence of alcohol, all these factors, together with a personality disorder ...are ... of a much higher valiance that the effect of possible brain damage of this magnitude." (R556). A neuropsychologist might have been able to "provide a more fine grained description of what degree of disability, if any, exists ..." (R559). However, Dr. Dee did perform some of the tests involved in a neuropsychological evaluation, indicating some brain damage. (R560).

An Order denying Hitchcock's second amended motion to vacate was issued on October 27, 2003. (R1117-31). Hitchcock timely filed a Notice of Appeal on November 21, 2003. (R1132-34).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court properly found the claims relating to Hitchcock's 1977 guilt stage proceedings procedurally barred. Those claims were not raised in any of Hitchcock's prior collateral proceedings, even though Hitchcock's conviction has been final since October 18, 1982. The guilt stage claims are time barred.

With respect to the penalty phase ineffective assistance of counsel claims, Hitchcock has not met the two-part test set out in *Strickland v. Washington* because he has not shown that counsel's performance was deficient, or that prejudice resulted. The trial court's findings are well supported by the evidence, are not clearly erroneous, and should be affirmed in all respects.

The "destruction of evidence" claim is procedurally barred to the extent that that claim is that he should be allowed to conduct DNA testing of certain items of evidence. This Court has already decided the DNA testing claim against Hitchcock, and he is not entitled to relitigate the final orders of this Court. To the extent that the claim is one that evidence has been destroyed, Hitchcock has not alleged bad faith on the part of any State actor, and, in any event, never raised the bad faith issue in Circuit Court. That Court cannot be placed in error

based on claims that were never before it.

The *Caldwell v. Mississippi* claim is alternatively procedurally barred, and meritless.

The "new evidence" claim is procedurally barred because it was raised and rejected on direct appeal. Moreover, this claim is time barred, as the collateral proceeding trial court found.

The "*Brady*" claim concerning FDLE analyst Bass is untimely, and is therefore procedurally barred. Alternatively, that claim is meritless.

The ineffectiveness of counsel claim relating to the "during the course of an enumerated felony" aggravating circumstance is meritless because it has no legal basis.

The "absence from bench conferences" claim is procedurally barred because it relates solely to the 1977 guilt stage proceedings. Moreover, the legal basis for this claim is not available to Hitchcock, anyway.

The *Ring v. Arizona* claim is procedurally barred and, in the alternative, meritless, as the collateral proceeding trial court found.

ARGUMENT

I. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY FOUND THE GUILT STAGE CLAIMS PROCEDURALLY BARRED.

On pages 8-16 of his brief, Hitchcock argues that the trial court should not have denied the various guilt stage claims on procedural bar grounds. Despite the contortions in which Hitchcock indulges in an attempt to create error, there is no legal basis for relief.

Hitchcock's conviction became final on October 18, 1982, when the United States Supreme Court denied certiorari review. *Hitchcock v. Florida*, 459 U.S. 960 (1982). Florida law is well-settled that January 1, 1987, was the deadline for seeking postconviction relief from **convictions** which became final prior to January 1, 1985. *Sireci v. State*, 773 So. 2d 34, 44 (Fla. 2000); *Downs v.* State, 740 So. 2d 506, 513 (Fla. 1999); *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993). Hitchcock raised **no** guilt stage claims in his first state postconviction motion, and it is noteworthy that Hitchcock did not receive **sentence** stage relief until April of 1987. What is even more striking is that Hitchcock made absolutely **no** attempt to raise any guilt stage claims until the filing of the motion that is the subject of this appeal. Despite the hyperbole and accusations contained in Hitchcock's brief, the fact remains that he made no effort to litigate the guilt stage claims until 20 years after the conviction was final. Those claims should have been, but were not, raised in the first postconviction motion - - because they

were not so raised, they are time-barred under settled Florida law. The trial court properly refused to entertain any procedurally barred claims, and the order denying relief should be affirmed in all respects.

To the extent that Hitchcock asserts that *Ring v. Arizona*, 536 U.S. 584 (2002), provides an avenue by which the 1977 conviction can be challenged, that assertion makes no sense -- *Ring* has nothing whatsoever to do with the **guilt** stage of a capital trial. Likewise, Hitchcock's "laches" argument has no legal basis. Hitchcock, who has at all relevant times been represented by counsel, did not raise any challenge to his conviction in his first postconviction motion, and is time barred from raising such challenges for the first time in a pleading filed more than 20 years later.

Finally, to the extent that Hitchcock includes claims of "newly discovered evidence" within this claim, his argument is based upon the false premise that the time limit[21] for the presentation of "new evidence" claims does not begin to run until the defendant has "already completed the State postconviction process." *Initial Brief*, at 14. That is not the law in this State. Rule 3.851(d)(2), *Fla. R. Crim. P.* Moreover,

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[21]Contrary to Hitchcock's claim, the time limitation period is **one** year, not two. Rule 3.851(d)(2), *Fla. R. Crim. P.*

the "new evidence" claim was litigated and decided adversely to Hitchcock in this Court's 2000 decision in this case. *Hitchcock v. State*, 755 So. 2d 638, 643-5 (Fla. 2000). The postconviction court properly found these claims untimely and meritless, and denied relief. (R1127-28). That disposition should not be disturbed.

II. THE "FAILURE TO OBJECT" INEFFECTIVENESS CLAIM.

On pages 16-20 of his *Initial Brief,* Hitchcock argues that penalty phase counsel was ineffective for "failing to object to the admission of testimony from the victim's sister" about threats made to the victim and her sister by Hitchcock. The postconviction trial court denied relief, finding that there was no legal basis for objection to this testimony, and that Hitchcock had failed to establish either deficient performance or prejudice, as required by *Strickland v. Washington*, 466 U.S. 668 (1984). Whether counsel was ineffective under *Strickland* is reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel claims); *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*, 222 F.3d 1298, 1302

(11th Cir. 2000) (holding that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland,* 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 postconviction trial court's denial of relief is in accord with settled law, and should be affirmed in all respects.

In its order denying Hitchcock's motion, the postconviction trial court stated:

> However, Ms. Driggers's testimony **was** admissible to establish the existence of two aggravating factors. The first factor was whether Defendant committed the capital felony while he was engaged in the commission of a sexual battery. Sexual battery may occur when the offender coerces the victim to submit by threatening to retaliate against the victim or any other person; *see* § 794.011(4)(c), *Florida Statutes*. This Court finds no requirement that the threats had to have been made on the exact date of the crime in order to be admissible. The second factor was whether the murder was especially heinous, atrocious, or cruel (HAC). A murder may warrant this aggravator when the victim experienced fear, emotional strain, and/or terror during the time leading up to the murder. *See, e.g., Poole v. State*, 704 So. 2d 1375 (Fla. 1998) (credible threat to kill victim, which occurred two days prior to the actual murder, gave victim ample time to ponder her fate). Here, the threats were made to both girls, and Ms. Driggers could hardly testify about her sister's fear without acknowledging her own.

> There is no reasonable probability that the outcome of the proceedings would have been different if Ms. Driggers had testified only as to the threats made on July 31, 1976, and only to her sister. This Court disagrees that her testimony regarding her own fear was irrelevant, inadmissible, or unduly prejudicial. Based on the foregoing, this Court concludes that counsel had no legal basis to object to the testimony of Debra Lynn Driggers, and the failure to do so was neither deficient nor prejudicial. Therefore, relief is denied as to Claim I.

(R1120-21) [emphasis in original]. That disposition is correct.

Despite the hyperbole of Hitchcock's brief, the fact remains that the complained-of testimony was relevant to the "during the commission of a sexual battery" aggravator as well as to the heinousness aggravator. There was no legal basis for objection, and, because that is so, Hitchcock can prove neither prong of *Strickland*. Hitchcock is not entitled to any relief.

III. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY FOUND THE "INEFFECTIVE ASSISTANCE FOR FAILURE TO PREPARE FOR THE GUILT PHASE" CLAIM TO BE PROCEDURALLY BARRED.

On pages 21-40 of his brief, Hitchcock argues that guilt phase counsel, at the 1977 trial, was ineffective in investigation and preparation of the guilt phase. The collateral proceeding trial court found this claim to be procedurally barred, and that finding should not be disturbed.

In denying relief on this claim, the collateral proceeding

trial court stated:

> This claim relates primarily to the 1977 guilt phase, and it is procedurally barred for the reasons set forth in Claim II, above. Defendant briefly alleges that the prejudice extended to the resentencing because the State used the facts established during the trial phase and the "tainted" conviction which would not have occurred if he had had effective counsel at the time. However, he fails to explain why this is so. Therefore, relief is denied as to Claim III.

(R1122).

To the extent that further discussion of this claim is necessary, the collateral proceeding trial court's denial of relief on procedural bar grounds follows well-settled Florida law. *Sireci v. State*, *supra*; *Downs v.* State, *supra*; *Zeigler v. State*, *supra*. *See,* Claim I, above. The circuit court should be affirmed in all respects.

IV. THE "INEFFECTIVENESS AT RESENTENCING" CLAIM.

On pages 40-60 of his brief, Hitchcock argues that resentencing counsel were ineffective at the 1996 sentencing proceedings. This claim appears to be a combination of Claims V and VI from Hitchcock's motion for postconviction relief. This Court's review of ineffective assistance of counsel claims is *de novo*, *Stephens, supra.* However, the underlying factual findings by the trial court are reviewed for clear error. *Byrd, supra.* See pages 24-25, above.

In denying relief on the penalty phase ineffectiveness claims, the collateral proceeding trial court stated:

> Defendant alleges counsel never recalled Dr. Toomer to explain the significance of the Minnesota Multiphasic Personality Inventory (MMPI) narrative report which the State admitted into evidence, thereby denying him the right to have the jury consider mitigation evidence. He acknowledges that counsel told the trial court that Dr. Toomer would not be recalled because the State was entering only certain pages into evidence, but he argues these pages contained the most damaging, prejudicial portrayals of him (Defendant). He further argues that because of counsel's failure to recall Dr. Toomer, the State was able to argue that the doctor was withholding information. He contends that Dr. Toomer could have explained the nature of the MMPI and how the narrative is used to form a diagnostic impression of the subject, thereby dismissing the prejudicial effect of said narrative.
>
> During the April 2003 evidentiary hearing, CCRC called trial counsel Kelly Sims, who testified that he had little recollection about the defense strategy regarding Dr. Toomer. he could say only that he did not remember being very impressed with the doctor's presence or delivery. he had no notes relating to discussions about which areas of mental mitigation would be pursued at the 1996 resentencing proceeding.
>
> In 1996, Dr. Toomer testified as an expert in the area of forensic psychology after conducting a clinical interview which included psychological testing designed to assess intellectual functioning, personality functioning, and whether or not and to what degree there might be disturbance in thought processes or brain damage. He also spoke with family members and others with knowledge of Defendant's history. The goal of his testing was to assess the likelihood of organic or neuropsychological impairment. (1996 hearing, pages 171-174). At the 2003 evidentiary hearing, Dr. Toomer testified that his testing data was consistent with a borderline

personality disorder, which had also been his diagnosis in 1996. he did not recall whether he had ever recommended that Defendant be tested for organicity (brain damage).

The record of the 1996 resentencing hearing indicates that trial counsel made a tactical decision not to recall Dr. Toomer. (1996 hearing, pages 271-274). While Defendant's allegations in the instant motion were sufficient to warrant an evidentiary hearing, he has failed to meet the burden of proof required at an evidentiary hearing. That it, he has not introduced evidence sufficient to overcome the presumption that counsel's decision constituted sound trial strategy. This Court finds that there is no reasonable probability that the outcome of the proceedings would have been different if Dr. Toomer had been recalled to explain the MMPI narrative. Therefore, relief is denied as to Claim IV.

Claim V

Defendant alleges counsel never had him evaluated for neuropsychological impairment although "there exists a possibility" that he suffered from it; therefore, the defense expert failed to conduct the appropriate tests for developmental and neuropsychological impairment, thereby denying him the right to develop factors in mitigation.

A claim that there is a "possibility" of impairment constitutes mere speculation which is insufficient to state a valid basis for relief. Furthermore, this claim is refuted by the record. Dr. Jethro Toomer, a clinical and forensic psychologist, testified during the 1996 penalty phase that he has conducted tests to assess the likelihood of organic impairment or neuropsychological impairment. This Court disagrees that Dr. Toomer's presentation was inadequate, or that evidence presented at the evidentiary hearing establishes that counsel's performance was deficient or prejudicial in this regard.

> Defendant has obtained new experts, such as Dr. Mosman, who have testified that his test results point to brain damage. However, even Dr. Mosman acknowledged that Dr. Toomer's testing was appropriate for a psychological evaluation. Furthermore, the State has also obtained two new experts to counter claims of brain damage. Dr. McClaren, the State's expert, has testified that the Defendant's behavior since the murder indicates that he has good coping and control of himself, which is inconsistent with the impulsiveness which arises from brain damage. He acknowledges that the Defendant might have some level of brain damage which contributed to an act of impulsive violence, but he opines that other factors played a much larger part in the murder.
>
> This Court finds that the evidence and testimony presented at the evidentiary hearing are sufficient to support the conclusion that while the Defendant may have suffered (and may continue to suffer) from a borderline personality disorder, he has the ability to appreciate the criminality of his conduct. he did not which to be accused of sexual battery by the victim, because that could result in returning to prison, where he had already served time. This Court further finds that there is no reasonable probability that the outcome of the proceedings would have been different if counsel had arranged for additional testing for neuropsychological impairment. Therefore, relief is denied as to Claim V.

(R1123-1125).

The factual findings of the circuit court are supported by the record, and the legal conclusion that Hitchcock demonstrated neither deficient performance nor prejudice is legally correct.

This Court has clearly stated the legal standard under which a claim of ineffective assistance of counsel is evaluated:

> In order to successfully prove an ineffective assistance of counsel claim a defendant must establish

the two prongs defined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is 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 694, 104 S.Ct. 2052.

According to *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* court also explained how counsel's actions should be evaluated:

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied

> by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Gudinas, supra. The Eleventh Circuit has described the *Strickland* analysis in the following terms:

> . . . our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny.
>
> Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994). That result is no accident but instead flows from deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume

> strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have explained:
>
> > The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.
>
> *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

Waters v. Thomas, 46 F.2d 1506, 1511-12 (11th Cir. 1995).

Despite the assertions contained in Hitchcock's brief, the standard by which ineffectiveness claims are judged is one of **reasonableness under prevailing professional norms.** *Strickland, supra.* The standard is not what the best lawyer would have done, nor is it what a **good** lawyer would have done -- instead, the issue is whether **a** lawyer could reasonably handled the case as defense counsel did. *Waters, supra*; *White, supra*. Given that Hitchcock's one expert acknowledged that the mental status evaluation at the time of trial was adequate, and the testimony from the State's expert witness was that Hitchcock's behavior is **inconsistent** with brain damage, Hitchcock's claim fails because

it has no factual basis. Under those circumstances, Hitchcock cannot make out the two-part deficient performance/resulting prejudice standard required by *Strickland.* The circuit court properly denied relief.

V. THE "DESTRUCTION OF EVIDENCE" CLAIM.

On pages 60-61 of his brief, Hitchcock argues that the collateral proceeding trial court erroneously found his destruction of evidence/DNA claim procedurally barred. To the extent that Hitchcock's claim is that he should be allowed to conduct DNA testing under *Florida Rule of Criminal Procedure* 3.853, this Court has already held that Hitchcock's motion for testing was properly denied. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004). Hitchcock is not entitled to relitigate final orders of this Court.

To the extent that Hitchcock's claim is that evidence has been destroyed, Hitchcock has not demonstrated bad faith as he is required to do under controlling law. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). Hitchcock presented **no** evidence tending to demonstrate bad faith, and, because that is so, he has failed to carry his burden of proof. In any event, the "bad faith" component was not raised in the circuit court, and that court cannot be placed in

error based upon a claim that was never before it.

VI. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY DENIED RELIEF ON THE *CALDWELL* CLAIM ON THE ALTERNATIVE GROUNDS OF PROCEDURAL BAR AND LACK OF MERIT.

On pages 61-65 of his brief, Hitchcock argues that the penalty phase jury instructions violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The collateral proceeding trial court denied relief on this claim on the alternative grounds of procedural bar and no merit. Specifically, the circuit court denied relief on this claim because it could have been but was not raised on direct appeal. (R1127). That ruling is an independently adequate basis for the denial of relief on this claim. *Teffeteller v. Dugger,* 734 So. 2d 1009 (Fla. 1999); *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989). The *Caldwell* claim is procedurally barred under long-settled State law, and the denial of relief should be affirmed on that basis.

To the extent that further discussion of this procedurally barred claim is necessary, this Court has repeatedly held that Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*. *Thomas v. State*, 838 So. 2d 535 (Fla. 2003) (rejecting ineffectiveness claim)*; Floyd v. State*, 850 So. 2d 383 (Fla. 2002); *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997); *Archer* v. State, 673 So.

2d 17, 21 (Fla. 1996); *Sochor v. State*, 619 So. 2d 285, 291-92 (Fla. 1993); *Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989). In addition to being procedurally barred, this claim lacks merit.

To the extent that Hitchcock claims that *Ring v. Arizona* and *Apprendi v. New Jersey* require that relief be granted under *Caldwell*, this Court has specifically rejected that claim:

> . . . Robinson claims that Florida's standard jury instructions in capital cases do not comply with *Caldwell*, in light of the *Ring* opinion, because *Ring* requires the jury to play a vital role in sentencing and the jury instructions currently diminish that role. *Caldwell* and *Ring* involve independent concerns. *Ring's* focus is on jury findings that render a defendant eligible for the death penalty, while *Caldwell's* focus as applied in this state is on the jury's role in the decision to recommend a sentence for death-eligible defendants. Therefore, *Ring* does not require that we reconsider the *Caldwell* issue raised in this case.

Robinson v. State, 865 So. 2d 1259 (Fla. 2004). Hitchcock's claim has no legal basis, and the Circuit court properly denied relief.

VII. THE CIRCUIT COURT PROPERLY DENIED RELIEF ON THE "NEW EVIDENCE" CLAIM.

On pages 65-75 of his *Initial Brief*, Hitchcock argues that the collateral proceeding trial court erroneously denied relief

on his “new evidence” claim. What Hitchcock ignores is that the “new evidence” claim was raised and rejected on direct appeal, and cannot be relitigated at this time. The circuit court properly denied relief.

In denying relief on this claim, the collateral proceeding trial court stated:

> However, on October 23, 1996, he filed a motion for an evidentiary hearing in which he claimed that Richard [Hitchcock] told their sister, Wandalene Green, that he killed the victim. This motion was denied, and the matter was raised and rejected in his subsequent appeal because it related only to the guilt phase of the trial. *Hitchcock v. State*, 755 So. 2d 638, 645 n. 1 (Fla. 2000). The additional witnesses named in the instant motion are offered to prove the same point, which was found to lack merit. **Furthermore, they are not newly discovered witnesses. They could have been discovered long before the instant motion, as Defendant acknowledges that Richard began implicating himself when he, Defendant, was sentenced to death.**

(R1128). (emphasis added). The disposition on time-bar grounds is correct, follows settled Florida law, and is supported by competent substantial evidence. It should not be disturbed.

To the extent that further discussion of this claim is necessary, in the portion of the decision referred to by the Circuit Court, this Court held:

> In his fifth claim, Hitchcock claims that it was error for a substitute judge to rule on Hitchcock's motion for a new penalty phase. This claim relates to the appointment of Judge Conrad to dispose of Hitchcock's motion for correction of sentence pursuant to Florida Rule of Criminal Procedure 3.800, seeking an

evidentiary hearing on alleged newly discovered evidence that Hitchcock's late brother had confessed to the instant murder before he died. After ordering and conducting an evidentiary hearing, Judge Conrad found no merit in Hitchcock's newly discovered evidence claim and denied his rule 3.800 motion. In pertinent part, Judge Conrad's order states:

> 9. In the defendant's Motion for Evidentiary Hearing on Newly Discovered Evidence, the defendant's counsel claims to have recently discovered that Richard Hitchcock confessed to Wandalene Green that he killed the victim in this case prior to Richard's death in 1994. The motion notes that the defendant has always contended that his brother Richard killed the victim and that the defendant so testified at his original trial and at his 1988 penalty phase. Finally, the motion states that "[t]his evidence is not proffered as lingering doubt about guilt; it shows actual innocence of the killing, as Mr. Hitchcock has always contended and has always sought to prove."
>
> 10. Since the alleged newly discovered evidence is related to the issue of the actual guilt or innocence of the defendant, this Court finds that after the scheduled rehearing it will be as qualified to rule on the validity of this claim as any other judge except the judge who presided over the case's original guilt phase. That judge is no longer sitting on the circuit court bench. Rehearing the proceedings related to the defendant's claim will allow this Court to itself evaluate the testimony and evidence presented upon it. A new penalty proceeding is unnecessary to this Court's decision as to whether the alleged newly discovered evidence qualifies as newly discovered and whether it would probably produce an acquittal on retrial. *Jones v. State,* 591 So. 2d 911 (Fla. 1991).

> We find no basis to conclude that Judge Conrad was not qualified to hear and rule on this motion. We also find no merit as to Hitchcock's claim that he was prejudiced by the original trial judge's removal from the case, as there is no showing of how any matters resulting from that removal prejudiced Hitchcock.
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> . . .
>
> Hitchcock's fifteenth and sixteenth claims are related to claim five, in which he disputed the role of Judge Conrad, the successor judge who held an evidentiary hearing and denied Hitchcock's motion for resentencing. Here, Hitchcock claims that Judge Conrad erred in excluding corroborative evidence. As in the fifth claim, this evidence was related only to the guilt phase of Hitchcock's trial, which is not the subject of this appeal of his third resentencing. **We reject these claims as being without merit.**

Hitchcock v. State, 755 So. 2d at 644-45. (emphasis added). To the extent that Hitchcock's claim on direct appeal was directed to the merits of the "new evidence" claim, this Court has denied relief on the merits, and that result is *res judicata*. To the extent that Hitchcock's direct appeal claims focused on various procedural aspects of the "new evidence" claim rather than on its relative merit, he is procedurally barred from litigating the merits of that claim at this time because it could have been but was not litigated on direct appeal.[22]

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[22]Assuming, *arguendo*, that the "new evidence" claim was presented in a procedurally correct way, Hitchcock is not entitled to relitigate a claim that this Court has already decided. This Court does not have one set of rules for capital defendants, and another set for everyone else. *See, Jackson v. Crosby*, 375 F.3d 1291, 1300 (11th Cir. 2004) (Carnes, J.,

Finally, as the Circuit Court found, these witnesses "could have been discovered long before the instant motion." (R1128). That finding is supported by competent substantial evidence, and should not be disturbed. This claim is time barred in addition to being procedurally barred because it either was, or could have been. litigated on direct appeal.

VIII. THE "*BRADY*" CLAIM IS UNTIMELY, AND IS PROCEDURALLY BARRED FOR THAT REASON.

On pages 75-87 of his brief, Hitchcock argues that the State's "failure" to disclose the alleged "deficiencies of [FDLE] hair analyst Diana Bass" is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The collateral proceeding trial court denied relief on this claim, finding that it was alternatively procedurally barred, and without merit. That finding is supported by competent substantial evidence, and should not be disturbed.

In denying relief on this claim, the trial court stated:

> Defendant alleges the State violated *Brady v. Maryland* when it used hair comparisons performed by FDLE analyst Diana Bass to obtain the conviction upon which his 1996 death sentence is based. He further alleges counsel failed to object to Ms. Bass's testimony

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concurring.). To the extent that Hitchcock did not directly challenge the merits of the prior denial of relief, he is procedurally barred from litigating that claim at this time. That claim should have been raised, if at all, on direct appeal.

> because she was not an expert and could not offer an opinion on hair analysis. He further alleges her supervisor, Steven Platt, author of a negative evaluation of Ms. Bass's work performance, read her testimony into evidence at the 1988 resentencing proceeding.
>
> Defendant argues the revelations of Ms. Bass and the Sanford crime lab constitute newly discovered evidence. However, he fails to establish that this is so. He could have obtained her unfavorable job performance review prior to the filing of his original postconviction motion. And, while he argues that Ms. Bass and the Sanford crime lab were "further discredited" in *Peek v. State*, 488 So. 2d 52, 53 (Fla. 1986), that opinion could hardly be described as "newly discovered" more than 15 years later.
>
> Defendant does not allege or establish that the testimony of Diana Bass played any part in his 1996 resentencing, except that it contributed to his 1977 conviction. For the reasons set forth in Ground II [Claim I of this brief], all such challenges to his conviction are procedurally barred. Moreover, any claims relating to the 1988 resentencing are moot because the results of that proceeding were reversed and remanded for a new penalty phase. For the foregoing reasons, relief is denied as to Claim.

(R1128-29). Those findings are supported by competent substantial evidence, are in accord with settled Florida law, and should not be disturbed.

To the extent that this claim deserves further discussion, this Court rejected the *Brady* component of this claim in 1988. In *Preston,* this Court held*:*

> Appellant also asserts that the state committed a *Brady* violation by failing to disclose to the defense an unfavorable personnel evaluation of a hair analysis expert who testified at appellant's trial. In

rejecting this contention, the trial court stated:

> The court finds as a matter of fact that Diana Bass' testimony was not misleading or based upon improper technique. The record at best shows only that Diana Bass was the subject of a critical employee evaluation and was being retrained. Robert Kopec, the author of the critical evaluation, indicated that he had no knowledge of her work on this case. James Halligan, the Defendant's expert, could not disagree with Diana Bass' conclusion, could not state that her conclusion was misleading, and could not state that she had not used proper techniques.
>
> We find no error in this conclusion. We do not believe that the state's responsibility under *Brady* extends to 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). Hitchcock's claim, like the one in *Preston*, simply is not a *Brady* claim at all. And, it stands reason on its head to suggest, as Hitchcock does, that a matter that is the subject of a published opinion of this Court can ever be considered error under *Brady*. This claim has no legal basis, and does not support relief.[23]

IX. THE TRIAL COURT PROPERLY DENIED RELIEF ON HITCHCOCK'S CLAIM CONCERNING THE "DURING THE COURSE OF AN ENUMERATED FELONY"

[23]Likewise, Hitchcock's claim that Ms. Bass "was not an expert" fails. She clearly has training and experience beyond that of a layman, and meets the definition of an expert under the *Evidence Code*. (R259-266).

AGGRAVATING CIRCUMSTANCE.

On pages 87-91 of his brief, Hitchcock argues that trial counsel was ineffective for not requesting a "jury instruction detailing the elements of sexual battery and at least argu[ing] to the jury that had a sexual battery [taken] place, that act was complete by the time the murder occurred." *Initial Brief*, at 90-91. Because this is a claim of ineffectiveness of counsel, this Court's review is *de novo* as to the legal conclusions of the trial court, and is subject only to clear error review with respect to the underlying factual determinations. For the following reasons, this claim was correctly decided, and is not a basis for relief.

In denying relief on this claim, the collateral proceeding trial court held:

> Defendant alleges that at the 1996, resentencing, counsel failed to object to the Court's jury instruction and failed to request an instruction on the elements of sexual battery so the jury could properly consider whether the murder occurred after a sexual battery was complete. He argues he was never convicted of a sexual battery (or "rape" as the State referred to it during closing arguments) but the trial court found as an aggravator that the murder took place during the commission of a sexual battery, even though the jury never returned a specific to this effect. he argues that in addition to requesting an instruction, counsel should have argued the State did not prove beyond a reasonable doubt that the murder occurred during the commission of a sexual battery. His point is that the sexual offense was complete prior to the victim's death.

> Even if true, Defendant's argument lacks merit. He has consistently admitted having sex with the victim, and the evidence - - even the testimony of Dr. Ruiz, set forth, in the instant Motion - - indicates that the sexual activity occurred within a very few hours of her death. The testimony regarding the victim's injuries indicate that the sexual activity was not consensual. This points to a single or ongoing criminal episode of sexual battery and murder, which is sufficient to establish this aggravator. There is no requirement that the murder must occur at the exact time as the underlying felony. Thus, the trial court was justified in concluding that, even though Defendant was neither charged with nor convicted of a sexual battery, the murder occurred during the commission of this criminal offense. Based on the foregoing, counsel had no basis to object to the instruction given on the aggravator that the murder was committed during the commission of a felony or to request a special verdict instruction which would have required the jury to determine whether the sexual battery actually occurred. Therefore, relief is denied as to claim XI.

(R1129-30). Those findings correctly state Florida law, and correctly conclude that trial counsel had no basis for objecting on the grounds advocated by Hitchcock.

To the extent that this claim deserves further discussion, Hitchcock's claim is that "[t]here was no evidence that the homicide occurred at the time the actual penetration was taking place." *Initial Brief*, at 88. There is no such requirement in Florida law. In fact, given that the murder during an enumerated felony is applicable to an **attempted** sexual battery, and given that a **conviction** for sexual battery is not a condition precedent to the application of this aggravator, Hitchcock's

argument is frivolous. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995) (attempted sexual battery); *Bogle v. State*, 655 So. 2d 1103 (Fla. 1995) (conviction for sexual battery not prerequisite). *See also, e.g., Gudinas v. State*, 693 So. 2d 953, 965-66 (Fla. 1997); *Robinson v. State,* 574 So. 2d 108, 111-12 (Fla. 1991). This claim is not a basis for relief.

X. THE "ABSENCE FROM BENCH CONFERENCES" CLAIM.

On pages 91-95 of his brief, Hitchcock argues that he is entitled to relief because he was not present at the bench conference when peremptory challenges were exercised, and that trial counsel was ineffective for not ensuring his appearance. The collateral proceeding trial court found this claim procedurally barred because it relates solely to the 1977 guilt stage proceedings. See Claim I, above. Alternatively and secondarily, while Hitchcock does not acknowledge it, this issue is not available to him, anyway. This Court has made it clear that *Coney* (which deals with the defendant's right to be "present" during jury selection) is not retroactively applicable to final judgments:

> The record reflects that Boyett was present in the courtroom, but not at the bench, when peremptory challenges were exercised. Boyett argues that our decision in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), *cert. denied*, 516 U.S. 921, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), should apply to him insofar as it

requires that a defendant be present at the actual site where jury challenges are exercised. Although in that case we explicitly stated that our ruling was to be prospective only, Boyett argues that he should be entitled to the same relief because his case was not final when the opinion issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should dictate the same result in his case. We reject both of these arguments.

In *Coney*, we interpreted the definition of "presence" as used in *Florida Rule of Criminal Procedure* 3.180. We expanded our analysis from *Francis v. State*, 413 So. 2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In Coney, we held for the first time that a defendant has a right under rule 3.180 to be physically present at the immediate 310 site where challenges are exercised. See Coney, 653 So.2d at 1013. Thus, we find Boyett's argument on this issue to be without merit. [footnote omitted]

Boyett's second *Coney* argument--that the rule of that case should apply because Boyett's case was non-final when the decision issued -- is also without merit. In *Coney*, we expressly held that "our ruling today clarifying this issue is prospective only." *Coney*, 653 So. 2d at 1013. Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. *See Armstrong v. State*, 642 So. 2d 730, at 737-38 (Fla. 1994), *cert. denied*, 514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995). Because Boyett had already been tried when *Coney* issued, *Coney* does not apply.

We recognize that in *Coney* we applied the new definition of "presence" to the defendant in that case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. *Coney*, 653 So. 2d at 1013. It was incorrect

> for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. Although the result in *Coney* would have been the same whether we found no error or harmless error, we recede from *Coney* to the extent that we held the new definition of "presence" applicable to Coney himself.

Boyett v. State, 688 So. 2d 308 (Fla. 1996). There is no basis for relief, and there is no basis for a claim of ineffectiveness of counsel, either. The Circuit Court should be affirmed in all respects.

XI. THE *RING V. ARIZONA* CLAIM IS PROCEDURALLY BARRED AND, ALTERNATIVELY, MERITLESS.

On pages 95-96 of his brief, Hitchcock argues that he is entitled to relief based upon *Apprendi v. New* Jersey, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). This claim is procedurally barred, as the collateral proceeding trial court found, though not for the precise reason stated in the Court's order. Hitchcock is not entitled to any relief.

In the order denying relief, the Circuit Court stated, in an apparent scrivener's error, that this claim is barred because it was raised on direct appeal. (R1130). However, a review of the State's closing argument and this Court's 2000 decision in this case shows that the *Apprendi/Ring* claim is actually procedurally barred because it could have been raised on direct

appeal, **but was not.** *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000); (R943-48). This claim is procedurally barred, and relief should be denied on that basis.

Alternatively and secondarily, this claim lacks merit, as this Court has repeatedly held. *See, Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002)*; King v. Moore,* 831 So. 2d 143 (Fla. 2002); *Peterka v. State/Crosby,* 2004 LEXIS 1554 (Fla. Sept. 30, 2004); *Hernandez-Alberto v. State*, 29 Fla. L. Weekly S 521, 525 (Fla. Sept. 23, 2004); *Pietri v. State*, 29 Fla. L. Weekly S440 (Fla. Aug. 26, 2004); *Dillbeck v. State*, 29 Fla. L. Weekly S437 (Fla. Aug. 26, 2004); *Sochor v. State*, 29 Fla. L. Weekly S363 (Fla. July 8, 2004); *Hutchinson v. State*, 29 Fla. L. Weekly S337 (Fla. July 8, 2004); *Kimbrough v. State*, 29 Fla. L. Weekly S323 (Fla. July 1, 2004); *Hamilton v. State*, 875 So. 2d 586 (Fla. 2004); *Henyard v. State*, 29 Fla. L. Weekly S271 (Fla. May 27, 2004); *Patton v. State*, 878 So. 2d 368 (Fla. 2004); *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004); *Stewart v. Crosby*, 880 So. 2d 529 (Fla. 2004); *Douglas v. State*, 878 So. 2d 1246, 1263-64 (Fla. 2004); *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004)*; Howell v. State*, 877 So. 2d 697, 705 (Fla. 2004); *Power v. State*, 29 Fla. L. Weekly S207 (Fla. May 6, 2004); *Windom v. State*, 29 Fla. L. Weekly S191 (Fla. May 6, 2004); *Globe v. State*, 877 So. 2d

663, 674 (Fla. 2004); *Reed v. State*, 875 So. 2d 415, 438-39 (Fla. 2004); *Robinson v. State*, 865 So. 2d 1259, 1265-66 (Fla. 2004).

CONCLUSION

Based upon the foregoing, the State of Florida submits that the Circuit Court's denial of Hitchcock's Rule 3.851 motion is supported by competent substantial evidence, and should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Eric Pinkard, Esquire, David Gemmer, Esquire, and James L. Driscoll, Esquire**, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this ___ day of October, 2004.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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