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

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

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

DIRECT APPEAL

ERIC PINKARD
ASSISTANT CCRC-MIDDLE
FLORIDA BAR NO: 651443
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33609-1004
COUNSEL FOR APPELLANT
(813) 740-3544

James L. Driscoll, Jr.
Florida Bar No. 0078840
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33619-1136
(813) 740-3544

David R. Gemmer
Florida Bar No. 370541
Assistant CCC

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.

The postconviction record on appeal 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 R. 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.

James Hitchcock, the Appellant now before this Court is referred to as such or by his proper name. To distinguish between Mr. Hitchcock and his brother, Richard Hitchcock is referred to as Richard or Richard Hitchcock and not Mr. Hitchcock. The attorneys who represented Mr. Hitchcock at his last penalty phase and sentencing were Patricia Cashman and Kelly Simms. They are sometimes referred to by name, sometimes as "defense" or "trial counsel" or resentencing counsel. Collateral and appellate counsel are referred to as such. The phrase "evidentiary hearing" refers to the evidentiary hearing conducted on Mr. Hitchcock 's motion for postconviction relief.

Mr. Hitchcock's evidentiary hearing were presided over by the Honorable Reginald Whitehead. The use of lower court refers to Judge Whitehead unless one of the prior proceedings are at issue.

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.

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STATEMENT OF THE CASE

This is an appeal from the denial of James Hitchcock's Second Amended Motion to Vacate Judgment of Conviction and Sentence by the Circuit Court, in and for Orange County, Florida.

In 1976 Mr. Hitchcock was arrested and indicted for first degree murder of Cynthia Driggers. Mr. Hitchcock was not charged with any other offense in the indictment. Mr. Hitchcock was tried, convicted and sentenced to death in 1977. *Hitchcock v. State*, 413 So.2d 741 (Fla.1982); *cert denied*, 459 U.S. 960 (1982).

At the 1977 trial Mr. Hitchcock recanted a prior false confession and told the jury the true facts and circumstances concerning the victim's death. On the night of July 30 th, 1976, at approximately 10:30 pm, Mr. Hitchcock went to a place called the Pines with some friends. (1977 VOL. V R. 757). Throughout the night, James Hitchcock drank beer and smoked marijuana. (1977 R. VOL. V R. 760-761). When he returned home the doors to the house were locked. (1977 VOL. V R. 760). When no one answered the front door Mr. Hitchcock went to the separate door that provided entry into the victim's bedroom. Cindy was Richard Hitchcock's step-daughter, and later on, Richard's victim. Cindy opened the door for Mr. Hitchcock. Mr. Hitchcock had consensual sex with her. (1977 VOL. V R. 762).

James Hitchcock approximated the time the consensual sexual relations were completed at around 3:00 am. As James Hitchcock was attempting to put his pants on, Richard Hitchcock entered the room. It was at this point that the murder by the hands of Richard Hitchcock began. (1977 VOL. V R. 764). As James Hitchcock struggled with his pants, Richard struggled with Cindy. (1977 VOL. V R. 764). Richard grabbed Cindy by the arm and pulled her through the door. (1977 VOL. V R. 764-65). When James Hitchcock was finally able to get his pants on, still scared from his initial encounter with Richard, James Hitchcock went outside the house. (1977 VOL. V R. 765). It was there that he saw the completion of the murder committed by Richard Hitchcock. James Hitchcock tried to break Richard's grip around the young girl's throat. (1977 VOL. V R. 765). When he could not break Richard's murderous grip he kicked Richard, but it was too late; Cindy was dead at the hands of Richard. (1977 VOL. V R. 765).

James Hitchcock picked Cindy up and checked for signs of life. (1977 VOL. V R. 765-66). There were none. (1977 VOL. V R. 766). James Hitchcock approached his brother and told Richard that Richard had killed Cindy. Richard claimed that he did not mean to kill her and kept asking James Hitchcock what he was going to do. (1977 VOL. V R. 766). James told Richard to go into the house and not to be the first to awake the next

morning. (1977 VOL. V R. 765).

Although James Hitchcock does not seek to justify this conduct, James Hitchcock, out of concern for his brother, took the body of Cindy and put it in some bushes a short distance from the house. (1977 VOL. V R.766-767). He then went in the house to make it look as if someone had gained entry through a screened window. (1977 VOL. V R. 767). Mr. Hitchcock took a shower and later he fell asleep.

When morning came, James Hitchcock did not want to awaken and confront the reality of the situation. James Hitchcock left his bed and after Richard apprized him of the situation, Richard and James Hitchcock set off on the same path that Richard had taken some family members on a ruse search. (1977 VOL. V R. 768). Richard asked Mr. Hitchcock what was Mr. Hitchcock going to do. (1977 VOL. V R. 768). Mr. Hitchcock told Richard that he "tried to cover it up some" but "if anything comes up it will be on [him]." (1977 VOL. V R. 768).

It did fall on James Hitchcock, as he was later prosecuted and convicted for the crime Richard committed. (1977 VOL. V R. 770). Mr. Hitchcock went to the Winter Haven Police Station and asked them if he was wanted for questioning. James Hitchcock was later questioned by detectives but denied involvement. (1977 VOL. V R. 771).

A few days after being taken into custody, James Hitchcock

admitted to Richard's crime. (1977 VOL. V R. 771). At trial, James Hitchcock explained that he was kept in isolation for about four days. (1977 VOL. V R. 772). Alone, away from family and friends and legal counsel, James Hitchcock confronted the harsh realities of what had become of his life. (1977 VOL. V R. 772). Just 19 years of age and suspected of his brother's crime, James Hitchcock was depressed and felt that he was through. He wanted to die so badly that he was willing to lie to the police and lie to the jury, to accept responsibility for the crime of his brother. (1977 VOL. V R. 772).

During the pendency of a death warrant the circuit court denied postconviction relief and this Court affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983). Mr. Hitchcock sought relief in federal court which, following appeals to the Eleventh Circuit Court of Appeals, culminated with the United States Supreme Court granting relief in *Hitchcock v. Dugger*, 481 U.S.1168 (1987).

After a second penalty phase, Mr. Hitchcock was again sentenced to death. This Court affirmed the lower court. *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). Certiorari was denied by the United States Supreme Court, *Hitchcock v. Florida*, 502 U.S. 912 (1991), which later granted rehearing and granted relief, *Hitchcock v. Florida*, 505 U.S. 1215 (1992).

After a third penalty phase, Mr. Hitchcock was again sentenced to death. This Court, however, reversed the trial court and remanded the case for a new penalty phase. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993).

After a fourth penalty phase, Mr. Hitchcock was again sentenced to death and this Court affirmed. *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000) *cert denied Hitchcock v. Florida*, 121 S.Ct 633, 148 L.Ed. 542 (2000). It was only at this point that Mr. Hitchcock was in a postconviction posture. However, before the appeal was final prior counsel for Mr. Hitchcock filed a "postconviction" motion on which a hearing was held after a successor judge limited Mr. Hitchcock's presentation of evidence.

Mr. Hitchcock filed his Second Amended Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend on November 30, 2001.[1] This was after the lower court had dismissed Mr. Hitchcock's initial and First Amended motions for postconviction relief. On December 13, 2002, the lower court granted Mr. Hitchcock's Motion to Amend Section D and his Motion to Amend Section E.

Mr. Hitchcock was granted a hearing on all claims for which

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[1]On December 19, 2001, Mr. Hitchcock filed a Motion for Post Conviction DNA Testing. The lower court denied the motion and this Court affirmed following oral argument. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004)

he requested a hearing. During the status conference the State agreed that Mr. Hitchcock was entitled to a hearing. The evidentiary hearing began on April 7, 2003 and continued for further testimony on May 8, 2003. The State and Mr. Hitchcock filed written closing arguments. The State also filed a letter to the State Attorney's Office. *See* (VOL. XII PCR. 1099-1116). The lower court entered a written order on October 27, 2003 denying each claim of the Second Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend(VOL. XII PCR. 1131).

This appeal follows from the lower court's denial of all postconviction claims.

SUMMARY OF ARGUMENTS

Mr. Hitchcock has been on death row for over 27 years for a crime he did not commit. This brief is filed to remedy this injustice.

Mr. Hitchcock sought relief through this State's postconviction process. Once again, Mr. Hitchcock was denied a remedy to his continued deprivation of liberty. The lower court managed to do this through the use of the procedural bar.

Argument I addresses the wrongfulness of the lower court's application of the procedural bar as the court applied it to claims involving Mr. Hitchcock's 1977 trial issues.

Argument II of this brief addresses the decision of the

lower court to deny Mr. Hitchcock relief on his resentencing counsel's ineffectiveness in addressing improper testimony.

Argument III of this brief addresses the decision of the lower court denying relief from Mr. Hitchcock's conviction. Mr. Hitchcock 1977 trial counsel was clearly ineffective.

Argument IV addresses the decision of the lower court denying relief on Claims IV, V, and VI of Mr. Hitchcock's motion. This argument involves the denial of Mr. Hitchcock's rights at the 1996 penalty phase and unconstitutional death sentence.

Argument V addresses the possible destruction of evidence in this case and Mr. Hitchcock's attempts to readdress the ongoing denial of scientific testing by the courts of this State.

Argument VI addresses the *Caldwell* error which is also addressed in Mr. Hitchcock's State Habeas Petition. The Caldwell error at issue here involves Mr. Hitchcock's resentencing counsel's deficiency in addressing the trial court's erroneous jury instruction.

Argument VII addresses the new evidence of Mr. Hitchcock's innocence. This evidence was extremely compelling and should free Mr. Hitchcock from both an unjustified conviction and undeserved death sentence.

Argument VIII addresses the evidence of the incompetence of

Hair Analyst Diana Bass and the lower court’s denial of relief despite these revelations.

Argument IX involves the lower court’s denial of Claim XI. There it is argued that Mr. Hitchcock was denied the effective assistance of counsel concerning the during the commission of a felony aggravator, which should have led to relief by the lower court.

Argument X involves the utter denial of Mr. Hitchcock’s right to be present during critical stages of the proceedings against him and the trial court’s failure to assure a proper record was made in this case. Lastly, Argument XI preserves the *Apprendi/Ring* claim for further review.

After review by this Court, it will be clear that Mr. Hitchcock has been denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for too long. This Court should reverse the lower court’s denial of relief.

STANDARD OF REVIEW

This Court should apply de novo review as per *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000).

ARGUMENT I

THE LOWER COURT ERRED IN FINDING MR. HITCHCOCK'S CLAIMS PROCEDURALLY BARRED. THIS DENIED MR. HITCHCOCK'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION. MR. HITCHCOCK PROPERLY SOUGHT A REMEDY FOR THE CONSTITUTIONAL VIOLATIONS THAT OCCURRED DURING HIS 1977 GUILT PHASE BY FILING THE MOTION FOR POSTCONVICTION RELIEF AT ISSUE IN THIS APPEAL.

The lower court erred in finding that Mr. Hitchcock was procedurally barred from raising claims in postconviction concerning his 1977 guilt phase. The lower court specifically found Claims II,III, X, and XII were procedurally barred for the reasons the court discussed under Claim II. Regarding the 1977 Claims the court stated:

> This claim is procedurally barred with respect to the 1977 guilt phase. First, it is based on evidence which has been available for many years through the exercise of due diligence. In addition, it could have been or actually was raised in the original collateral motion wherein Defendant unsuccessfully attempted to set aside his 1977 judgment and sentence. *See Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983). Note also that when this decision was overturned, the United States Supreme Court reversed only the death sentence, not the judgment of guilt. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (VOL. XII PCR. 1121).

All claims raised by Mr. Hitchcock were properly raised in his Rule 3.851 Motion. Mr. Hitchcock was the victim of serious constitutional errors and injustice which continues to this day. Mr. Hitchcock has maintained his innocence from the time of

trial and remains wrongfully convicted and wrongfully sentenced to death. Had Mr. Hitchcock received the effective assistance of counsel at trial and in the last penalty phase he would not have been convicted of a crime he did not commit and would not have been sentenced to death. The duty to remedy this injustice was the trial courts.

A. The Procedural Bar Does Not Apply to Issues Concerning Mr. Hitchcock's Guilt Phase Trial in 1977.

There was no absolute prohibition to second postconviction motions at the time that Mr. Hitchcock filed his original postconviction motion in 1983. Thus, had Mr. Hitchcock not received a new penalty phase from the United State's Supreme Court, he could have filed a second postconviction motion after completing the course of litigation in that Court. Following the United States Supreme Court's opinion in *Hitchcock v. Dugger*, 481 U.S.1168 (1987), Mr. Hitchcock received one new sentencing after another due to the State's repeated denial of his constitutional rights and has not had an opportunity to fully litigate his guilt phase issues.

The motion at issue was Mr. Hitchcock's first opportunity to fully investigate the present postconviction claims, some of which were discovered well after Mr. Hitchcock had received his last sentencing hearing. Accordingly, because the motion was filed within the time requirement of the current rule, Mr.

Hitchcock was not barred from raising claims concerning his 1977 guilt phase. This Court should not deny Mr. Hitchcock relief on his 1977 guilt phase claims because the State has kept violating his rights.

The evolution of the postconviction rules shows that Mr. Hitchcock could properly bring the claims argued in this motion under Florida Rule of Criminal Procedure 3.851. Specifically, Rule 3.851(d) provides in part:

> (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner **within 1 year after the judgment and sentence become final**. For the purposes of this rule, a judgment is final. . .
> (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final)
> (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

Florida Rule of Criminal Procedure 3.851 (Emphasis added).

Mr. Hitchcock filed this motion within one year of his judgment <u>and</u> sentence becoming final. Moreover, this motion was not a successor motion. Paragraph E subparagraph 2 defines a motion as successive "if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Because Mr. Hitchcock's judgment <u>and</u> sentence did not become final until the United States Supreme Court disposed of his certiorari petition in 2000, Mr. Hitchcock was within the

relevant time provisions of Rule 3.851. The hearings that took place in 1997-98 were void because Mr. Hitchcock judgment and sentence were not final. The rules simply do not provide for different rules when the defendant's guilt phase and sentencing phase occur at different times.

Mr. Hitchcock's original 3.850 motion was filed before 1984 when successor motions were addressed for the first time. Accordingly, when his attorneys filed that motion they did so with the understanding that they could later file an additional motion. The rule in effect when Mr. Hitchcock filed this motion in 1983, Rule 3.850(1977), did not bar successor postconviction motions. *See Re Florida Rules of Criminal Procedure*, 343 So. 2d 1247, 1264-65 (Fla. July 1, 1977). Nothing in this rule prohibited Mr. Hitchcock from returning to state postconviction and raising issues concerning his guilt. He could not do so, however, until his judgment and sentence were again final.

Furthermore the State was procedurally barred from raising any objection to Mr. Hitchcock being heard on any of these issues. While the State did raise a hodgepodge of procedural bar objections in its response, during this hearing and its closing argument, the State conceded that a hearing was required under Rule 3.851 at the case management conference.

B. Under *Ring v. Arizona,* the 1977 Guilt Phase Jury's Determination of Guilt Is Subject to Challenge Because it Provided a Basis for the Most Recent Penalty Advisory Jury to

Return a Death Recommendation.

This Court has denied relief under *Ring v. Arizona*. 536 U.S. 584, 122 S.Ct 2428 (2002). *See Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), and *King v. Moore,* 831 So. 2d 143 (Fla. 2002). This, however does not affect the validity of the United States Supreme Court's holding in *Ring* that "capital defendants. . . are entitled to a jury determination of any fact that the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

In Mr. Hitchcock's case, the jury's finding of guilt in 1977 was inextricably intertwined with the trial court's death sentence and finding of sufficient statutory aggravators to overcome the mitigation. Moreover, so was the most recent resentencing jury's death recommendation; without the finding of guilt from the 1977 the 1996 resentencing jury could not have been empaneled to recommend death and the trial court could not have sentenced Mr. Hitchcock to death. The 1977 jury's verdict was a condition precedent to the later death recommendation simply because, without that conviction for first degree murder, a death sentence was not possible.

From the 1977 jury conviction, the State was able to argue in 1996 that certain aggravators were proven beyond a reasonable doubt. The State would not have been able to do so had the jury

not returned a guilty verdict. If the 1977 verdict of guilt was obtained contrary to the constitutions of the United States and Florida, that taint infected the last death sentence and is properly challenged here. Mr. Hitchcock may have been prohibited from arguing "lingering doubt" at the penalty phase, as the State argued numerous times during this hearing. This argument, however, has absolutely nothing to do with lingering doubt during penalty phase but rather was offered for support for the lower court hearing all of Mr. Hitchcock's claims.

Accordingly, because the 1977 conviction was intertwined with the 1996 jury recommendation of death and his death sentence, Mr. Hitchcock rightfully challenged both phases below.

C. Laches or Similar Argument Cannot Defeat Mr. Hitchcock's Guilt Phase Claims Because the State Caused the Delay in Raising These Claims Through its Continued Violation of Mr. Hitchcock's Rights under the Florida and United States Constitutions.

Mr. Hitchcock only entered a postconviction posture when certiorari was denied by the United States Supreme Court in the year 2000. *See Hitchcock v. Florida* (2000). The responsibility for the length of time that it took for Mr. Hitchcock to enter a postconviction posture was that of the State and the courts. None of this delay is attributable to Mr. Hitchcock who has continually had his constitutional rights violated. Beginning with the 1977 trial, the State has engaged in repeated acts and omissions which have denied Mr. Hitchcock his rights and

justice. The denial of Mr. Hitchcock's rights during the guilt phase of the 1977 trial was properly the subject of the evidentiary hearing and discussed fully herein. The denial of Mr. Hitchcock's rights during the 1977 guilt and 1996 penalty phase ranged from ineffective assistance of counsel to false and misleading evidence. The question remains whether the various courts that have granted Mr. Hitchcock penalty phase relief throughout the years ever truly provided a remedy to Mr. Hitchcock. If the end result is that this Court denies Mr. Hitchcock relief because of the State's objection to the timing of his plea for relief, the State's multiple violations of Mr. Hitchcock's rights would again deny Mr. Hitchcock justice.

Mr. Hitchcock did not have lawyers assigned to him to represent him in postconviction and he could not raise postconviction claims under the Florida Rules of Criminal Procedure because the judgment and sentence were not final until this Court affirmed his last death sentence and the United States Supreme Court denied *certiorari*. Any delay in bringing the claims the lower court found procedurally barred was entirely the fault of the State. The State, with unclean hands, should not reap the benefits of its continual denial of Mr. Hitchcock's rights.

D. Other Claims That Raise Questions of Mr. Hitchcock's Guilt Involve Newly Discovered Evidence

and Were Not Procedurally Barred.

To the extent that Mr. Hitchcock's motion raised newly discovered evidence, *see* Argument III, VII and VIII, these claims and issues should have been considered by the lower Court. The two year limitation of *Jones v. State*, 591 So. 2d 911 (Fla. 1992), applies to successor motions where the defendant has already completed the State postconviction process. Mr. Hitchcock only began the postconviction process upon the denial of his certiorari petition by the United States Supreme Court in 2000.

Moreover, most of the newly discovered evidence from the witnesses from Arkansas was discovered through the investigation of CCRC-Middle and was raised within any imputed or real time limit. Specifically, Mr. Hitchcock was also entitled to present corroborative evidence to the null and void hearing from 1998, in which the court limited Mr. Hitchcock's presentation of evidence.

Contrary to the lower court's order finding that the issue of Richard Hitchcock's confession to the murder of the victim in this case was denied by this Court, this Court did not address this issue or any issue resembling the postconviction claims on the merits. On appeal, Mr. Hitchcock raised the issue of whether "the trial court erred in denying relief based on newly discovered evidence without considering corroborating evidence

and circumstances” and whether “the trial court (a substitute judge) erred in ruling on and denying Hitchcock’s motion for a new sentencing procedure”. *Hitchcock v. State*, 755 So. 2d 638, 641 (Fla. 2000). This Court stated Mr. Hitchcock's fifteenth and sixteenth claims “were 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.” *Id.* at 645. Mr. Hitchcock claimed in his direct appeal that Judge Conrad erred in excluding corroborative evidence. This Court found that, as with the fifth claim, this evidence was related only to the guilt phase of Mr. Hitchcock's trial, which was not the subject of Mr. Hitchcock’s appeal of his third resentencing, and rejected these claims as being without merit. *Id.*

That was a far cry from Mr. Hitchcock having the opportunity to raise these issues during postconviction. All issues raised including the guilt phase issues were properly the subject of this motion. This Court’s statements meant that the issues were not properly the subject of the last appeal, not that Mr. Hitchcock could not raise these issues in this forum.

E. Conclusion to Argument

For the reasons discussed above, Mr. Hitchcock was not procedurally barred from raising any claim in postconviction.

The lower court erred in denying Mr. Hitchcock relief based on procedural bars that do not and cannot exist. By doing so, the lower court denied Mr. Hitchcock a fair postconviction proceeding and left in place very serious constitutional deprivations. If this Court does not grant full relief on the arguments below, this Court should grant Mr. Hitchcock a new postconviction hearing.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM I OF MR. HITCHCOCK'S MOTION FOR POSTCONVICTION THUS VIOLATING MR. HITCHCOCK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Mr. Hitchcock's trial counsel were ineffective for failing to object to the admission of testimony from the victim's sister, Deborah Lynn Driggers, concerning alleged threats that Mr. Hitchcock made to both her and the victim. This Court should reverse.

At Mr. Hitchcock's 1996 resentencing the State called Deborah Lynn Driggers as a witness and elicited grossly prejudicial testimony. Ms. Driggers testified that at some point she and her sister confronted Mr. Hitchcock about the "things" Mr. Hitchcock was allegedly doing with Cynthia Driggers. (1996 VOL. VI R. 133). According to Deborah Lynn Driggers, Mr. Hitchcock responded that he would "rape and kill

Cynthia Driggers <u>and</u> Deborah Lynn Driggers." (1996 VOL. VI R. 133).

The State then elicited from Deborah Lynn Driggers that because of the alleged threat, she was scared, and that based on her assumption, the victim was scared as well (1996 VOL. VI R. 134). Ms. Driggers based this assumption on a conversation that allegedly took place between herself and the victim the night before the events in question. Ms. Driggers also told the jury, that on the night before the events in question, she and the victim allegedly had a conversation and Deborah told the victim that they had to tell her mother (1996 VOL. VI R. 134). The State did not establish that Mr. Hitchcock was present when this conversation allegedly took place.

Mr. Hitchcock's counsel made no contemporaneous objection to this testimony despite the fact that this evidence was far greater in scope then what the State said Ms. Driggers would be testifying to when the court overruled the defense's objection to the State's opening statement. *See* (1996 VOL. VI R. 82).

The lower court's order denied this claim. It found that there was no legal basis to object to the testimony of Deborah Lynn Driggers as it was admissible to establish that the murder was committed during the commission of a sexual battery because a sexual battery may occur when the offender coerces victim to

submit by threatening to retaliate against the victim or any other person (VOL. XII PCR. 1120). The lower court found no requirement that the threats had to be made on the exact date of the crime to be admissible (VOL. XII PCR. 1120).

The lower court also found this testimony relevant to whether the murder was heinous, atrocious and cruel and cited a case in which threats made two days before the murder justified a finding of the HAC aggravating factor. (VOL. XII PCR. 1120) The lower court then concluded that the failure of defense counsel to object was neither deficient nor prejudicial. (VOL. XII PCR. 1121).

The lower court should have granted relief on Claim I of Mr. Hitchcock's Motion. Relief was supported by the trial transcripts, the hearing and, the arguments made in the motion and written closing argument. At the evidentiary hearing, the State offered no evidence which refuted this claim and Mr. Hitchcock's prior counsel offered no explanation for their ineffectiveness. The State had the opportunity to address whether counsel's failure to object was strategy and failed to do so. Accordingly, counsel's ineffectiveness which was manifested in the record remained unjustified and apparent.

The testimony was unfairly prejudicial, improper character evidence, immaterial and irrelevant, and a non-statutory aggravator. *See Hitchcock v. State*, 631 So. 2d 859, 861-62

(Fla. 1996). Resentencing counsel was ineffective for failing to object to this damaging and inadmissible testimony and for failing to move for a mistrial to protect James Hitchcock's right to a fair penalty phase.

None of the testimony concerning James Hitchcock's alleged threats towards Deborah Lynn Driggers was admissible to prove the witness elimination aggravator or to prove the circumstances of the crime. Moreover, the lower court simply failed to make a distinction between threats made to Deborah and threats made to the victim. Ms. Driggers clearly was not eliminated. The crime for which the State sought the death penalty according the State's indictment was committed on July 31, 1976. The State may have been within bounds to put forth a theory of witness elimination in relation to July 31, 1976. The State may also have been within bounds to discuss the circumstances of the crime that occurred on July 31, 1976. When, however, the State, elicited testimony of alleged threats prior to July 31, 1976, and "inappropriate things" prior to July 31, 1976, the State was merely attempting to obtain a death sentence based on the perceived character of James Hitchcock and not the nature of the crime for which he faced the death penalty.

The testimony by Deborah Lynn Driggers concerning alleged threats and "inappropriate things" that James Hitchcock had allegedly engaged in with Cynthia Driggers prior to her death

greatly prejudiced James Hitchcock in a number of ways. Foremost, the testimony of alleged previous "inappropriate things" between Mr. Hitchcock and Cynthia Driggers caused the jury to consider non-statutory aggravation instead of deciding whether the State met its burden of proving any of the statutory aggravators at issue and whether the aggravators outweighed the numerous mitigating factors offered by James Hitchcock.

Resentencing counsel's failure to object to Deborah Lynn Driggers' testimony and move for a mistrial fell below the standard of reasonable performance of an attorney in a death phase. Because of this failure, the jury considered a number of unrelated alleged acts and statements of James Hitchcock and the alleged subjective fears of Deborah Lynn Driggers. This prejudiced James Hitchcock and seriously undermines the confidence in James Hitchcock's sentence of death.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 668. To establish ineffective assistance of counsel *Strickland* requires a showing of (1) unreasonable attorney performance, and (2) prejudice. *Id.* Mr. Hitchcock proved both and the lower court failed to grant Mr. Hitchcock the relief that was

justified. Accordingly, this Court should reverse.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM III OF MR. HITCHCOCK'S MOTION FOR POSTCONVICTION DENYING HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

The performance of counsel at the 1977 guilt phase was both deficient and prejudicial. Mr. Hitchcock was denied the right to effective counsel under the Sixth and Fourteenth Amendments and sought a remedy for this in Claim III of his postconviction motion.

The lower court found that this claim, as related to the 1977 guilt phase was procedurally barred for the reasons set forth by the court under Claim II. (VOL. XII PCR. 1122). The court again failed to address the arguments Mr. Hitchcock made at the hearing and in written closing regarding the procedural ripeness of this claim. (VOL. XII PCR. 1122)

Mr. Hitchcock again submits, for the reasons stated in Argument I of this brief, he was not procedurally barred from raising this claim. The lower court's erroneous procedural bar prevented Mr. Hitchcock from receiving relief from the constitutional violations that occurred at his 1977 guilt phase. The court failed to address the deprivation of effective

counsel that was so apparent in the record and unrefuted at the hearing. This Court should reverse.

A. 1977 Counsel Was Ineffective During Investigation Preparation, and Questioning of Witnesses.

Mr. Hitchcock's 1977 trial counsel was ineffective. More than just failing to subject the State's case to meaningful adversarial testing, trial counsel committed egregious blunders and missteps that ultimately ensured that James Hitchcock would be convicted of a crime he did not commit. Today, because of his 1977 trial counsel's ineffectiveness, James Hitchcock remains on Death Row.

At the evidentiary hearing, 1977 trial counsel could not provide an explanation for his ineffectiveness. While 1977 counsel claimed a lack of memory, it was apparent that there could be no explanation for the ineffectiveness that so infected the trial and manifested itself in the record. Such blatant disregard for the admission of improper and highly prejudicial evidence cannot now be explained or justified by strategy.

It was apparent from the 1977 trial record that trial counsel did not adequately inform Mr. Hitchcock of possible trial strategies and discuss possible defenses. Trial counsel clearly did not seek the input of Mr. Hitchcock as to what witnesses would be called at trial and what questions witnesses would be asked. Had adequate consultation with James Hitchcock

occurred, trial counsel would have avoided opening the door to the highly prejudicial testimony on James Hitchcock's reputation for violence in the community. This was not a case where during cross examination defense counsel became caught up in the moment and asked one too many questions. This was far worse - - here trial counsel called defense witnesses and inexplicably proceeded to open the door to the very damaging rebuttal testimony by State witnesses.

Trial counsel called Roy L. Carpenter (1977 VOL. IV R. 723-726). After establishing that Mr. Carpenter knew Mr. Hitchcock for "several weeks before the unfortunate accident," trial counsel then elicited that the witness encountered James Hitchcock the day after the incident. (VOL. IV R. 723). According to Mr. Carpenter, Mr. Hitchcock tried to organize a search party for Cynthia Driggers. (1977 VOL. IV R. 725).

Considering that Mr. Hitchcock would take the stand and testify that he in fact moved the body of Cynthia Driggers after his brother Richard Hitchcock murdered her, this testimony had the effect of falsely showing Mr. Hitchcock creating a ruse search. From there, trial counsel proceeded to open the door to further bad character evidence by asking the following question: "Have you ever known the defendant to be, to commit any violence?" To which Mr. Carpenter answered: "No, sir, I certainly haven't." (1977 VOL. IV R. 725).

Trial counsel called Archie Sooter who testified that he knew James Hitchcock for "little over a year" and that they were previously roommates. (1977 VOL. IV R. 730). The following testimony ensued:

> Trial Counsel: During the period of time that you have known the Defendant, have you ever known him to be violent?
> Prosecutor: Objection, leading question.
> The Court: Sustained.
> Trial Counsel: How would you describe the Defendant's character as far as violence or lack of violence?
> Archie Sooter: Calm and jovial. (1977 VOL. IV R. 732)
>
> * * * * *
> Trial Counsel: During the time that you have been acquainted with the Defendant, have you ever known him to have what you call, a girlfriend?
> Archie Sooter: Yes. (1977 VOL. IV R. 733)
>
> * * * * *
> Trial Counsel: What was her name, do you recall her name?
> Prosecutor: Objection, immaterial and irrelevant.
> The Court: Sustained:
> Trial Counsel: Did you ever have occasion to see the Defendant do any violence towards this girl?
> Archie Sooter: No.
> Prosecutor: Objection, no predicate laid, immaterial and irrelevant, repetitious.
> The Court: It's in, it will stay in. (1977 VOL. IV R. 733).
>
> * * * * *

Trial counsel called further witnesses: James Hitchcock's sisters Martha Hitchcock (Galloway) and Brenda Reed, James Hitchcock's mother Loreen Galloway, James Ernest Hitchcock's brother, who was named James Harold Hitchcock, and James Harold Hitchcock's wife, Fay Hitchcock. Trial counsel asked each

witness whether they knew James E. Hitchcock to be violent. (1977 VOL. IV R. 737, 739, 740, 745, 747, 749). Importantly, trial counsel attempted to ask similar questions about Richard Hitchcock's propensity for violence, to which the State objected and the trial court sustained the objections. (See 1977 IV VOL. R. 737, 740-41, 747, 750). Even if trial counsel did not understand the concept of opening the door to bad character evidence, trial counsel should have known something was wrong when the court sustained the objection to the same or similar questions concerning Richard Hitchcock, but allowed him to ask the same questions concerning James Hitchcock.

After the State was able to exclude all the evidence concerning Richard Hitchcock's history of violence, sexual abuse, reputation for violence, and specific acts of violence, the State proceeded through the door that trial counsel had opened. On rebuttal, the State recalled Judy Hitchcock, the victim's mother. As to James Hitchcock's reputation for truth and veracity in the community, Judy Hitchcock responded: "It's not very good." (1977 VOL. V R. 797).

Then the State, after the trial court overruled trial counsel's objection to lack of predicate and improper character evidence, asked Judy Hitchcock: "Ma'am, do you know what his general reputation is for violence in the community?" Judy Hitchcock responded that "its not very good, either." (1977 VOL.

V R. 798). On cross examination, trial counsel opened the door even wider when he attempted to attack the credibility of Judy Hitchcock by asking her who she had talked to in forming the opinion concerning James Hitchcock's reputation for being a violent person. Judy Hitchcock responded "James Hitchcock himself and the girl he used to live with Connie Reed." (1977 VOL. V R. 801).

The State asked Judy Hitchcock if James Hitchcock had talked to her about his own reputation for violence. (1977 VOL. V R. 806). Over defense objections Judy Hitchcock stated answered:

> He told me on the last day that [Connie Reed and James Hitchcock] worked together before [Connie Reed] left to go to Tennessee, they were picking fruit and she decided she did n't want to pick fruit any more, and he got angry with her and he grabbed her around her throat and started choking her and then threw her down. (1977 VOL. V R. 807).

Trial counsel continued to elicit damaging testimony on rebuttal re-cross examination by asking if Judy Hitchcock knew whether Connie Reed was hurt during that incident. (1977 VOL. V R. 805). This had the effect of conceding the fact that an incident had occurred, and allowed Judy Hitchcock to answer that Connie Reed "didn't have any broken bones or anything, but she did have marks on her neck. . . .[s]he showed me those" and for the State to elicit that the marks were "black and blue." (1977 VOL. V R. 805). The trial court at this point did sustain an objection as to what Connie Reed told Judy Hitchcock. (1977

VOL. V R. 805).

The State then called Richard Hitchcock in rebuttal and asked him what James Hitchcock's reputation for truth and veracity in Winter Garden and in the entire State of Arkansas. Richard Hitchcock stated it was "not very good." (1977 VOL. V R. 812). The State asked Richard Hitchcock, "Sir his general reputation in the Winter Garden community for violence, do you know what that reputation was?" Unresponsively and without objection Richard Hitchcock replied, "I just, for mental aggravation I have seen that." (1977 VOL. V R. 814). The trial court itself interjected and told Richard Hitchcock "just yes or no," to which Richard Hitchcock responded:"Not really, no." (1977 VOL. V R. 814).

The State moved on to James Hitchcock's general reputation for violence or non-violence in the "Arkansas community". Richard Hitchcock went on to say that James Hitchcock's reputation for violence or non-violence in the "Arkansas community" was "that he stayed in trouble all the time." (1977 VOL. V R. 814). Trial counsel failed to move for the voir dire of Richard Hitchcock, outside of the presence of the jury, on the basis of his knowledge of James Hitchcock's reputation in the community prior to this improper testimony.

Trial counsel then asked Richard with whom he had discussed

James Hitchcock's reputation. Richard Hitchcock responded that he discussed James Hitchcock's reputation for truth and honesty with Robert Joe Coy, his employer, and with other people later named as James Allen, Juanita Allen, and names that allegedly slipped Richard Hitchcock's mind. According to Richard Hitchcock, "everybody would have something nasty to say about him." (1977 VOL. V R. 817). Counsel did not move to strike either this unresponsive testimony or all the prior testimony of Richard Hitchcock even though it was now apparent that Richard Hitchcock had no idea of James Hitchcock's reputation for truth and veracity or violence in the community.

Trial counsel next called Connie Reed to testify that it was true that James Hitchcock choked her when they were picking fruit and that he "pushed [her] off the bucket and he got on top of [her], put his hands around my throat and started to hit [her]." Trial counsel attempted to minimize the choking in that Connie Reed was not hurt, however, Connie Reed then reenacted the choking for the jury and described how allegedly James Hitchcock reached back to hit her while sitting on top of her chest. (1977 VOL. V R. 828). The State was then able to elicit that she and James Hitchcock stopped living together after the purported incident. Trial counsel, near the conclusion of this redirect, asked Connie Reed ". . . What do you consider your current relationship to be with [James Hitchcock]?" When

Connie Reed apparently had difficulty answering the question, trial counsel asked: "**Well, he is in jail**, but under the circumstances, what would you say your current relationship is with him?" (emphasis added) (1977 VOL V R. 830). This had the effect of showing that trial counsel's own Client was so dangerous that he was in jail. Importantly, during the guilt phase of the trial, where James Hitchcock was presumed innocent under the United States Constitution, trial counsel created the impression with the jury that he was not presumed innocent otherwise he would not be in jail. This was all brought to the attention of the jury by the one person in the courtroom who had a duty to defend James Hitchcock, his trial counsel.

Trial counsel, after having personally made it possible for the State to introduce all of the improper character evidence discussed above, did not recall James Hitchcock to refute the character evidence and testimony of Judy Hitchcock and Richard Hitchcock.

Trial counsel, having had only brief encounters with James Hitchcock prior to James Hitchcock's direct examination, did not adequately prepare James Hitchcock on how to properly and honestly avoid damaging statements while on the witness stand. Specifically, trial counsel should have discussed the facts of the case and then carefully crafted his questions to avoid hurting his own client.

The responsibility and fault for the jury hearing the bad character evidence about James Hitchcock was clearly the fault of trial counsel. Trial counsel opened the door for the admission of extremely damaging testimony that would not have been admissible if counsel had been effective. Directly and affirmatively allowing the introduction of horrible character evidence and specific bad acts was certainly unreasonable. The prejudice was overwhelming because the jury was able to consider the otherwise inadmissible bad acts and character which assured Mr. Hitchcock's wrongful conviction.

B. The Failure to Seek the Admission of the Similar Fact Evidence about Richard Hitchcock's Sexual Attacks and Choking.

Trial Counsel was ineffective for failing to present the available similar fact evidence of Richard Hitchcock's violent sexual attacks, sexual possessiveness and choking. Richard Hitchcock saw the victim as his sexual property and became enraged and choked the victim just as he had done to his sisters. Counsel should have investigated Richard Hitchcock and then presented the testimony about Richard's attacks under a similar fact theory of admissibility. Martha Hitchcock Galloway and Brenda Reed testified at both the 1977 trial and at the hearing at issue. With proper investigation and argument, the testimony that these witnesses provided at the hearing below could have been presented to the jury in 1977. Had that

occurred, James Hitchcock would not have been convicted of a crime that he did not commit.

In James Hitchcock's original appeal, Mr. Hitchcock raised the issue that the trial court improperly limited his right to examine witnesses. This Court held that the person seeking the admittance of evidence has the burden of showing its admissibility. *Hitchcock v. State*, 413 So. 2d 741, 743, (Fla. 1982) The burden of showing the admissibility of the evidence regarding Richard Hitchcock, and ultimately that there was a reasonable doubt, was that of Mr. Hitchcock's trial counsel.

In James Hitchcock's original direct appeal, appellate counsel argued that:

> The trial court improperly restricted Appellant's presentation of evidence concerning the commission of the alleged offense by another person, and concerning the impeachment of a key prosecution witness, thereby denying Appellant the right to a fair trial, and the right to present evidence in his behalf, as guaranteed by the Florida and United States Constitutions.
> 1982 Initial Brief of Appellant pg. 8.

This Court denied this claim. *Hitchcock v. State*, 413 So. 2d 741, 743, (Fla. 1982). This claim was based on the trial court continually sustaining objections to trial counsel's attempts to elicit Richard Hitchcock's reputation in the community for violence. (See 1977 VOL. IV R. 737, 740-41, 747, 750). Counsel never approached the bench and argued why this testimony was admissible, so from the bare transcript it was

understandable how the Court could have ruled this way.

This Court held that the specific acts of Richard Hitchcock were properly excluded because "it could have only been relevant to show Richard Hitchcock's alleged bad acts and violent propensities and, thus was properly excluded for impeachment purposes." *Id.* at 743-44. Certainly the trial court and this Court did not know about Richard Hitchcock's sexual possessiveness and his choking the females in his family, just as he did to the victim in this case. The facts about Richard were unknown because trial counsel never investigated Richard in order to put forth a proper theory of admissibility.

Most importantly, this Court stated what any trial attorney should know: "The person seeking admission of testimony must demonstrate why sought-after testimony is relevant." *See Haager v. State*, 83 Fla. 41, 90 So. 812 (1922). Hitchcock has presented nothing to show that he made a clear offer of proof which would overcome the state's objections." *Id.* The responsibility for demonstrating that any evidence regarding Richard Hitchcock was relevant was that of trial counsel and trial counsel alone. On this account trial counsel failed miserably.

Had trial counsel conducted an adequate investigation and made a proper argument to the trial court, the trial court would

have admitted the evidence. If not, this Court would not have been able to dismiss appellate counsel's argument because there would have been a full record showing why this evidence was admissible.

Through an adequate investigation, trial counsel would have discovered the circumstances under which Richard Hitchcock's acts of sexual and other physical violence took place. After a proper investigation it would have been apparent; rather than a number of individualized sexual and physical attacks, Richard Hitchcock engaged in a clear pattern of seeing young, often prepubescent and pubescent, females as his sexual property, with whom, only he had the right to have sexual relations. Richard Hitchcock would then become physically violent when, correctly or incorrectly, he perceived that these females were showing interest in another male. The reason for these acts of violence was that Richard Hitchcock was jealous and viewed the young females in his family as his, and his alone, to do what he wanted to sexually. Richard Hitchcock would choke these young women when he was dissatisfied or angry.

This was precisely what happened to the victim in this case. When Richard Hitchcock came upon Cynthia Driggers and James Hitchcock in bed after a sexual situation, Richard Hitchcock became enraged and choked Cynthia Driggers to death. As the evidentiary hearing showed, Richard Hitchcock's modus operandi

was to choke when he thought that the female members of his family were moving outside his sexual possession.

For the jury to have heard this probative evidence trial counsel would have had to reasonably performed the duties of trial counsel in a case where the State was seeking the death penalty. First, trial counsel should have spoken to Martha Galloway, Brenda Reed and James Hitchcock's other family members. Had trial counsel asked proper questions, these witnesses would have told trial counsel about Richard Hitchcock's possessiveness of the young girls in his family and his use of violence as a means of controlling their sexual interests and to ensure that they did not tell Richard Hitchcock's dark secrets. Second, trial counsel, having the burden of showing relevance and admissibility, should have argued on the record exactly why this evidence was admissible.

Trial counsel's unreasonable performance greatly prejudiced Mr. Hitchcock. Because of trial counsel's unreasonable performance the jury that found James Hitchcock guilty never heard substantial competent evidence of Richard Hitchcock's motive for the murder of Cynthia Driggers. Because of trial counsel's unreasonable performance, Richard Hitchcock's motive and bias in testifying against his brother was also never exposed to the jury, nor was his modus operandi of choking.

There was a reasonable probability that had trial counsel presented these available similar fact witnesses the outcome of the trial would have been different and James Hitchcock, who was innocent, would have been found not guilty.

Martha Hitchcock Galloway is James and Richard Hitchcock's sister. Her testimony at the evidentiary hearing showed what the jury should have heard in 1977 and why that testimony was admissible. Richard Hitchcock, the true perpetrator of the crime at issue in this case, was older than James E. Hitchcock and the second oldest male. Mrs. Galloway testified with great fortitude and courage at this hearing about Richard's violent sexual possessiveness and attacks. While she was not a reluctant witness, Mrs. Galloway had to confront the demons from her past, and one demon in particular, Richard, so that the lower court could hear the truth.

The truth was what the lower court heard. Mrs. Galloway's testimony did more than simply recount the evil acts and deeds that Richard committed. Mrs. Galloway's testimony was part of the greater picture of this case that was not heard by the jury that convicted James Hitchcock. The fault for this lies with 1977 trial counsel who never presented the argument which would have allowed the jury to hear similar fact evidence concerning Richard Hitchcock. To the extent that defense counsel did not have this information this constituted newly discovered

evidence.

At this evidentiary hearing, after detailing the age relationship between Mr. Hitchcock and his siblings, Mrs. Galloway described a number of detailed attacks made by Richard. Mrs. Galloway testified how as a young girl of about eight years of age until she was seventeen, Richard Hitchcock touched her sexually. (VOL. VI PCR. 144). The sexual attacks by Richard brought not just the violation of young Martha but also bruises around her throat and all over her body. Even family members could not stop the sexual violence; as Mrs. Galloway described, one time Richard "threw [another sister] plumb through a window" when that sister tried to get Richard away from Mrs. Galloway. (VOL. VI PCR. 145). Resistance to Richard's sexual violence and violent attacks only resulted in bruises around her throat and on her body. (VOL. VI PCR. 146).

Mrs. Galloway continued on to painfully describe Richard's reaction to her futile resistance. Richard enjoyed it and "[i]t wouldn't phase Richard a bit to take, just knock one of us plumb across the room, Richard was so obsessed with sex." (VOL. VI PCR. 146). Richard did not stop with just sexually and physically attacking his sister, he also forced Mrs. Galloway and her sister to stand and watch as he tried to make two children have sex in front of them. (VOL. VI PCR. 146). When Mrs. Galloway and her sister did not want to watch Richard would

whip them. (VOL. VI PCR. 146).

Even a simple answer of no or telling Richard to get away from her could cause Richard to choke Mrs. Galloway, but when Richard suspected that Mrs. Galloway may have as a young woman been interested in boys of her own age, Richard also became violent. (VOL. VI PCR. 147). Mrs. Galloway recounted at hearing, "[t]hat wasn't allowed. That made [Richard] real violent if you messed with anybody else." (VOL. VI PCR. 147) Merely "going to date somebody" brought about a beating with a switch that drew blood from young Mrs. Galloway's legs. (VOL. VI PCR. 147).

After years of violent sexual attacks by Richard, Mrs. Galloway married and was able to live away from Richard. Richard did not like that Mrs. Galloway married. (VOL. VI PCR. 147). Even after marriage and leaving her childhood home, Richard Hitchcock managed one last attack on Mrs. Galloway, though Mrs. Galloway was married and just seventeen years of age. As Mrs. Galloway described it, she was simply going to see her mother. (VOL. VI PCR. 157) While Mrs. Galloway may have thought Richard had changed, he had not. (VOL. VI PCR. 157). It was this last and final rape that was for Mrs. Galloway the worst and during which Richard almost choked her to death. (VOL. VI PCR. 157).

Mrs. Galloway described one last encounter with Richard before his death. (VOL. VI PCR. 157). This, however, served to

add credibility to the account of Mrs. Galloway because she certainly could have contrived an encounter with Richard after the murder where Richard admitted to killing Cynthia Driggers. Instead she merely came to court and told the truth which the jury that convicted Mr. Hitchcock was denied. That truth was that Richard Hitchcock was a violent sexual predator who viewed the young women of his family as his sexual property - - to be taken when he, Richard, wanted, and to be dealt with violently when interested in other men.

Mrs. Galloway's testimony about Richard would have been available had 1977 trial counsel taken the time to fully investigate and develop a theory of defense. Moreover, after interviewing Martha Galloway about Richard Hitchcock, defense counsel then should have presented a coherent theory of admissibility to the 1977 trial court so that the court could have properly decided the issue of the admissibility of the evidence concerning Richard's relationship with the women in the family.

Richard also sexually and violently attacked Brenda Hitchcock Reed, the youngest member of the Hitchcock family. Richard repeatedly sexually abused Ms. Reed as he did Mrs. Galloway. (VOL. VI PCR. 181). While Ms. Reed did not find Richard possessive, (VOL. VI PCR. 181), having not paid much attention to Richard's jealousy about the women in the family,

(VOL. VI PCR. 181), Ms. Reed lacked the sophistication and comprehension of her older sisters, Martha Galloway and Wanda Green. 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 also have considered the testimony of Wanda Green and Judy Gambale under this claim. While their testimony was newly discovered evidence it also lends support to the credibility and probity of the accounts of Richard's acts and would be available at a new trial. Though not presented to the jury that convicted James Hitchcock, this was also similar fact evidence. Richard would see the women of his family as his sexual property. When these woman were interested or appeared to be engaged in sexuality apart from Richard, as Mrs. Galloway did when she married, Richard would choke.

Richard Hitchcock's history of sexual violence and choking went beyond mere bad acts and propensity. Rather, this evidence would have shown that Richard Hitchcock's violent possessiveness of the young women in his family and his use of violence as a means of controlling these young girls was the motive behind Richard Hitchcock's murder of Cynthia Driggers. Similar fact evidence was admissible to show Richard Hitchcock's motive for the murder and to show his bias in testifying against James Hitchcock. Florida law supports the admission of similar fact

evidence even when it reveals the existence of another crime. *See Duckett v. State*, 568 So. 2d 891 (Fla. 1990)(finding that an accused police officer's tendency to pick up young, petite women and make passes at them while in his patrol car at night and on duty was admissible under the circumstances of the case). *See also Crump v. State,* 622 So.2d 963, 967 (1993) (under the *Williams* rule, similar fact evidence is generally admissible, even though it reveals the commission of another crime, as long as the evidence is "relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

Had defense counsel developed and presented the evidence concerning Richard Hitchcock, the jury would have had the corroboration needed to believe James Hitchcock. With this evidence the jury would have seen that, just as with Martha Galloway, Richard saw the victim in this case as his sexual property and when she became engaged in a sexual encounter with James Hitchcock, Richard became enraged and choked her to death.

There was a reasonable probability that had trial counsel presented the available witnesses to Richard Hitchcock's motive for the murder, his motive and bias for testifying against his brother and his modus operandi of choking, the outcome of the trial would have been different and James Hitchcock who was

innocent would have been found not guilty.

The prejudice did not end with the 1977 guilty verdict. James Hitchcock was prejudiced by his original trial counsel's unreasonable performance at the resentencing because the State used the "facts" as established during the 1977 trial phase and the tainted conviction that would not have occurred if James Hitchcock had effective counsel at that time. In sum, James Hitchcock's death sentence was the fruit of the poisonous guilt phase.

The lower court found a procedural bar in this case were no such procedural bar existed. The finding of a procedural bar to consideration of the trial testimony allowed the lower court to abdicate its duty to remedy the denial of effective counsel that Mr. Hitchcock suffered.

To establish ineffective assistance of counsel *Strickland* requires a showing of (1) unreasonable attorney performance, and (2) prejudice. *Id*. Here, unrefuted by the State, Mr. Hitchcock proved both. Accordingly, the lower court should have granted Mr. Hitchcock a new trial. Based on these instances of ineffectiveness and the cumulative effect of the error in this case, this Court should reverse.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. HITCHCOCK'S CLAIMS THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BECAUSE RESENTENCING COUNSEL WERE INEFFECTIVE FOR

FAILING TO PRESENT AVAILABLE MENTAL MITIGATION EVIDENCE AND IN FAILING TO CONDUCT THE RESENTENCING PROCEDURE IN A REASONABLY PROFESSIONAL MANNER. THIS VIOLATED MR. HITCHCOCK'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

(A) Failure to Present Statutory Mental Mitigators

The sentencing court found and weighed only one statutory mitigator – the age of the defendant at the time of the offense. (1996 Vol. XVI R. 114) The lower court also found non-statutory mental mitigating circumstances that Mr. Hitchcock: (1) Was under the influence of alcohol and marijuana during the commission of the crime; (2) Had suffered from life long personality difficulties which influenced him at the time of the offense; and (3) Committed the offense as a result of an unplanned impulsive act. (1996 Vol. XVI R. 114) The sentencing court gave each of those non-statutory mental mitigating circumstances "very little weight." (1996 Vol. XVI R. 114) Defense counsel did not present or argue, at either the resentencing jury proceeding or the *Spencer* hearing, the existence of statutory mental health mitigators under Florida Statute 921.141(7)(b) "that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" or 921.141(7)(f) that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was

substantially impaired.”

Because counsel did not present or argue the existence of the two statutory mental mitigators, this Court did not consider them on the direct appeal. *See Hitchcock*, 785 So.2d at 639, 640. Consequently, the statutory mental mitigators were not a component of this Court’s mandatory de-novo proportionality analysis.

In claim VI of Mr. Hitchcock’s Second Amended Motion to Vacate Judgment of Conviction and Sentence, he raised a claim of ineffectiveness of counsel based upon failure to present evidence concerning the existence of the two statutory mental mitigators . (Vol. X PCR. 599). The lower court denied this claim stating “this Court disagrees that Dr. Toomer’s presentation was inadequate, or that the evidence presented at the evidentiary hearing establishes that counsel’s performance was deficient or prejudicial in this regard.” (Vol. XII PCR. 1126).

The lower court erred by failing to consider substantial evidence at the evidentiary hearing and in the resentencing record showing the failure of resentencing counsel to properly investigate and present evidence to establish the existence of the two statutory mental mitigators. Under *Stephens v. State* this is a mixed question of law and fact requiring de-novo review by this Court.

The ineffectiveness of Mr. Hitchcock's resentencing counsel began during the pre-trial period. Counsel waited until it was too late in the proceedings to retain an appropriate mental health expert and lost the opportunity for a meaningful and complete presentation of the available mental mitigation evidence. Specifically, defense expert Dr. Toomer, a psychologist, was not retained until August 13, 1996, a mere three weeks prior to the scheduled September 6, 1996, trial. (1996 R. 66) On August 13, 1996, the State filed a motion demanding disclosure under Florida Rule of Criminal Procedure 3.202, which requires the defense to give notice, not less than 20 days before trial, of intent to present expert testimony of mental mitigation and requires a statement of particulars listing the statutory and non-statutory mental mitigating circumstances the defendant expects to establish. At the August 13, 1996, hearing on the state's motion, Mr. Hitchcock's resentencing counsel made the following representations to the court:

> MS. CASHMAN: What I've laid out in the motion is that I have retained an expert. That expert has agreed to be available to testify - - if he should find non-statutory mitigation - - the week of September 9. I have not been - - that expert cannot evaluate Mr. Hitchcock until August 20. I indicate in my motion he will interview my client on August 20.
>
> There are a number of other things he needs to do in addition to talk and documents to review. And that he expects to be able to give me an answer on or about August 24. I would ask that the court allow me at that

> time to inform the state whether I will be using this expert or not. It's absolutely impossible for me to give notice any sooner because the evaluation won't be done and the work won't be done.

(1996 Vol V R. 67).

> MS. CASHMAN: We're having an evaluation done by another expert. It is our intention to not call Dr. McMan who did previous evaluations and who testified previously in the penalty phase. We will not be using her.

(1996 Vol. V R. 67).

> MS. CASHMAN: We have used Dr. Betty McMan in the past. There are strategic reasons for not using her again, reasons which are not something I can be forced to divulge to the state, reasons that–reasons that have nothing to do with the state's preparation.
>
> We have done everything we can to get an expert who is available September the 9th, who, on such short notice , is to do an evaluation for purposes of a penalty phase. We are using all due diligence to prepare this case and to comply with the time constraints. We have done everything we can to notify the court of where we're at in terms of the expert and what dates we expect to comply.

(1996 Vol. V R. 70). (*emphasis added*)

The Court gave the defense until August 24, 1996, to provide the necessary notice. It is readily apparent from the above representations that Mr. Hitchcock's resentencing counsel was not properly prepared to proceed with the September 9, 1996 resentencing. A mere three weeks prior to trial, counsel had no idea what mental mitigation evidence would be presented. This was below the level of preparation and investigation required of counsel in a death penalty case.

At the evidentiary hearing, Mr. Hitchcock’s other resentencing counsel, Kelly Sims, addressed the importance of timely pre-trial preparation in death penalty cases regarding mental mitigation:

> Q. And this meeting, as you outlined, where the mental mitigation aspect would be discussed in the fashion you described, how far in advance of a penalty phase proceeding was such - - would such a meeting take place.
>
> A. In the course of a normal case you would start talking about mitigation from the time we were appointed before the guilt phase. And as mitigation was built these things would be addressed. Miss Cashman, specifically, for most of the time that I was at the PD office was the chief of special defense. And she was always exceptional at addressing issues with plenty of time before trial. She was never like I was, sometimes get there couple of weeks before hand and say hey, I need all this and put everybody behind the eightball while I scrambled around to try and get all the information I needed to get and all the experts I needed. Mis Cashman was never like that, she was very thorough and always prepared, so.
>
> In Mr. Hitchcock’s case things were a little bit different because I think generally there would have been a shorter time frame just based on what the Supreme Court had told us to do and how quickly to do it. But I don’t remember what the time frames were now on the ninety six case.
>
> Q. Assuming that the mandate in the case came down and the resentencing procedure was set several months after when would you, what would the normal procedure be for such a meeting as you have described where mental mitigation would be discussed in that type of time frame.
> A. At the first meeting we had as a special defense unit after the mandate had been received, and we met monthly. And if you had some emergency you could always go to Mr. Durocher directly and talk about his approval.

> Q. And hiring an expert to do an evaluation within two weeks or so of a resentencing procedure would not be the typical procedure that Ms. Cashman would follow?
> A. I would think so.
>
> Q. You would think it would not be usual procedure?
> A. I think it would be typical procedure she would use. Miss Cashman, like I said, was very good about getting her work done right away and I would think that she would have hired somebody almost immediately.

(Vol. V. PCR. 67,68). (*Emphasis added*)

Rather than hiring a defense mental health expert "almost immediately," as was the standard procedure as outlined in Mr. Sims' testimony, Mr. Hitchcock's resentencing counsel waited until two weeks before trial to even schedule an **evaluation** of Mr. Hitchcock. This was ineffective assistance of counsel. This lack of preparation and investigation led directly to an inadequate and incomplete presentation of statutory and non-statutory mental mitigation evidence on Mr. Hitchcock's behalf at the resentencing jury procedure and the *Spencer* hearing.

Resentencing counsel's notices of intent to present expert testimony of mental mitigation further reveal the lack of preparation. On the 26th day of August, 1996, only 13 days before trial, counsel filed a written notice under rule 3.202 stating that the defense intended to present expert testimony of mental mitigation of "personality difficulties and self improvement". (1996 R. 812). August 30, 1996, counsel filed a "supplemental notice of intent to present expert testimony of

mental mitigation”, this time stating an intent to present evidence of the “Defendant being under the influence of extreme mental or emotional disturbance at the time of the incident”, a statutory mental mitigator. (1996 Vol XIV R. 862, 863).

The second notice was filed because of what the **defense** learned during the **state’s** deposition of Dr. Toomer on August 29, 1996. Incredibly, defense counsel didn’t know what mental mitigators Dr. Toomer had found and actually modified the scope of mental mitigation during the deposition.

> Q. Now, let me just say this and, Trish, you can respond if you like, I assume he will not be testifying as to the statutory mitigators since they are not listed, am I correct in that assumption?
> MS. CASHMAN: I assume you are asking about under extreme mental or emotional disturbance?
> MR. ASHTON: I’m asking you if you are planning on listing any testimony as to any of those? Trish, I’m asking you, not asking him. Are you planning on listing testimony to these matters? If not, I will not bother asking him. It wasn’t in the notice so I’m assuming you are not but–
> MS. CASHMAN: Doctor, do we have anything upon which you could testify with regard to and taken one at a time under extreme mental or emotional disturbance?
> THE WITNESS : Yeah

Dr. Toomer Deposition p. 44

> MR. ASHTON: We have a problem with your notice.
> MS. CASHMAN: My notice says - -
>
> MR. ASHTON: Personality difficulties and self improvement?
> MS. CASHMAN: Right.
>
> MR. ASHTON: Okay.
> MS. CASHMAN: Doesn’t say borderline personality disorder and doesn’t say statutory mitigation so.

Jeff, I can't tell you today I'm going to argue the statutory mitigator, I **don't know whether so I can't give you notice**. I can't tell you that.

MR. ASHTON: The notice, the requirement of the notice is so that I know what he is going to be called for. So you need to make a decision. That is the purpose of the notice, what you are going to call him for. And at this point you said two things and I have talked about both of those. If you want to speak to him as to whether you want to broaden that that is one thing but it's not up to him to broaden your notice. It's up to you. So I need to be able to rely on your notice. And now we are going into DSM-4 diagnosis that are not listed in your notice. So that is my problem. It's not his fault.

Is he not the one that is supposed to do the notice. What are we going to do about this? I can stop right now and when he comes down and I will object and make my motion but we can't just leave this vague.

MS. CASHMAN: So far I don't think he's talked about anything, you know, there's a question about the statutory mitigator and I'm going to need to research it obviously and, you know, I will give you notice if that comes up.

I know–Jeff, **I think it's obvious at the time I gave you the notice I didn't believe we had the statutory mitigator**. I don't know whether we do now if there comes a time that.

MR. ASHTON: This thing–if you want to speak to him for a little while and determine that, that's fine but the point of me coming down here with the notice was so I could know what to ask him about.

And at this pont you seem to be telling me that the notice doesn't mean anything, you may come up with something else later on and I don't think that is the purpose of the notice.

MS. CASHMAN: No that is not what I said.

MR. ASHTON: Do you want to take a few minutes and talk to him about the statutory mitigator? I don't have a problem if you do it now. I want to know now so I don't walk away from here and Monday come up with something new.

> MS. CASHMAN: To make it clear, **if I go back and research the case law and find out that I'm going to add under extreme mental or emotional disturbance at the time is there anything else that you would be testifying to with regard to other than what you a have already told Jeff today?** Anything during your evaluation or the records that you reviewed? Is there any other testimony you would be giving in regard to that?
> THE WITNESS: No, that's basically it.

Dr. Toomer Deposition p. 50-51. (*emphasis added*)

Resentencing counsel had no idea what mental mitigation evidence she intended to present on Mr. Hitchcock's behalf. It is beneath the standard of care for defense counsel in a death penalty case to be formulating what mental mitigators to present within 10 days of the penalty trial. These issues should have been thoroughly investigated, decided, and discussed with the Dr. Toomer well in advance of the September 9, 1996, resentencing procedure, and, indeed, before the state deposed him.

Defense counsel's ineffectiveness concerning the presentation of available mental mitigation evidence was manifested in the lack of pre-trial preparation and culminated at the September 9, 1996, resentencing jury procedure. Incredibly, after filing the August 30, 1996, "Supplemental Notice," counsel failed to ask Dr. Toomer whether the statutory mental mitigators were present when she questioned him at the penalty trial.

Questions to Dr. Toomer by Defense Counsel:

> Q. Doctor, based upon your evaluation did you find Mr. Hitchcock to suffer from borderline personality disorder?
>
> Q. Let's go back over each of those areas, tell us specifically what you found with regard to the borderline personality disorder with regard to Mr. Hitchcock?
>
> Q. What deficits can you talk about in his interpersonal relationships that were the result of this history?
>
> Q. These personality difficulties that you've told the jury about, would they have had an effect on him at the time of the crime?
>
> Q. What would they - - can you tell us what affect they would have had at the time of the crime ? what Mr. Hitchcock's mental status would have been then?
>
> Q. Can you give us a brief description of what James's mental status was at the time of the incident?

(1996 Vol. VI R. 175, 176, 183, 188, 190).

In response to the above questioning, Dr. Toomer testified that: Mr. Hitchcock suffered from borderline personality disorder and personality difficulties. He also testified that Mr. Hitchcock grew up in a dysfunctional traumatic family, had poor interpersonal relationships, overall instability, grew up in a family situation characterized by poverty and sustained illness and loss of father, observed abuse by his alcoholic stepfather upon his mother, ran away from home, and had no long range planning. Dr. Toomer stated these circumstances led to a feeling of isolation and abandonment and lack of security. He

also testified Mr. Hitchcock has benefitted from a structured environment in prison and has developed a "stick-to-itiveness" direction leading to remediation. He also stated Mr. Hitchcock had, while incarcerated, assisted individuals in prison trying to resolve conflicts. (1996 R. 164-187).

But Dr. Toomer's picture of the available mental mitigation was incomplete. Defense counsel failed to question him about the existence of the statutory mental mitigators. Given that Dr. Toomer had already stated in his pre-trial deposition that Mr. Hitchcock had been under the influence of extreme emotional disturbance and counsel had filed a written notice of intent to present that statutory mental mitigator, It was blatant ineffective assistance of counsel to fail to elicit this critical testimony.

This failure was prejudicial because Dr. Toomer testified at the evidentiary hearing that he was ready, willing, and able to testify at the penalty trial that both statutory mitigators existed, had he only been asked.

> Q. Now do you recall any discussions that you had with attorney Patricia Cashman between the time of your evaluation of Mr. Hitchcock and the time the state- which occurred on August 20th 1996, and the time that the state took your deposition on August 29, 1996?
> A. I discussed with her the findings of my evaluation. That was the nature of the interaction and discussions I had with her.
>
> . . . .
>
> Q. Now are you familiar with the– what's known as statutory mental health mitigation in the State of

Florida? Specifically an analysis of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. That's the first one. And second one, the capacity of the defendant to appreciate the criminality of his conduct or conform conduct to the requirement of the law was substantially impaired. Have you been asked in the past to render an opinion as to the presence of those two statutory mitigating circumstances?
A. Yes, I have.

Q. In death penalty cases?
A. Yes, I have.

Q. And you have done that in courts across the state of Florida?
A. That is correct, yes.

Q. Could you, Doctor Toomer, would you - - could you turn to the deposition which, I think for the purposes of the record, occurred on August 29, 1996?
A. Yes

Q. Now, page 44 of this particular deposition, and I'm starting on line 20, there's a question, discussion between Mr. Ashton and then Miss Cashman asked you questions.

> Question: Doctor, do we have anything which you can testify to, with regard to, and taking one at a time, under extreme emotional mental disturbance.
> Your answer there was yes.

A. Yes.

Q. That is correct. **Is that the first time you can pinpoint there was a discussion with Ms. Cashman concerning whether the statutory mental mitigation was present in Mr. Hitchcock's case?**
A. My recollection is that in terms of discussing all of the findings of the evaluation and the relationship of those to the collateral data as I mentioned, we discussed, for example, the findings of the evaluation. And as part of the discussions of those findings we indicated that these factors relate to mitigation. In other words, if you conduct an evaluation and there's certain results that come from

that evaluation as part of the discussions, it’s indicated that these factors relate to mitigation or would impact upon mitigation, and put **this is the first place where it is you might say discussed formally in that particular theme.**

Q. And can you take a look at page 50 of the same deposition, 1996, deposition, and take a look at what Ms. Cashman - - looking at - - starting with line - - so much their. And the second paragraph of that began on line 11. She’s discussing with Attorney Ashton and she says, Jeff, I think it’s obvious at that time I gave you those I didn’t believe we had statutory mitigator.

I don’t know whether we do know, if there comes a time that would -- that coincide with your understanding?
This is the first time you formally discussed with Ms. Cashman the existence of your opinion that the statutory mitigator, homicide, was committed by the defendant under the influence of extreme mental or emotional disturbance present in Mr. Hitchcock’s case?
A. In that formal sense, yes.

Q. And in the deposition you reiterated later in the deposition that it was your opinion that the statutory mitigator was, of capital felony, was committed while the defendant was under the influence of extreme mental or emotional disturbance was present. And in Mr. Hitchcock’s case, was that your opinion at the time the deposition took place?
A. Yes

Q. And what about the other statutory mental mitigator that – the capacity of the defendant to appreciate the criminality of his conduct or conform conduct with the requirements of the law was substantially impaired. Did you hold that opinion at the time of this deposition also?
A. That is correct, yes.

Q. Did anything change between the time of your deposition and the time of Mr. Hitchcock’s penalty phase? Did your opinion about existence of those two statutory mitigators alter or change in any way?
A. No, they did not.

> Q. Were you anticipating going into Mr. Hitchcock's penalty phase in 1996, that in fact you would be testifying as to the presence of the two statutory mental mitigators?
> A. As well as - - that, in addition to his overall psychological function, yes.

(Vol. VII PCR. 292-295)

The testimony shows that resentencing counsel even failed to discover the second statutory mitigator after she learned for the first time in the deposition that the first one existed.

At the evidentiary hearing, Mr. Hitchcock presented the available mental mitigation evidence which would have been presented at the resentencing proceeding had counsel properly prepared. Dr. Henry Dee testified about the existence of the statutory mental mitigators and of brain damage in Mr. Hitchcock as follows:

> Q. Well, were there any other tests you administered to Mr. Hitchcock when you evaluated him that were - - that showed evidence of brain damage?
> A. Yes, sir. First, let me say that the performance on test of general mental functioning and memory were essentially normal, slightly above average actually. Performance on the following tests was essentially normal. Judgment of line orientation, facial recognition, visual form discrimination, right/left orientation, stereognosis. He performed at a deficient level on two tests; categories test and Wisconsin card sorting tests. Both of those tests were developed to, as I just said, to detect presence of frontal lobe damage. He did perform at a defective level on both of those.

(Vol. VII PCR. 357)

> Q. Now those two tests that you administered, were the

results of those tests enough in and of itself to diagnose there was reasonable degree of neuropsychological probability that he has frontal lobe damage?

A. I think so, yes.

(Vol. VII PCR. 364)

Q. In your previous experience testifying as an expert witness have you been asked to formulate opinions as to what's known as statutory mental health mitigators?
A. Yes

Q. And death penalty litigation?
A. Yes

Q. And those statutory mental health mitigators being that at the time of the homicide whether or not Mr. Hitchcock was under the influence of extreme mental or emotional disturbance or the capacity of Mr. Hitchcock to appreciate the criminality of his conduct or conform conduct to the requirements of the law were substantially impaired. Did you endeavor to make an analysis in Mr. Hitchcock's case as to whether those statutory mitigators were present at the time of the homicide in question?
A. Yes. The best I can answer it is the following: I would say that both categories of statutory mitigation seem to be present. Because the kinds of behavior disorganization being a patient with frontal lobe injury they are dramatic and important. And that's the first one you said, major mental emotional disorder or defect, second one, and really speaks to the nature of the difficulty confirming their conduct to any kind of expectation, challenge your understanding at times. For example, if you give them a task to solve like a betting game, this is all well documented, there's been research done, they can verbalize the principal or high risk, low probability of success. And yet they'll lose all their money on the high risk. They can tell you it was a foolish thing to do. Invite them to participate again, they do the same thing again and again, repeatedly. Seem to be unable to inhibit these kinds of responses. Almost challenges your notion of free will when you see it happening, actually. So I

think both are present.

(Vol. VII PCR. 365)

Based upon the testimony of Dr. Dee and Dr. Toomer, it was established at the evidentiary hearing that resentencing counsel were ineffective for failing to investigate and present available evidence that:

(1) The capital felony was committed while Mr. Hitchcock was under the influence of extreme mental or emotional disturbance;

(2) The capacity of Mr. Hitchcock to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired; and

(3) Mr. Hitchcock has frontal lobe brain damage which contributed to the two statutory mental mitigators.

The proper presentation of this "weighty" mental mitigation evidence at either the jury resentencing procedure or the *Spencer* hearing would have "changed the picture" of the aggravating and mitigating factors where there is a reasonable probability the outcome would have been different sufficient to undermine confidence in the judgment and sentence.

This Court has consistently held that failure to present available expert opinions of the defendant's mental and emotional condition in support of mitigating circumstances constitutes substantial deficiencies in the performance of

counsel. In *Rose v. State*, 675 So.2d 567 (Fla. 1996), the Court found counsel ineffective for failing to present mental mitigators. In that case, Dr. Jethro Toomer testified at the evidentiary hearing that evidence could have been presented at trial that: (1) Rose suffered from organic brain damage; (2) Rose was a chronic alcoholic; (3)Rose had a longstanding personality disorder; (4) Rose met the criteria for the statutory criteria of being under the influence of an extreme emotional or mental disturbance at the time of the offense; and (5) Rose's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense.

This Court stated

> "We find counsel's performance, when considered under the standards set out in *Hildwin* and *Baxter*, to be deficient. It is apparent that counsel's informed strategy during the guilt phase was neither informed or strategic."

Id. at 572. Addressing the prejudicial effect of failing to present the mental mitigators this Court stated:

> [W]e have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order [*citing Hildwin v. State*, 654 So.2d at 110 (Fla. 1995), and *Santos v. State*, 629 So.2d 838, 840 (Fla. 1994)] and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness . . . indeed, the substantial mitigation that has been presented on the record is similar to the mitigation found in *Hildwin* and *Baxter* to require a sentencing proceeding where such evidence may be properly

presented.

Id. at 573.

Federal courts have also held that failure to present available mental mitigation evidence can be ineffective assistance of counsel. In *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit held that counsel was ineffective for failing to present psychiatric evidence. *Id.* at 495. In that case, Dr. Krop testified in the post conviction hearing that Mr. Middleton was under extreme emotional distress at the time of the homicide and that he had very limited capacity to conform his conduct to the requirements of the law. *Id.* The Court held that such testimony could very possibly have been obtained at the time of sentencing. The Court explained the importance of mental health mitigation evidence by stating that

> **[T]his kind of psychiatric evidence has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. . . . [T]his psychiatric mitigation evidence not only can act in mitigation, it could significantly weaken the aggravating factors"**.

Id. (Emphasis added).

The United States Supreme Court provides excellent guidance to this Court in evaluating Mr. Hitchcock's ineffective assistance of counsel claims. In *Wiggins v. Smith*, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Court addressed prevailing

professional standards in penalty phase investigation. Wiggins argued that his attorney's failure to investigate his background and present mitigation evidence of his unfortunate life history at his capital sentencing proceedings violated his sixth amendment right to counsel. *Id.* at 2531.

Applying the mitigation investigative standards outlined by *Wiggins* to Mr. Hitchcock's case, it is clear that trial counsel did not conduct a professionally competent investigation. Efforts were not undertaken to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence introduced by the prosecution. As noted by the *Wiggins* Court, ABA guidelines state that such investigation is essential to the fulfillment of the lawyer's role in raising mitigating factors to the court. A cursory investigation, as conducted by trial counsel in Mr. Hitchcock's case, does not suffice.

As outlined in the factual allegations in this claim, resentencing counsel did not confer with the mental health expert concerning mitigation findings until mere days before the resentencing trial was to begin. The lower court's order denying Claim VI of Mr. Hitchcock's Second Amended 3.951 Motion does not address the central issue of the failure of resentencing counsel to present the available statutory mental health mitigators. Accordingly, this Court should reverse.

B. Resentencing Counsel Was Ineffective for Failing to Present Available Evidence of Organic Brain Damage

In claim V of Mr. Hitchcock's Second Amended 3.851 Motion, he alleged his resentencing counsel were ineffective for failing to seek neuropsychological testing for presentation of evidence of brain damage. (Vol. X PCR. 596) The lower court denied relief stating "This Court finds that there is no reasonable probability that the outcome of the proceeding would have been different if counsel had arranged for neuropsychological testing."

The lower court erred in denying relief on this claim. This claim involves a mixed question of law and fact and requires de-novo review by this court under the *Stephens* case.

Contrary to the conclusion of the lower court, Mr. Hitchcock presented substantial evidence at the evidentiary hearing that he was prejudiced by the failure to refer him to a neuropsychologist. Specifically, at the evidentiary hearing Dr. Toomer testified about testing he administered to Mr. Hitchcock which indicated "signs" of organic brain damage:

> Q. One of the things that you did in your evaluation of Mr. Hitchcock, give him testing that would be for the purpose of screening whether there was evidence of organicity or brain damage?
> A. That's one of the aspects of the evaluation process yes.
>
> Q. Could you tell us about that? What did you do to screen for that and what is the purpose of that?
> A. The screening instrument that is utilized is Bender

Gestalt designs. Consists of a series of cards, each has a different simple drawing and the individual is asked to, in their best ability, to duplicate that particular symbol or drawing. . . . So we can look at the reproductions and we look at the distinctions between the drawings produced by the individuals and the original stimulus cards and it suggest what may be a particular problem and that problem could be organicity. The difference could also suggest underlying personality disturbance or thought process disturbance. It's a screening treatment. It suggests that there is a possibility.

Q. And why is it important to determine whether or not there is a possibility of brain damage?
A. Because if there's a likelihood then the next step would be to conduct a neurologically based assessment in order to pinpoint the extent and the nature of any underlying neurologically based impairment.

Q. And in Mr. Hitchcock's case what was the result of that testing on him?
A. I could not render an opinion, definitive opinion with regard to whether there was any organic deficit or brain damage. There was some soft signs which means there was some indication that suggests there might be some underlying organically based deficit.

Q. Would that be enough to alert you to have it followed up on by a neuropsychologist for further testing?
A. Right. When you get some indication then the next step is for some degree of follow up by some neurologically based instrument.

Q. And your not a neuropsychologist yourself?
A. No. I'm not.

Q. Now do you have any specific recollection of discussing those findings with any attorney representing Mr. Hitchcock, either Ms. Cashman or Kelly Sims?
A. No specific recall except that given the standard procedure in this work and in this particular case, in all cases, all that information would have been shared as part of the results of the examination conducted.

> Q. And would it say your available to discuss that matter with them if they wanted to discuss that topic with you and that you would have explained that in the same way you explained it to me in court today had you been asked by defense counsel?
> A. Yes, by all means.

(Vol. VII PCR. 314, 317)

The “signs” of brain impairment testified to by Dr. Toomer were inadequate to present a complete picture of the nature and extent of Mr. Hitchcock’s brain impairment. As Dr. Toomer stated, he is not a neuropsychologist. In order to effectively represent Mr. Hitchcock, resentencing counsel should have referred Mr. Hitchcock to a neuropsychologist such as Dr. Dee so a battery of brain impairment measures could be utilized. This would have allowed for a complete presentation of the brain damage issue, as was outlined earlier in Dr. Dee’s evidentiary hearing testimony. However, as previously outlined, resentencing counsel did not begin the investigation into mental mitigation testimony until very late in the proceedings. By the time Dr. Toomer had discovered the “signs” of brain impairment, resentencing counsel did not have time to refer Mr. Hitchcock to a neuropsychologist for the needed testing. Such a haphazard approach to a penalty phase of a death penalty case violated Mr. Hitchcock’s Sixth Amendment right to counsel and the spirit of the *Wiggins* case. This Court should reverse.

<u>ARGUMENT V</u>
THE LOWER COURT ERRED IN DENYING RELIEF ON

CLAIM VII OF MR. HITCHCOCK'S MOTION

Mr. Hitchcock continues to raise the claim that to the extent that any evidence used to implicate Mr. Hitchcock, or that could be used to exonerate him, is unavailable for later testing or destroyed, this destruction of evidence violated his right to challenge his counsel's effectiveness under the Sixth and Fourteenth Amendments, his rights to due process under the Fifth, Sixth, and Fourteenth Amendments and his rights not to be subjected to cruel or unusual punishment under the Eighth and Fourteenth Amendments as well as his rights under the corresponding provisions of the Florida Constitution.

The lower court denied Claim VII finding that the claim was procedurally barred. (Vol. XII PCR. 1127). In closing argument, Mr. Hitchcock argued that the lower court should allow DNA in light of the proffered testimony of Steven Platt, Diana Bass and Robert Kopec. Of particular note, Mr. Platt testified that he informed prosecutors of Diana Bass' availability before Mr. Hitchcock's 1988 resentencing and the prosecution informed the court that Ms. Bass was unavailable. The testimony of these witnesses showed that the hair testing conducted by Diana Bass was inevitably false. This Court should order testing despite this Court's denial in *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004).

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM VIII OF MR. HITCHCOCK'S MOTION CONCERNING THE *CALDWELL* ERROR THAT OCCURRED VIOLATING THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In his contemporaneously filed habeas petition, Mr. Hitchcock argues that appellate counsel was ineffective for failing to raise on appeal, the *Caldwell* violation that occurred in Mr. Hitchcock's 1996 resentencing, because this issue was both preserved at trial and apparent in the record on appeal. To the extent that this Court finds that the trial court's error was somehow not preserved, the fault for this lies squarely with Mr. Hitchcock's 1996_resentencing counsel and relief should have been granted by the lower court.

Here the jury instruction violated Mr. Hitchcock's rights under the Eighth and Fourteenth Amendments to the United States Constitution and counsel was ineffective for failing to object and demand that the jury which sentenced Mr. Hitchcock to death understood the importance of their decision.

Resentencing counsel filed a "MOTION TO STRIKE PORTIONS OF 'FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES' RE: CALDWELL v. MISSISSIPPI." (1996 VOL. XIV R. 723-725). In this motion counsel argued that "[i]t is not constitutionally permissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility

for determining the appropriateness of the Defendant’s death sentence rests elsewhere. *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985).”

Resentencing counsel’s motion also quoted the Florida Standard Jury Instruction in Criminal Cases:

> Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury render to the court an advisory sentence as to what punishment should be imposed on the defendant.
>
> It is now your duty to advise the court as to what punishment should be imposed upon the defendant . . . . As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you and to render to the court [an] advisory sentence. . . . (1996 VOL. XIV R. 723-725).

Resentencing counsel also stated “Additionally, these instructions often use the words ‘advisory’ and ‘recommendation’ when dealing with the jury’s sentencing decision. (1996 VOL. XIV R. 724). The trial court denied the motion by written order dated September 5, 1996 (1996 VOL. XV R. 939).

The trial court unconstitutionally minimized the jury’s role in the sentencing process beyond even the standard jury instruction by instructing the jury that:

> As you have been told, your final decision as to what punishment shall be imposed **is the responsibility of me as the judge**. However, it is your duty and responsibility to follow the law that I will now give

> you to render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of death penalty and what is sufficient mitigating circumstances exist to outweigh any aggravating circumstances you may find to exist. (1996 VOL. VII R. 363).(Emphasis added).

This instruction not only minimized the jury's function, it was also confusing to the jury because it inaccurately tracks the standard jury instruction. Based on a plain reading of the actual jury instruction in this case, not only was the jury's decision advisory, it was also the judge's responsibility. This informed the jury that they not only had no responsibility for determining whether Mr. Hitchcock received the death sentence, they also did not have any responsibility for their own decision as to what sentence should be imposed. Counsel should have objected at the time that the Court misinformed the jury of their role. This failure was both deficient and prejudicial under *Strickland.* In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court held that, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". *Id.* at 328-29. If the jury's responsibility for its role in determining a death sentence has been diminished, the defendant may be biased. It may likely deprive a defendant of his constitutional rights to

an individualized sentencing proceeding because the jury feels that any lack of consideration will be appropriately decided by another authority. *Id.* at 330-331. The jury might be unconvinced that death is the appropriate punishment but, nevertheless, recommend a death sentence to express disapproval for the defendant's acts or "send a message to the community". *Id.* at 331.

The lower court found that Claim VIII was procedurally barred because the claim could have been raised on direct appeal and in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *citing Card v. State,* 803 So. 2d 613(Fla. 2001). (VOL. XII PCR. 1127). Nothing in *Apprendi* justified the lower court's denial of the claim. Indeed, *Apprendi* recognizes the importance of a jury finding any fact that subjects an individual to an enhanced penalty. *See Apprendi*. The sentencing court's erroneous instruction assured that Mr. Hitchcock would be deprived of this important right. *Card*, as cited by the lower court, also provided no justification for the lower court's denial. In *Card*, this Court found that the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation did not violate *Caldwell v. Mississippi*, 472 U.S. 320, 105. Beyond any constitutional infirmity in Florida's standard instruction, the point of this claim was that the

instruction that the sentencing court gave was far worse than even the standard jury instruction.

To the extent that this Court finds that the sentencing court's jury instruction was not preserved and thus appellate counsel was not ineffective, resentencing counsel was ineffective. Florida's death penalty scheme, at least so far as it survives *Ring v. Arizona*, does so because at least in theory, Florida juries determine the applicability of the death penalty. The jury instruction given in Mr. Hitchcock's case diminished the jury's role far beyond that of even the standard jury instruction and led to Mr. Hitchcock being sentenced by a jury who was told their responsibility was assumed by the sentencing court. Accordingly, this Court should reverse the lower court's denial of relief and grant Mr. Hitchcock a new sentencing.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM IX OF MR. HITCHCOCK'S MOTION THUS DENYING MR. HITCHCOCK'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The lower court denied Claim IX and in doing so, denied Mr. Hitchcock his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*See* VOL. XII PCR. 1128). The court relied upon *Hitchcock v. State*, 755 So. 2d 638, 645, n.1 (Fla. 2000). The court did not discuss that this claim was amended to

include Rossi Meacham who testified at the hearing. The court also did not discuss Mr. Hitchcock's arguments justifying the raising of these claims after Mr. Hitchcock entered postconviction.

The lower court should have granted relief on Claim IX of Mr. Hitchcock's Motion. Since the time of Mr. Hitchcock's 1977 trial newly discovered evidence has emerged that shows his innocence and casts real doubt upon the legitimacy of his conviction. Mr. Hitchcock, as discussed in Argument I, has properly raised the newly discovered evidence within the time limits of 3.851. This was also the first instance that Mr. Hitchcock has been in a postconviction posture since he was granted relief by the United States Supreme Court in *Hitchcock v. Dugger*.

The newly discovered evidence presented at this hearing was unavailable to the original trial counsel at the 1977 hearing. In the case of Wanda Hitchcock Green, she had simply not heard Richard Hitchcock confess to the murder at that time. Ms. Green revealed Richard's confession for the first time on television following James Hitchcock's last sentence of death. The hearing that followed was a nullity because Mr. Hitchcock's judgment had not become final following an appeal to this Court and the United States Supreme Court's denial of Certiorari.

On September 11, 1996, James Hitchcock's sister Wandalene

Hitchcock Green appeared on television and stated that Richard Hitchcock had implicated himself in the death of Cynthia Driggers. Prior to this occasion, Ms. Green had never told anyone about Richard Hitchcock's admission. Richard Hitchcock died in October of 1994. Prior to Richard Hitchcock's death, Ms. Green spoke with Richard Hitchcock at their mother's house. During this conversation Richard Hitchcock implicated himself in the murder of Cynthia Driggers by stating that he, and not James Hitchcock, committed the murder and that James Hitchcock was only guilty of rape.

Richard Hitchcock also attacked Judy Gambale and in doing so implicated himself in the murder of Cynthia Driggers. This evidence was newly discovered when CCRC-M investigated this case. Ms. Gambale could not have testified to Richard Hitchcock's violent attack at the 1977 trial because Richard had not yet attempted to rape her.

Richard Hitchcock also admitted to Rossi Meacham that he murdered the victim. The facts that Rossi Bell Meacham offered at the hearing, which was pled by amendment, were not known even by Mr. Hitchcock's current counsel at the time that Mr. Hitchcock filed this motion. After becoming aware of the information that Ms. Meacham could offer, counsel immediately amended Mr. Hitchcock's postconviction motion.

During the time period that Richard Hitchcock was making

statements that implicated him in the murder, James Hitchcock did not have attorneys or investigators who had a duty to obtain evidence of his innocence. He was also unaware of this information until it came to light through the disclosure of Ms. Meacham, Ms. Green and Ms. Gambale.

As the hearing established, Richard had other victims besides Martha Galloway and the victim in this case. Richard also attacked Judy Gambale, his niece. Judy Gambale was the daughter of James H. [Not James E. the subject of this motion] and Fay Hitchcock. Richard Hitchcock jumped on Judy when she was 12 or 13 years of age and started to attack Judy sexually. (VOL. VI PCR. 201). Ms. Gambale's account would be admissible under the same legal theories that would have provided for the admissibility of Ms. Galloway and Brenda Reed which was discussed in full in Argument III B.

When asked what happened to her, Judy Gamble told the 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).

From this account it was clear that had Ms. Gambale not been able to kick Richard Hitchcock in what obviously was the genital area, she too would have fallen victim to Richard's sexual violence. This account also represents an admission by Richard that he committed the murder of the victim. Certainly, if the roles were reversed and James Hitchcock had made the same statement, the State would have sought the admission of the statement to show guilt. Such a statement was no less admissible in his defense to show the jury just who had committed this offense.

The account of Judy Gambale was discovered by the investigative efforts of Mr. Hitchcock's current representation. Prior to the discovery by CCRC-M, Mr. Hitchcock did not have counsel who were appointed to investigate his innocence and he certainly was limited in his ability to do so from his cell on Florida's death row. Accordingly, this constituted newly discovered evidence which, alone, or in addition to the other evidence in this case, would likely produce an acquittal. It is important for this Court to consider the additional evidence that the jury never heard at the trial due to 1977's ineffectiveness, the actual trial and the other newly discovered evidence in this case.

Wanda Hitchcock Green, another sister, also testified at this hearing over the objection of the State. The State's

objections were without legal or factual grounding. As stated in Argument I, the headnote cited by the State during its objection does not hold that the lower court properly denied relief. *See Hitchcock v. State*, 755 So. 2d 638, 645. At a legitimate hearing Mr. Hitchcock would have been able to call witness to have corroborated Ms. Green's testimony. At this hearing, Ms. Green's testimony not only was offered as newly discovered evidence but also was corroborative of the other Arkansas witnesses as they were corroborative of her.

While Ms. Green was able to avoid being raped by Richard Hitchcock, she was not so fortunate in avoiding his violence and sexual possessiveness. 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 but I would fight back so he couldn't do me that way. He only he can only do the ones that way that were, I'm not going to say - - well, younger. He couldn't handle me like that. (VOL. VI PCR. 187).
>
> 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).

Although Richard never could rape Wanda like his other sisters, because of her size and age, this did not prevent the fierce beatings she would endure at the hands of Richard when Richard was denied the fulfillment of his desire to dominate

Wanda as his sexual property. Wanda Green described what would happen when she resisted:

> A: Richard he would slam me against the wall and almost choke me to death. At one point, one point I passed out and he thought he had choked me to death.
> Q: Okay. What brought on that choking?
> A: Rage.
> Q: And what would set the man off?
> A: Anything that he couldn't control. He wanted to control everybody. When my dad died he thought he was boss and my mother let him get with it.
> Q. Can you tell us anything, any other specific times when Richard Choked you.
> A: Yes. One time I came in I guess I was sixteen and I didn't know that Martha and Brenda was at home by their self with him. As I walked through the door he was trying to rape Martha and I caught him and I did. Carl [Richard] grabbed me around the neck and was choking me and he slammed me through the front door which was a plate glass door, the top part. And when he did the glass fell and cut my leg open on the side of my leg which I still got a scar about that long. And he like, he almost killed me then. He liked to choke me then. He ran my head through the window then.
> Q. Okay. Did Richard Carl Hitchcock ever react to you being interested in another boy or possibly being interested as young girls often are at that age.
> A. Yes.
> Q. How old are (sic were) you?
> A: Thirteen
> Q: Could you tell us what happened with that?
> A: At fifteen years old, and this was a date that Carl [Richard] had arranged hisself, he decided I could go. My cousin Patricia and her boyfriend picked me and this other guy up and it was one of Carl [Richard]'s friends. And he let us go riding around. I was supposed to be home eleven o'clock. We had a flat. We didn't get there until eleven fifteen. When I walk through the door he grabbed me around the neck and almost choke me to death and beat me with a broom stick.
> Q. Did he say anything to you?
> A. Yes. He called me all sorts of whores and everything else and he just continually done that and my mother stood there and let him do this. And then

> finally, when he quit I was black and blue. So the next morning he gets up and he tells my mother, he says you have a choice. Either she can stay here and I will leave or she can leave and I'll stay here And my mother sent me away.
>
> - - - - -
>
> Q. How many times would you say Richard, he choked you over the years.
>
> A. Oh, Lord. I would say about twenty times

(VOL. VI PCR. 187-90).

Ms. Green would have refused to talk to Mr. Hitchcock's 1977 trial counsel because she believed if the State accused somebody that meant that the accused was guilty. (VOL. PCR. VI 193-94). Her reluctance would disappear after she heard Richard confess to the murder for which James Hitchcock still remains on death row. Ms. Green sat with a free Richard Hitchcock at her mother's table when Richard revealed his guilt. Wanda Green stated at the 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).

Rossi Bell Meacham was an acquaintance of Richard Hitchcock and knew some of the rest of the family from Arkansas. (VOL. VI PCR. 160). Ms. Meacham lived in Manila, Arkansas. Ms. Meacham was an important witness because Richard Hitchcock revealed to her the dark secrets which he never revealed to the jury: that he was the killer of Cindy Driggers. Ms. Meacham was discovered through the investigative work of CCRC-M and was previously unknown.

Ms. Meacham had never met James Ernest Hitchcock, but she did know Richard Hitchcock. (VOL. VI PCR. 160). Ms. Meacham met Richard in the early nineties before Richard died. (VOL. PCR. 160-61). At this hearing after Ms. Meacham answered the question of whether Richard Hitchcock ever discussed a murder, the State objected and mistakenly described Ms. Meacham's testimony as lingering doubt evidence. (VOL. PCR. 161). This was absolutely incorrect; 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 other testimony.

Over the State's objection Ms. Meacham continued to tell the

truth about Richard’s admission to murder. (VOL. PCR. 162). Ms. Meacham 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 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. 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).

The lower court never made a ruling that these witnesses were anything less than credible. These witness came to court told the lower court the truth that Mr. Hitchcock, the jury and this Court have so long been deprived.

In *Jones v. State*, 591 So. 2d 911 (Fla. 1992), this Court stated “ [W]e hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal upon retrial. The same

standard would be applicable if the issue were whether a life or death sentence should be imposed." *Id.* at 915. It is also required that the newly discovered evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by the use of diligence." *Id.* (citations omitted.)

While the evidence here goes primarily to a new penalty phase, the lower court should also have considered that evidence of Richard's guilt would have led to an important mitigator. This new evidence established that Mr. Hitchcock was only an accomplice to the murder Richard had committed, if he even was an accomplice.

Under Section 90.804, Florida Statues, the evidence from the hearing would be admissible in a new trial or sentencing because Richard Hitchcock is unavailable and made these statements against his own interest. *See also Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973); *Carpenter v. State*, 785 So.2d 1182 (Fla. 2001) on the right to put forth this evidence.

Mr. Hitchcock has met both the criteria for newly discovered evidence and for the admissibility of the testimony discussed in this section. Hopefully the truth has not come to late for the injustice that happened to James Hitchcock to be remedied. This

Court, based on all the evidence considered in its entirety and the newly discovered evidence argued here, has the opportunity to remedy this injustice and should grant Mr. Hitchcock a new trial.

ARGUMENT VIII
THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM X OF MR. HITCHCOCK'S MOTION FOR POSTCONVICTION THUS DENYING HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Claim X of Mr. Hitchcock's postconviction motion involved the performance of the hair analyst Diana Bass and the State's violation of its duties under *Brady, Giglio and Napue*. Claim X alleged that the failure to disclose the deficiencies of hair analyst Diana Bass violated Mr. Hitchcock's right to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Trial counsel was ineffective in failing to object to Diana Bass's testimony because Ms. Bass was not an expert and could not offer an opinion, thus denying Mr. Hitchcock his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution. Lastly, the motion alleged, that the revelations concerning Ms. Bass and the Sanford Crime Lab constituted newly discovered evidence.

The lower court denied Claim X. (VOL. XII PCR. 1128-29).

For the reasons the court set forth in Ground II, it found this claim procedurally barred as it related to the 1977 guilt phase and moot_as it related to the 1988 resentencing. (VOL. XII PCR. 1129). The_court did not discuss the misconduct of the State, as confirmed by the testimony of Steven Platt, or the many arguments made by Mr. Hitchcock as to why this claim was properly before the court. Having sustained the numerous state objections at the hearing, leading to the proffer of the testimony in support of this claim, the court did not address the substance of the witnesses testimony. Had the lower court reached the merits the court would have been bound to grant Mr. Hitchcock relief. This Court should reverse.

For the reasons discussed in Argument I of this brief, Mr. Hitchcock was not procedurally barred from raising this claim. Moreover, contrary to the lower court's finding the 1988 misconduct of the State moot, the evidence of the State's misconduct in 1988 offers further justification for raising this claim in postconviction.

In support of Claim X, Mr. Hitchcock called Robert Kopec as a witness at the hearing. (VOL. VI PCR. 207). Mr. Kopec was extremely well qualified as a hair and microscopy expert based on his education, training and experience in the field. (VOL. VI PCR. 207-08). Moreover, Mr. Kopec was the supervisor of Diana Bass, the microanalyst from the 1977 trial that led to the

false conviction of Mr. Hitchcock. (VOL. VI PCR. 214). Mr. Kopec was accepted as an expert in the area of hair analysis but, because the State's objection was sustained, his testimony came in only as a proffer. (VOL. VI PCR. 220). The record from this hearing was unclear as to which part of the State's shotgunned objection the lower court sustained.

The testimony of Mr. Kopec, contrary to the State's objection, was relevant proved Mr. Hitchcock's Claim X. Claim X of Mr. Hitchcock's motion addressed the many ways that the testimony of Diana Bass violated James Hitchcock's rights. By proffer, Mr. Kopec detailed the gross inadequacies of Diana Bass. What he observed when he became responsible for the supervision of Diana Bass was:

> At the time Diana Bass had about three years of experience at the Sanford Regional Crime laboratory. Didn't really exhibit the level of knowledge and experience that she should have had in three years in many aspects. She didn't exhibit many of the even basic skills that any analyst should have had in their first year of analysis. In particular, the very basic skills were missing. What seemed to be a failure to understand the importance of the integrity of items of evidence, microanalytical evidence, which much of the time you can't see. Evidence handling skills were extremely poor and I have -- I would suspect that -- well, my experience has been this is one of the -- this is the one of the first things you learn and she did not exhibit even very beginning of understanding how to handle evidence.
>
> For instance, it was on quite a number of occasions when I observed her doing hair cases. One of the things she would do would be to take out hairs from multiple items of evidence at one time and have multiple hair items on the desk at one time. There

was -- normally in a situation like that it was easy to contaminate one sample with another sample. Hair is so light, simply one person walking by the desk could blow a hair from one pile to the next pile. Occasionally, she would have these multiple samples out. She would take little stick on dots. She would stick the hair down on a piece of paper, line it was graph paper, as I recall. And this evidence would be remain on the desk in that condition throughout lunch periods. I observed her do that overnight on a number of occasions. Even though she was constantly told not to do this type of thing she continued to do it. And again this is a very dangerous situation particularly with microanalytical evidence. There was no protection of the evidence at. All simply didn't quiet understand how important maintaining integrity of each item is first. Probably first month's training we would normally teach that you only examine one item of evidence at one time. People remove hair from one item at a time and only have it under the microscope one item at a time. never have more than one item at a time open. This is very very basic understanding with microanalytical skills until you find a way to permanently protect the hairs. And that might be by mounting them on microscope slides so they can't blow away. But again, she had exhibited none of the very basic things in that aspect.

At that time, Sanford Lab, it was common to assign one analyst multiple cases. And the main purpose for that was to give somebody responsibility of following that case up. The expected procedure would have been the analyst would have worked on one case at a time, had the evidence opened from one case at a time. The expected procedure would have been that those other cases would have been in the evidence room and the folders may have, the administrative folders may have been at an analysts disk but they were only working one case at a time. Diana's -- Miss Bass' procedures was that she would start on one case and when she got to a point where she had difficulty or board with a case or something along those lines, she would stop the analysis on that case and leave the evidence out on her work table, get another case, Bring that, open that one up and again, it was possible to have__contamination between the two different cases, very very high, considering the way she handled evidence.

> And again these are the very very basic, very very basic things. She was instructed time and again of the proper procedures and she refused to follow them. She had quite a number of deficiencies in the area of basic skills. I want to say I was appalled by what I saw and I was. And she just -- I instructed her as best as I could but she didn't seem to want to learn. Secondarily, she had a very poor understanding of the techniques used in microanalytical analysis of hair. (VOL. VI PCR. 221-24)

Mr. Kopec went on to describe the proper method for hair examination:

> Actually, the method of examining hair then is basically the same as it is now, same as it was in nineteen thirty. It hasn't changed very much except for the introduction of d n a evidence recently. Normal procedure would have been to examine specific type of thing we're talking about, known and unknown hair from the crime scene to the known sample of hair from a specific person. It's a comparative analysis, one against another. It's done microscopically. However, normal procedure would be to open up the packet envelope with the known hair of one of the people, examine it under low power microscope taking care not to allow any of it to get blown away, any contaminates in the room fall. Examine it on low power to describe the hair, length and general color. General amount of curl, this type of thing. Very low level analysis. At that point the hairs, then those specific hairs would have been mounted on microscope slides. That is little glass slide, one inch by three inches. Hair would have been cemented and fused to the glass plates and a cover is slipped over that which would have been cemented also. This makes a permanent protective box, so to speak for the hair. Also allows the hair to sit flat so you can look at it under the microscope.
>
> Once that was done, all of those known hairs that were not mounted were put away in the envelope that came in, then you would go to the questioned hairs and each one would be the same procedure would be followed for each one of those specific hairs. And again if the questioned hairs came from multiple places of the crime scene; one was found in a car, one was found on

> the body, one was found on the floor, each one of those would be examined separately away from the other ones. They are mounted separately. They would -- packages would be opened separately, examined separate and mounted separately. And then you would go to the next one do the same procedure. Then what you would do is compare slides contained in the known hairs. So hairs on the known slide to the mounted hairs on the questioned sample. This is done microscopically. It was done generally using either comparison microscope or a high quality medical type microscope.(VOL. PCR VI 224-26).

The very nature of hair, its fineness, showed that the analyst could falsely include someone through hair analysis because the samples were mixed up. 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).

Most of all, Mr. Kopec confirmed that this type of procedure was being used by Diana Bass at that time. Mr. Kopec's testimony clearly showed the incompetence of Diana Bass. This information was not disclosed by the State while this case has been pending all of these years on resentencing and on appeal. Thus, the State as a whole, failed to disclose extremely important *Brady/Giglio* information and correct the 1977 trial testimony of Diana Bass.

Even Diana Bass' own testimony supported her incompetence in the area of hair analysis. Again by proffer, after a State objection, Ms. Bass testified that she only had a degree in Biology when she began work at the Sanford Crime Lab as a criminalist. (VOL. VI PCR. 257). This crime lab later became the FDLE crime lab (VOL. VI PCR. 257). Ms. Bass later worked primarily as a microanalyst. (VOL. VI PCR. 259).

Importantly, Ms. Bass testified that one of the reasons she left her position at the lab was because she felt that she needed more training than what was offered at the Sanford Crime Lab or FDLE. (VOL. VI PCR. 261). Ms. Bass even requested training but was discouraged from obtaining further training because of her heavy case load. (VOL. VI PCR. 261). Ms. Bass was unsure of dates but she did experience back logs and at one time 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). She was, in her opinion, a better hair analyst in 1978 when she left then she was in 1976, the year that she conducted hair comparisons in James Hitchcock's case and excluded Richard Hitchcock.

Diana Bass admitted that there was a problem with evidence handling at the lab. (See VOL. VI PCR. 263). Most importantly, she admitted that hair was left out overnight during her tenure at the lab. (VOL. VI PCR. 264). While Diana

Bass could not recall specific dates, Mr. Kopec did not discover Ms. Bass' incompetency and truly horrible evidence handling skills until 1978. Thus, while Ms. Bass may have been improving and reached her best right before she left in 1978, she still lacked fundamental skills and knowledge.

The 1977 testimony of Diana Bass should not have been admitted into evidence and would not have survived a *Frye* hearing. The failure to properly challenge the admissibility of Diana Bass' "expert" opinion was the failure of Mr. Hitchcock's trial attorney. Even had there been a proper challenge to the admission of Diana Bass' testimony, James Hitchcock was denied exculpatory evidence in the form of a match between the known hair of Richard Hitchcock and the questioned hair found on the victim. A false exclusion by Diana Bass denied Mr. Hitchcock his rights the same as a false inclusion.

Mr. Hitchcock was entitled to a trial free from the taint of Diana Bass' testimony. 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 that 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."

It only becomes worse if the knowledge of the State as a whole were considered. Ms. Bass' own testimony at the hearing showed that she was incapable of doing a proper hair comparison analysis. Ms. Bass, the State Attorney's Office, the Sanford Crime Lab, then FDLE, never disclosed to the jury the lack of training Ms. Bass had, her sloppiness of work and the case load that she worked under during her tenure at the lab. Through the testimony of Diana Bass, Steven Platt, and Mr. Kopec at the hearing, it was evident that a *Brady/Giglio* violation occurred in Mr. Hitchcock's case.

The State must disclose evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995). Additionally, ". . . the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437-38. Diana Bass was incompetent to

conduct hair analysis. She may have falsely excluded Richard Hitchcock's hair through improper evidence handling and testing and falsely matching James Hitchcock's and the victim's hair with the unknown samples taken from the crime scene. The evidence of Diana Bass' incompetence was favorable because it was also impeaching of her credibility. It was suppressed by the State, specifically by Diana Bass and other members of the crime lab who knew she was unable to properly conduct hair analysis. The prejudice that followed was great, the State was able to cloak its case in false scientific certainty and convict an innocent man.

The State also 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, 92 S.Ct. 763, 31 L.Ed.2d 104 (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 lab that lacked the methodology to conduct reliable scientific hair analysis. The State, especially Diana Bass never brought this truth to jury or to the defense.

Moreover, the State's failure to disclose the incompetence of Diana Bass was compounded by the prosecutors misinforming the court that Diana Bass was unavailable and then reading in her

1977 testimony at Mr. Hitchcock's 1988 resentencing. Ms. Bass was available and could have been subjected to cross examination at the 1988 resentencing, thus divulging that there was a problem with her testimony at the original trial. This was proven for the first time when Mr. Platt took the stand at this hearing and stated that he had informed the prosecution that he had found Diana Bass before Mr. Hitchcock's 1988 resentencing. (VOL. VI PCR. 247). Mr. Platt was questioned and replied as follows on this point:

> 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).

Ms. Bass, when appearing at this hearing, confirmed that she was living in Florida in 1988 the year that Mr. Hitchcock's penalty phase and second death sentence occurred. (VOL. PCR. 210). Accordingly, Ms. Bass was not unavailable as the State misled the Court in 1988.

This Court did address the unavailability of Diana Bass in its opinion following Mr. Hitchcock's death sentence. *Hitchcock v. State*, 578 So. 2d 685, 691 (Fla. 1990); vac'd on other

grounds 614 So. 2d 483 (Fla. 1993). When this Court issued this opinion, this Court did not know what came to light at this hearing. Without the knowledge that Diana Bass was available this Court stated:

> Hitchcock next claims that the court erred in allowing the state to read into evidence the trial transcript of a hair analyst's testimony because the state did not demonstrate her unavailability. At 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. We see no error in the court's finding this witness to be unavailable. Moreover, because the court admitted her entire testimony, including cross-examination, no confrontation clause violation occurred. See Chandler v. State, 534 So.2d 701 (Fla.1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989). Therefore, we find no merit to this issue.

Id. 691

This Court clearly did not know that the prosecutors had misinformed the Court about Diana Bass' availability. This Court also never considered that the State did not disclose the evidence of Diana Bass that came to light in the *Peek* case. *See Peek v. State*, 488 So. 2d 52, 53 (Fla. 1986).

The testimony concerning Diana Bass at this hearing also constitutionally mandated a new trial because, as raised in the motion, the evidence that came to light at this hearing through proffer was newly discovered. *See Jones v. State*, 591 So. 2d 911 (Fla. 1992). 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 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. Moreover, because Hitchcock received penalty phase after penalty phase because of the denial of his rights and only reentered a postconviction posture now, the issues involving Diana Bass should have been considered by the lower court. 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.

After this evidentiary hearing, the fact remains that Mr. Hitchcock remains sentenced to death for a crime he did not commit, and this was made possible because Diana Bass lacked the competence to properly conduct hair analysis in this case. The evidence had not obtained a level of scientific certainty as required under *Frye*. Counsel performed deficiently regarding Diana Bass' testimony as a whole and failed to safeguard Mr. Hitchcock's due process rights to a fair trial. Counsel's performance denied Mr. Hitchcock his right to effective assistance of counsel under the Sixth and Fourteenth Amendments to United States Constitution. Lastly, the State violated Mr.

Hitchcock’s right to due process by failing to disclose the incompetency of Diana Bass and allowing false testimony to be heard by the jury. The prejudice that resulted from these failures was overwhelming; the State’s case was wrapped in a false cloak of scientific credibility which led to the false conviction of James Hitchcock. Accordingly, this Court should reverse.

ARGUMENT IX

THE LOWER COURT ERRED IN DENYING RELIEF ON CLAIM XI OF MR. HITCHCOCK’S MOTION THUS DENYING HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Mr. Hitchcock was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendment’s to the United States Constitution. *See Strickland supra.* The lower court erred in denying relief on this claim. This Court should reverse.

Claim XI of the motion alleged, in sum, that the sexual battery, as seen by the State’s own evidence, was complete by the time that the homicide in question began. Accordingly, the aggravator of during the course of a felony, (*see* Section 921.141(5)(d),did not apply to Mr. Hitchcock’s case and counsel was ineffective for not adequately addressing this issue.

The lower court denied Claim XI (VOL. XII R. 1129). The

court found that “counsel had no basis to object to the instruction given that the murder was committed during the commission of a felony or to request that a special instruction which would have required the jury to determine whether the sexual battery actually occurred”(VOL. XII PCR. 1130).

Mr. Hitchcock was charged and convicted of murder under Section 782.04, Florida Statutes. The indictment in this case states in relevant part: “James Ernest Hitchcock did, on the 31st day of July, 1976, in Orange County, Florida, in violation of Florida Statute 782.04, from a premeditated design to effect the death of CYNTHIA ANN DRIGGERS, a human being, kill and murder the said CYNTHIA ANN DRIGGERS, in said State and County, by strangling her with his hands.” (1996 VOL. XIV R. 630). At the 1977 guilt phase the jury was instructed on premeditated murder and felony murder but did not return a verdict as to which theory applied to Mr. Hitchcock or whether both applied.

At the 1996 resentencing, the State argued for the aggravator that the murder took place during the commission of a sexual battery or “rape” as the State continually referred to it. The trial court found this aggravator existed. (1996 VOL. XVI R. 1051) The jury, however, never returned a specific finding that the murder in the instant case occurred during the commission of a felony.

Resentencing counsel never argued that even if there was a murder, the act of sexual battery took place before the murder

that James Hitchcock was charged with and the entire act was complete. There was no evidence that the homicide occurred at the time the actual penetration was taking place. At the 1996 resentencing Dr. Ruiz the medical examiner testified in response to State questioning on direct as follows:

> Q. And you indicated in your opinion prior to that incident she was virginal, hadn't been -
> A. Yes.
> Q. Can you determine how close to the time of her death that the hymenal tear was caused?
> A. Well, a few hours before, because it was a recent one.
> Q. It would have been from a few hours to just before, or did there have to be a few hours in between, in other words, is it from the time of death to a few hours back, that's the range or that it had to have happened a few hours before death?
> A. No a few hours before the death of the victim.

(1996 VOL. VI R.118).

On cross examination Dr. Ruiz testified as follows in response to trial counsel's questioning:

> Q. Let me get this straight for my own edification. You say the sexual battery would have occurred a few hours before the actual death of Miss Driggers, is that correct?
> A. Well, this was a recent injury. Could be one hour or maybe half an hour or maybe two hours.
> Q. Or maybe - - give me a time frame, all I'm asking.
> A. Well, a recent injury is something that occurs within hours, but not 20 hours or 25 hours or something like that.
> Q. I understand, Doctor, listen to my question, from when to when, what are the outsides?
> A. I wasn't there.
> Q. Give me your opinion?
> A. I would say between one and one hour. I could say that this is as recent laceration that took place a

few hours before.
Q. Few hours before?
A. Few hours, within one hour, two-hour, three hours.
Q. One, two, three hours, is that what you're saying?
A. Yes, more or less.

(1996 VOL. VI R. 118-19).

Section 921.141(5)(d), Florida Statutes provides in relevant part:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any. . . . sexual battery. . . ..

Evidence at the 1996 resentencing did not prove this aggravator beyond and to the exclusion of every reasonable doubt. The State's own expert, Dr. Ruiz had the sexual battery occurring an hour or more before the death. (1996 VOL. VI 118-19).

The 1996 resentencing jury never heard the elements of sexual battery. Had the jury been instructed on these elements the jury would have had a reasonable doubt as to the aggravator that the murder was committed **during the course of** a sexual battery. Reasonable counsel would have requested this jury instruction so that the jury would not have considered this aggravator if it found that the sexual activity was complete before the murder began.

Apart from requesting the jury instruction, resentencing

counsel was ineffective for not arguing that the State had not proved beyond a reasonable doubt that the murder occurred during the commission of a sexual battery. Reasonable counsel would have argued that the State did not prove this aggravator beyond a reasonable doubt and would have discussed the testimony of both Dr. Ruiz and the recorded statement that any sex act was complete before the murder took place. Based on the overwhelming mitigation, absent the jury's finding of this aggravator it is probable that the jury would have recommended life.

Accordingly, counsel should have moved for both a jury instruction detailing the elements of sexual battery and at least argued to the jury that had a sexual battery took place, that act was complete by the time the murder occurred. With a proper instruction, or a coherent argument, it was reasonably probable that the jury would not have recommended death. Counsel's failure allowed the jury, either individually or collectively, to return a death recommendation and allowed the trial court to impose such a sentence. The prejudice was not just apparent but overwhelming in this regard. This Court should reverse.

ARGUMENT X

THE LOWER COURT ERRED IN DENYING MR. HITCHCOCK RELIEF ON CLAIM XII OF HIS MOTION THUS DENYING MR.

HITCHCOCKS RIGHTS UNDER THE FIFTH, SIXTH, EIGTH AND FOURTEENTH AMENDMENTS.

The lower court denied Claim XII (VOL. XII PCR. 1130). The court found that the claim related solely to the 1977 guilt phase and was procedurally barred for the reasons the court found under Claim II (VOL. XII PCR. 1130). For the reasons discussed in Argument I of this brief, Mr. Hitchcock was not procedurally barred from raising this claim in postconviction.

In the postconviction motion at issue, Mr. Hitchcock alleged that:

> MR. HITCHCOCK WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE COUNSEL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE: HE WAS NOT PRESENT AT BENCH CONFERENCES DURING THE JURY SELECTION PROCESS WHERE PEREMPTORY CHALLENGES WERE EXERCISED BY BOTH THE STATE AND THE DEFENSE; THE TRIAL COURT BREACHED IT'S RESPONSIBILITY TO ENSURE A COMPLETE RECORD BY FAILING TO DIRECT THE COURT REPORTER TO RECORD AND TRANSCRIBE THE BENCH CONFERENCES WHERE PEREMPTORY CHALLENGES WERE EXERCISED BY BOTH THE STATE AND DEFENSE AND TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ENSURE THAT MR. HITCHCOCK WAS PRESENT DURING CRITICAL STAGES OF THE PROCEEDINGS.

During the jury selection process in Mr. Hitchcock's 1977 trial, peremptory challenges by both the State and Defense were exercised at bench conference outside the presence of Mr. Hitchcock and the Court Reporter (1977 VOL. I R. 99, 100, 161, 188, 198, 204). Mr. Hitchcock's 1977 trial counsel could not recall whether Mr. Hitchcock was at the bench when peremptory

strikes were made and the jury that falsely convicted Mr. Hitchcock was selected. (VOL. V. PCR. 128). The record, however, speaks for itself and accurately reflected what occurred in court at Mr. Hitchcock's trial.

It was well settled law at the time of Mr. Hitchcock's trial in 1977 that a defendant had a right to be present during critical stages of his trial, including all stages of jury selection. In *State v. Melendez*, 244 So.2d 137 (Fla. 1971), this Court stated: "It is settled law that trial begins when the selection to the jury to try the case commences. The defendant has the right to be, and is required to be, present during certain phases of his trial, including all stages of the jury selection." *Id*. at 137. The Court went on to say that the defendant may affirmatively waive this right on the record after inquiry by the court to his acquiescence *Id*. at 137, 138.

Mr. Hitchcock never waived his appearance at the bench conference or accepted the jury panel on the record. Therefore, Mr. Hitchcock is entitled to a new trial due to this fundamental breach in his right to due process of law.

As to the failure of the trial court to ensure a complete record, Florida Law is clear that the circuit court is required to certify the record on appeal in capital cases. Art. 5 Section 3(b)(1), Fla. Const.; 921.141(4), Fla. Stat. In *Dobbs v.*

Zant, 113 S.Ct. 835 (1993), the Supreme Court acknowledged the integral nature of a complete transcription of the record to a death sentenced individual's right to review. The failure of the trial court to record the entire proceedings, including bench conferences where peremptory challenges were exercised and other legal arguments throughout the trial, violated Mr. Hitchcock's right to a full review on appeal, his right to equal access to the courts that would review his conviction, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The trial court judge was responsible for ensuring a complete record in a death penalty case. In this case, the trial court failed to ensure a complete record because the bench conferences where the peremptory challenges were exercised by the State and Defense were not transcribed by the Court Reporter. Due to this fundamental error by the trial court, it was impossible for Mr. Hitchcock to ascertain whether peremptory challenges were exercised in a constitutionally required manner. For example, due to the absence of transcripts, it is impossible for Mr. Hitchcock to know whether any African American jurors were improperly challenged by the state. Because there was no transcription of this critical stage of the proceedings against Mr. Hitchcock, no meaningful appellate and postconviction review

of his conviction can take place. Mr. Hitchcock is entitled to a new trial.

Trial counsel was ineffective for failing to ensure Mr. Hitchcock's presence at critical stage of the proceedings. One of the responsibilities of trial counsel was to ensure that his client was present at critical stages of the proceedings. One of the legally recognized "critical stages" of a criminal trial is the use of peremptory challenges in the jury selection process. Trial counsel performed below the professional standard of care by failing to ensure his client's presence at bench conferences where peremptory challenges were exercised by the State and Defense (1977 VOL. I R. 99, 100, 161, 188, VOL. II 198, 204).

The failure of trial counsel to ensure Mr. Hitchcock's presence during the jury selection process is such a fundamental error and denial of right to adequate counsel, that no showing of prejudice under the *Strickland* standard need be established to warrant relief. Because the ineffective performance of counsel deprived Mr. Hitchcock of a fundamental right to be present at all "critical stages" of the proceedings, prejudice is presumed and a new trial is mandated by the United States and Florida Constitutions.

Trial counsel rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United

States Constitution by failing to ensure Mr. Hitchcock’s presence at critical stages of his trial i.e. the jury selection process when peremptory challenges were exercised. The absence of Mr. Hitchcock during the exercising of peremptory challenges is a “trial error” reflecting a structural error in the constitution of the trial mechanism of the type contemplated by the Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246 (U.S. 1991). As such, the harmless error doctrine does not apply because prejudice is presumed.

The lower court failed to confront the gross deprivation of Mr. Hitchcock’s rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. This Court should reverse.

ARGUMENT XI

MR. HITCHCOCK IS ENTITLED TO RELIEF UNDER *RING V. ARIZONA* AND *APPRENDI V. NEW JERSEY* AND RAISES THIS ISSUE IN THIS APPEAL TO PRESERVE THIS ISSUE FOR FURTHER REVIEW.

Mr. Hitchcock is cognizant of this Court’s decisions denying Ring relief. *See Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), and *King v. Moore,* 831 So. 2d 143 (Fla. 2002). He is also cognizant that despite the United States Supreme Court precedent that supported the United States Supreme Court’s decision in *Hitchcock v. Dugger* a number of individuals were executed in

Florida until the Supreme Court issued this opinion.

Florida's death penalty scheme, under which Mr. Hitchcock was sentenced, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. As *Apprendi* made clear, any circumstance that subjects an individual to an enhanced penalty must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. This did not occur in Mr. Hitchcock's case, and the lower court should have granted Mr. Hitchcock a new penalty phase.

In denying this claim the lower court failed to consider the claim as amended. The court also erroneously stated that the United States Supreme Court rejected the argument that *Apprendi* requires aggravating circumstances to be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt, and cited this Court's opinion in *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002). Mr. Hitchcock respectfully submits that *Apprendi and Ring* hold directly to the contrary, and despite this Court's rulings, justifies relief in his case.

Accordingly, because relief is warranted under *Apprendi* and *Ring*, and to preserve this issue for federal review, Mr. Hitchcock appeals the lower court's decision and asks this Court to reverse the lower court's denial of relief.

CONCLUSION

James Hitchcock remains on death row for a crime he did not commit and with a sentence he did not deserve. The lower court failed to remedy the denial of Mr. Hitchcock's rights. This Court should reverse.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States mail to all counsel of record on this 24th day of June 2004.

____
Eric C. Pinkard
Florida Bar No. 0651443
Assistant CCC

____
David R. Gemmer
Florida Bar No. 370541
Assistant CCC

____
James L. Driscoll Jr.
Florida Bar No. 0078840
Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544

Copies furnished to:

Chris Lerner
Assistant State Attorney
Office of the State Attorney
Post Office Box 1673
Orlando, Florida 32802

Kenneth Nunnelly
Assistant State Attorney

General
Office of the Attorney General
444 Seabreeze Boulevard,
Fifth Floor
Daytona Beach, FL 32118

James E. Hitchcock
DOC#058293; p1206
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

____
Eric C. Pinkard
Florida Bar No. 0651443
Assistant CCC

____
David R. Gemmer
Florida Bar No. 370541
Assistant CCC

____
James L. Driscoll Jr.
Florida Bar No. 0078840

Assistant CCC
Capital Collateral Regional
Counsel - Middle
3801 Corporex Park Drive,
Suite 210
Tampa, Florida 33619-1136
813-740-3544