

IN THE SUPREME COURT OF FLORIDA

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No. SC03-2203

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**JAMES HITCHCOCK,**  
*Appellant*

**versus,**

**STATE OF FLORIDA,**  
*Appellee.*

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

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REPLY BRIEF OF APPELLANT

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JAMES L. DRISCOLL JR.  
ASSISTANT CCRC-M  
Florida Bar No. 0078840  
CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE REGION  
3801 Corporex Park Drive  
Suite 210  
Tampa, Florida 33619  
813-740-3544  
813-740-3554 (Facsimile)  
COUNSEL FOR APPELLANT

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**REPLY TO APPELLEE'S ANSWER TO ARGUMENT I**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. As the history of Mr. Hitchcock's case and of postconviction in this State show, contrary to the State's Answer, Mr. Hitchcock was not procedurally barred from raising guilt phase claims.

Following this Court's original affirmance of Mr. Hitchcock's conviction and sentence, *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982), the Governor signed a warrant. Mr. Hitchcock then filed his first postconviction motion, which was denied in the trial court and affirmed by this Court. *Hitchcock v. State*, 432 So.2d 42, 43 (Fla. 1983). Mr. Hitchcock's former appellate counsel properly sought to save Mr. Hitchcock's life by taking the claims to federal court, including the issue that ultimately led relief being granted by the United States Supreme Court in *Hitchcock v. Dugger*, 481 U.S. 383 (1987).

*History of Postconviction in Florida*

This Court set out the history of Florida Rule of Criminal Procedure 3.850 in *Baker v. State*, 878 So.2d 1236 (Fla. 2004).

When rule 1, the predecessor to rule 3.850, was first promulgated by this Court in 1963, it specifically provided that all motions filed

pursuant to the rule "may be made at any time." *In re Criminal Procedure Rule No. 1*, 151 So.2d at 634. However, the rule as initially promulgated also specifically provided that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.* at 635. Between 1963 and 1983, these provisions remained the same, even though the numbering of the rule itself changed. See *In re Florida Rules of Criminal Procedure*, 196 So.2d 124, 177-78 (Fla.1967) (renumbering rule 1 to rule 1.850); *In re Florida Rules of Criminal Procedure*, 253 So.2d 421, 421 (Fla.1971) (substituting the existing number system, "which is a prefix number of '1' followed by a decimal and additional numbers, [with] a numbering system which has a prefix number of '3' followed by a decimal and the numbers following the decimal as they now exist.").

In 1983, the law on the scope of relief available under the rule, particularly in light of the provision regarding second or successive motions, was explained by this Court in its decision in *McCrae v. State*, 437 So.2d 1388 (Fla.1983):

The purpose of the Rule 3.850 motion is to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal. The motion procedure is neither a second appeal nor a substitute for appeal. Matters which were raised on appeal and decided adversely to the movant are not cognizable by motion under Rule 3.850. Furthermore, any matters which could have been presented on appeal are similarly held to be foreclosed from consideration by motion under the Rule. Therefore, a Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied.

In addition to issues that were raised on appeal and those which could have been raised, which are not proper grounds, a motion under the Rule

may also be summarily denied when it is based on grounds that have been raised in prior post-conviction motions under the Rule and have been decided adversely to the movant on their merits. A "second or successive motion for similar relief," as used in Rule 3.850 has thus been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule. Furthermore, this restriction against successive motions on the same grounds is applied only when the grounds raised were previously adjudicated on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency. *On the other hand, a second or successive motion by the same prisoner attacking the same judgment or sentence but stating substantially different legal grounds is permitted under the Rule and should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion.*

*Id.* at 1390 (citations omitted and emphasis added in original).

In his concurring opinion in *McCrae*, then Chief Justice Alderman agreed with the result reached by the majority but suggested, in the interests of finality, that rule 3.850 be amended to provide further limitations on the ability of criminal defendants to obtain collateral postconviction relief under the rule:

I believe ... that we should impose a time limitation for filing 3.850 motions and should narrow the scope of grounds which may be alleged in successive petitions for relief. In order to give due weight to the finality and the presumption of legality of a final judgment and to restore the public's confidence in our criminal system of justice, we should amend rule 3.850 by adding a one-year statute of limitations on the filing of these motions. In my view, one year from the time the judgment

becomes final, that is after the appellate process is concluded, is a sufficient and reasonable limitation period to place on the filing of these motions. This would include certiorari review to the United States Supreme Court if it is sought. There is no reason why a defendant, through the exercise of due diligence, cannot determine his basis for collateral attack during that period of time. Moreover, I do not believe that successive motions to vacate should be allowed where the grounds alleged in the successive petition were known or could have been known to the defendant at the time he filed his initial motion for relief. A defendant should not be allowed to file one 3.850 motion after another to prolong his inevitable execution, each time reserving one or more grounds for relief that could have been alleged in his initial motion. The movant should be required to plead in his motion that he did not know and could not have known the grounds for his present motion for relief.

*Id.* at 1391-92 (Alderman, C.J., concurring in result only). In November of 1984, when this Court amended rule 3.850 to include language codifying the law as set forth in the majority opinion in *McCrae*, it also essentially accepted Chief Justice Alderman's suggestions in his concurring opinion in that case. See *Fla. Bar re Amendment to Rules of Criminal Procedure (Rule 3.850)*, 460 So.2d 907 (Fla.1984).

First, the prohibition against relief under the rule based on claims which could have been raised on appeal, as stated in *McCrae*, was explicitly stated in the rule as follows: "This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." *Id.* at 908. This language now appears at the end of subdivision (c) of the rule. See Fla. R.Crim. P. 3.850(c).

Second, the then existing prohibition against the



filing of second or successive motions for postconviction relief under the rule was modified to not only set forth in explicit detail the state of the law, as explained in *McCrae*, regarding when the prohibition would be applicable, but also to expand the scope of that prohibition to include not only claims that were raised but also those that could have been raised in a previous motion denied on the merits. See 460 So.2d at 908. The new provision specifically stated:

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a (prior motion constituted an abuse of the procedure governed by these rules.

*Id.* This language now appears in subdivision (f) of the rule. See Fla. R.Crim. P. 3.850(f). As this Court explained less than two years after the addition of this language to the rule:

Abuse of the procedure doctrine existed in Florida before the recent amendment to rule 3.850. However, the doctrine was previously limited to providing for summary dismissal of issues contained in a successive motion that were or could have been raised on direct appeal and those issues which had previously been decided on their merits. The abuse of the procedure doctrine, as recently codified in rule 3.850, is now expanded to allow a court to summarily deny a successive motion for post-conviction relief unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed. Further, the movant must show justification for the failure to raise the asserted issues in the first motion.

*Christopher v. State*, 489 So.2d 22, 24

(Fla.1986) (citations omitted in original).

Finally, the two-year limitations period for filing motions for collateral postconviction relief under the rule that was adopted in the same 1984 amendments discussed above provided:

A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

460 So.2d at 907. This new time limitation on seeking relief pursuant to the rule became effective on January 1, 1985. See *id.* Prisoners adjudicated guilty prior to January 1, 1985, were specifically given until January 1, 1986, to file motions for postconviction relief in accordance with the new amended rule. See *id.* at 908. This time-limitation provision, with the additional exception for those circumstances where "the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion," now appears in subdivision (b) of the rule. See Fla. R.Crim. P. 3.850(b).

878 So.2d at 1242-44.

By *In re Rule 3.850 of the Florida Rules of Criminal Procedure*, 481 So.2d 480(Fla. 1985), this Court amended the Rule to read as follows: "Any person whose judgment and sentence became final prior to January 1, 1985, shall have

until January 1, 1987, to file a motion in accordance with this rule." *Id.*

This Court affirmed the lower court's denial of Mr. Hitchcock's original postconviction motion in 1983 while Mr. Hitchcock was under a death warrant. *Hitchcock v. State*, 432 So. 2d 42, 43 (Fla. 1983). Following this Court's affirmance, Mr. Hitchcock sought a federal writ of habeas corpus which the federal district court denied and the Eleventh Circuit Court of Appeal affirmed. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984) The Eleventh Circuit reheard the case *en banc*. *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir.), *rehearing denied*, 777 F.2d 628(11th Cir. 1985). Certiorari was granted in part by *Hitchcock v. Wainwright*, 476 U.S. 1168 (1986), on June 9, 1986. The Court reversed in *Hitchcock v. Dugger*, 481 U.S. 393(1987), on April 22, 1987. Mr. Hitchcock filed his federal petition for writ of habeas corpus before the new limitation on seeking State postconviction relief became effective on January 1, 1985. *See Baker*, 878 So. 2d at 1244.

Mr. Hitchcock's case was squarely within the jurisdiction of the federal courts when the new limitation became effective. He pursued his claim through the state courts and

the federal district and circuit court, all of which denied him relief. It was not until his claim was reviewed by the Supreme Court that he finally obtained relief.

The Supreme Court granted certiorari in 1986 well before the January 1, 1987, deadline. Once the Court granted relief, the case returned to the state courts to correct the constitutional error. Mr. Hitchcock was no longer sentenced to death, and had to await his judgment of conviction **and** death sentence to again be final before any postconviction claims would be ripe. This occurred, after this Court's mandate in *Hitchcock v. State*, 755 So.2d 638(Fla. 2000). Mr. Hitchcock was not free to seek collateral relief until all of his direct appellate remedies were exhausted. Once that occurred, Mr. Hitchcock was free to raise any postconviction claim he could have raised in a successive motion prior to January 1, 1987, since this was his first opportunity to do so.

In other words, Mr. Hitchcock filed his initial postconviction claims under warrant at a time when he was not compelled to raise all claims or forever be time barred. His case remained in state and federal limbo throughout the period when the rules changed to require inclusion of all claims in the first and only postconviction motion and when the deadline

to bring postconviction motions under the old rule had passed. Not until the present proceedings was Mr. Hitchcock able to bring the claims he would have had the right to raise in a successive motion.

How this would have occurred is best seen in *Sireci v. State*, 773 So.2d 34 (Fla.2000), cited by the State in its answer. Mr. Sireci's conviction and death sentence were upheld by this Court in *Sireci v. State*, 399 So.2d 964 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Mr. Sireci then unsuccessfully sought postconviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, and that decision was affirmed on appeal as well. *Sireci v. State*, 469 So.2d 119 (Fla.1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986). Following the signing of a death warrant, Mr. Sireci filed a second motion for postconviction relief. This Court affirmed the trial court's order mandating a limited evidentiary hearing on this postconviction motion. *State v. Sireci*, 502 So.2d 1221 (Fla.1987). After conducting the limited evidentiary hearing, the trial court ordered a new penalty phase, which was affirmed by this Court in *State v. Sireci*, 536 So.2d 231 (Fla.1988). The trial court again imposed the death penalty. The death sentence was again affirmed by this

Court. *Sireci v. State*, 587 So.2d 450 (Fla.1991). Thereafter, the United States Supreme Court denied certiorari review. *Sireci v. Florida*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Mr. Sireci then challenged his new sentence of death by amended motions for postconviction relief. The court summarily denied Mr. Sireci's motion on February 9, 1999, and this Court affirmed in *Sireci v. State*, 773 So.2d 34 (Fla.2000). This is the *Sireci* opinion cited by the State in its answer.

*Sireci* differs both procedurally and factually from the instant case. Mr. Sireci filed a **second** postconviction motion after a warrant was signed. Mr. Hitchcock filed his **first** postconviction motion after the Governor signed a death warrant on April 21, 1983. *Hitchcock v. State*, 432 So. 2d 42, 43 (Fla. 1983).

Mr. Sireci did raise guilt phase issues in his second postconviction motion filed after the warrant was signed. See *State v. Sireci*, 536 So. 2d 231. Mr. Sireci received only penalty phase relief, which was affirmed by this Court. *Id.* During the course of litigation that led to the United States Supreme Court's reversal in *Hitchcock v. Dugger*, Mr. Hitchcock was denied a constitutional remedy by this State's courts.

*See Hitchcock v. State*, 432 So. 2d 42, 43 (1983). Unlike Mr. Sireci who was granted relief, Mr. Hitchcock was forced to proceed to federal court where jurisdiction rested until the United States Supreme Court granted him penalty phase relief.

The *Sireci* opinion cited by the State clearly showed that Mr. Sireci did raise guilt phase issues in his third postconviction motion. *See Sireci*, 773 So. 2d, at 39. This motion was filed in 1993 and subsequently amended. *Id.* at 40. The lower court summarily denied Mr. Sireci's appeal. *Id.* at 40. At the outset this Court found several claims were procedurally barred because they were raised on direct appeal or should have been raised on direct appeal. *Id.* at 41, fn 10. This Court found other claims were also legally insufficient to warrant relief or refuted by the record or both. *Id.* at 41, fn 11. The rest of the claims this Court disposed of at the outset of the opinion were denied because they were not properly raised by a motion for postconviction relief, *Id.* at 41, fn 12, or had previously been decided adversely or were without merit. *Id.* at 41, fn 13.

This Court did address a number of *Brady* issues which were more likely than not discovered after the United States Supreme Court's denial of certiorari. Two of the three areas

that this Court addressed were based on evidence that Mr. Sireci alleged the State withheld that would have been impeaching at trial. For instance, in theory, a property receipt would have contradicted the State's argument that Mr. Sireci owned two identical jackets. See *Sireci* 773 So.2d, at 41.

This Court did not deny this *Brady* claim as time barred or impermissively successive. See *Id.* at 42; (finding that Sireci's claim as to the property receipt failed to establish a *Brady* violation). The point here is that this Court still considered the merits of a guilt phase *Brady* claim. This Court most notably did so in a third postconviction motion proceeding, after a second postconviction motion led to only a new resentencing.

To the extent that the lower court in this case denied claims that implicated *Brady*, *Sireci* establishes this was in error. Unlike *Sireci*, the lower court in this case never addressed the *Brady* implications raised in Mr. Hitchcock's postconviction motion. Mr. Sireci had the opportunity to return to postconviction and raise a claim of ineffectiveness in a second postconviction motion before the 1987 deadline. *Sireci v. State*, 469 So. 2d 119, 121 (Fla. 1985). Mr. Hitchcock had no such opportunity; before this State's rules



changed Mr. Hitchcock was already under a warrant and in the federal appeals court. Mr. Hitchcock should have no less of an opportunity to present his claims simply because the State has continually violated his rights and thus he did not return to a postconviction posture until after the 1987 deadline.

Argument I of Mr. Hitchcock's initial brief and this reply make clear that the lower court was in error to deny Mr. Hitchcock's guilt phase claims. For all of the reasons stated in Mr. Hitchcock's written closing argument, initial brief and reply, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT II**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. Contrary to the State's reply, Mr. Hitchcock has proved both prongs of ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). At the 1996 resentencing counsel was ineffective for failing to object to the improper and inadmissible testimony elicited by the State from Deborah Lynn Driggers. This is fully detailed in Mr. Hitchcock's motion for postconviction, written closing argument and initial brief.

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 Mr. Hitchcock's right to a fair penalty phase. The testimony at issue was relevant to nothing except to ensure that Mr. Hitchcock would not receive a fair resentencing.

Resentencing counsel was especially ineffective because of their prior experience with Mr. Hitchcock's 1992 resentencing. At the 1992 resentencing the same attorneys served as defense counsel and the very same prosecutor who elicited the improper testimony in 1996 was the prosecutor. Resentencing counsel had experienced this same prosecutor's tactics of seeking the admission of testimony which this Court later found improper. *See Hitchcock v. State*, 631 So.2d 859, 861-62 (Fla. 1996)(reversing death sentence because of admission of improper evidence). Accordingly, resentencing counsel should have been especially vigilant in light of their previous experience.

The State in its Answer and the lower court fail to address the distinction between the threats allegedly made by Mr. Hitchcock to the victim and the threats allegedly made by Mr. Hitchcock to Deborah Lynn Driggers. Apart from the entirety of the testimony in question being inadmissible and

improper, the threats to Deborah Lynn Driggers were even further removed from the scope of fairly admissible evidence.

Lastly, the prejudice must be considered in light of the risk that the prosecutor accepted when he decided to present this evidence to Mr. Hitchcock's resentencing jury. In light of the this Court's reversal it is patently obvious that the prosecutor was risking yet another reversal by treading in the area which had caused the last reversal. In other words, this improper testimony was so necessary to obtaining a death sentence that the prosecutor chose to risk another reversal rather than risk obtaining only a life recommendation by avoiding the objectionable evidence.

Accordingly, for the reasons stated in the initial brief and in this reply, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT III**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. Because the lower court sustained the State's objection Mr. Hitchcock was forced to present most of this evidence by proffer. For the reasons stated in Argument I of the initial brief and in this reply, Mr. Hitchcock was not procedurally barred from raising the claim at issue.

For the reasons that emerged at the evidentiary hearing it was apparent that the jury which returned a guilty verdict

against Mr. Hitchcock never heard important evidence of Mr. Hitchcock's innocence. Mr. Hitchcock has maintained his innocence for over 27 years. Because of his trial counsel's ineffectiveness he remains incarcerated and sentenced to death.

Trial counsel's ineffectiveness went beyond failing to properly argue for the admission of critical evidence that showed that Richard Hitchcock committed the murder in question. As detailed in the initial brief and evident in the 1977 trial record, defense counsel actually admitted harmful evidence that assured Mr. Hitchcock's conviction for a crime he did not commit. No conceivable strategy could have led to an outright abandonment of trial counsel's role as an advocate. The right to effective counsel demanded more than what Mr. Hitchcock received. Had the lower court not relied upon a non-existent procedural bar, the result would have been clear -- James Hitchcock was entitled to a new trial.

Trial counsel's ineffectiveness was established by the testimony offered at the evidentiary hearing and the 1977 trial record. The lower court based its ruling on a non-existent procedural bar. This Court should not accept the State's invitation to once again deny Mr. Hitchcock the justice which has for so long eluded him. Accordingly, this

Court should reverse the lower court's denial of this claim and remand for a new hearing or simply grant Mr. Hitchcock a new trial so that he can be freed from his unjust conviction.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT IV**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. Mr. Hitchcock was denied the effective assistance of counsel in the 1996 penalty phase trial. Resentencing counsel never presented substantial, readily available mitigation evidence. Resentencing counsel also never presented important arguments on Mr. Hitchcock's behalf. Thus, there was a reasonable probability that the jury's recommendation would have been different and the resentencing court would not have imposed a death sentence had resentencing counsel been effective.

The State's answer and the lower court's order both fail to consider the full arguments which Mr. Hitchcock made in his written closing and which he reargues here on appeal. At hearing, Mr. Hitchcock proved that resentencing counsel was ineffective as alleged in Claims IV-VI of Mr. Hitchcock's postconviction motion. The Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demanded more than the level of representation that Mr. Hitchcock received at resentencing. This Court should

reverse.

Both the State's answer and the lower court's order ignored Mr. Hitchcock's arguments concerning resentencing counsel's lack of preparation. Resentencing counsel could not pursue the very strong neuro-psychological mitigation that was available because counsel simply waited too long to take advantage of what Dr. Toomer could have offered. See Initial Brief at 42-47. This error was due to resentencing counsel waiting until very late in the litigation to retain Dr. Toomer, leaving no opportunity to follow up, investigate, and present expert testimony based on the preliminary finding of brain damage Dr. Toomer had found in his evaluation and communicated to counsel.

Resentencing counsel's lack of preparation was compounded with counsel's utter failure to question Dr. Toomer concerning the existence of the statutory mental mitigation factors. Dr. Toomer testified that he was ready, willing and able to testify at resentencing that two statutory mitigators existed, if counsel had only asked him about them during his testimony. See Initial Brief at 49-52.

The State's answer completely ignores Claim VI of Mr. Hitchcock's postconviction motion and all the hearing evidence in support of this Claim. The State's answer fails to repeat

any of the lower court's order on Claim VI as the State did on Claims IV and V. 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's order failed to consider the importance of statutory mitigation. Statutory mitigation is critical to the legitimacy of this State's death penalty scheme, and would have had a major impact on a jury properly instructed on the significance of statutory mitigators. Here, because of resentencing counsel's failure to elicit two statutory mental mitigating factors from Dr. Toomer the jury never considered these factors in advising the resentencing court of whether a death sentence was appropriate. In turn, the resentencing court considered the jury's recommendation without the jury's consideration of these factors and itself never weighed the existence of two significant mental mitigating factors. The

failure of resentencing counsel to elicit these two mitigating factors culminated with this Court's appellate review of the resentencing. On both the issue of whether the death penalty was appropriate and whether it was proportional, this Court never had the benefit of Dr. Toomer's expert opinion that the two statutory mental mitigating factors were present in Mr. Hitchcock's case.

The lower court and the State in its answer both failed to consider the significance of Dr. Henry Dee in this hearing and to this case. Dr. Dee was the only neuro-psychologist to testify at the evidentiary hearing or at Mr. Hitchcock's last resentencing. As a board certified neuro-psychologist, Dr. Dee was the only expert called who could give a definitive opinion on neuro-psychological impairment. The importance of a neuro-psychological opinion was explained by Dr. Toomer's testimony at the evidentiary hearing:

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 neuropsychological evaluation or some neurologically based assessment in order to pin point the extent and the nature of any underlying neurologically bases impairment.

Q: And Mr. Hitchcock's case what was the results 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 might be some underlying organically based deficit.

Q: And would that be enough to alert you to have it followed up on by neuro-psychologists 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 assessment.

Q: And you're not a neuro-psychologist 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 Mr. Cashman (sic) or Kelly Sims?

A: No specific recall except that given the standard procedures in this work and this particular case, in all cases, all that information would have been shared as part of the results of the evaluation conducted.

Q: And would it say you're 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. 316-17).

Clearly, when an individual shows the signs of brain damage that Mr. Hitchcock presented to Dr. Toomer, further testing by a neuro-psychologist is necessary. While Dr. Toomer's evaluation of Mr. Hitchcock may have been "adequate"

as a forensic evaluation, reasonable counsel had two duties left to perform. First, after being informed of the possibility of brain damage, counsel should have retained a neuro-psychologist to perform a neuro-psychological evaluation as Dr. Dee did in postconviction. Dr. Toomer was an expert forensic psychologist, but by his own testimony, the specialized training and expertise of a neuro-psychologist was needed to present a full picture of Mr. Hitchcock's mental impairment, including frontal lobe damage, that established the two significant statutory mental mitigating factors.

Second, and regardless of whether a neuro-psychologist was retained, counsel still had a fundamental duty to utilize Dr. Toomer's evaluation to the greatest benefit of Mr. Hitchcock at resentencing. Dr. Toomer's evaluation may very well have been adequate, but if resentencing counsel did not present Dr. Toomer's testimony that he found the existence of two statutory mental mitigators, it was of no benefit to Mr. Hitchcock. The very best evaluation is worthless without effective counsel to present it to the jury.

Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT V**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. While this Court affirmed the lower

court's denial of DNA testing Mr. Hitchcock sought under Florida Rule of Criminal Procedure 3.853, Mr. Hitchcock still submits that he has a right to challenge the evidence against him. Through the testimony of Robert Kopec at this hearing it was clear that the hair analyst from the original trial was not competent to conduct hair analysis and any opinion she gave was therefore inevitably false and unreliable.

Mr. Hitchcock appeals to this Court's inherent power to do justice and asks this Court to allow D.N.A. testing of the evidence. Prior to the enactment of Florida Rule of Criminal Procedure 3.853 and the corresponding statute, the courts of this State always had the power to allow a postconviction litigant the opportunity to independently test the forensic evidence that led to conviction. In James Hitchcock's quest to prove his innocence of a crime that was committed by his brother Richard Hitchcock, James Hitchcock appealed to the lower court as he does to this Court now, for just such an opportunity.

Absent such relief, Mr. Hitchcock continues to maintain that the destruction of any evidence violated his constitutional rights. Mr. Hitchcock continues to raise the claim that to the extent that any evidence used to implicate him, or that could be used to exonerate him, is unavailable

for later testing or destroyed, the 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.

Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT VI**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. He does so with the full knowledge that the State will argue that almost every claim he makes is in some form procedurally barred. The lower court found that this claim was procedurally barred because it should have been raised on direct appeal. As Ground IV of Mr. Hitchcock's contemporaneously filed Petition for Writ of Habeas Corpus makes clear, appellate counsel certainly was ineffective for not doing so. Should, however, this Court find that the *Caldwell* error that occurred during the jury instructions in Mr. Hitchcock's resentencing was not preserved for appellate review, this failure was clearly that of resentencing counsel.

Resentencing counsel filed a proper motion challenging the constitutionality of the standard jury instructions. The resentencing court denied the motion. Counsel renewed the motion to properly preserve this issue. When the resentencing court attempted to read the jury instruction the court failed to give even the standard jury instruction and instead instructed the jury:

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 went beyond the infirmity of the standard jury instruction. Both the State and the lower court ignored this point. Should this Court find that appellate counsel was not ineffective because this issue was not fundamental or properly preserved, then counsel was ineffective for not raising a contemporaneous objection.

Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT VII**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. In particular, Arguments I and VII of Mr. Hitchcock's initial brief clearly show that the lower court was in error by finding this claim was procedurally barred.

The new evidence presented at the postconviction hearing was compelling. The hearing clearly showed that Richard Hitchcock actually committed the murder in question and that James Hitchcock is actually innocent of the crime for which he is sentenced to death. All of this evidence was newly discovered after the 1977 trial and demands a new trial.

Mr. Hitchcock has a fundamental right to not be executed or incarcerated for a crime he did not commit. At the heart of any system of justice is the basic principle that the innocent should not pay for the crimes of the guilty. In support of his innocence Mr. Hitchcock presented the compelling evidence of a number of witnesses to Richard Hitchcock's confession. The only witness who has previously spoken on the matter who testified at this hearing was Wandelene Hitchcock Greene. Ms. Greene was the sole factual witness to Richard Hitchcock's confession at the illegitimate 1996 hearing. (For consistency the hearing is referred to as the 1996 hearing. There were actually two hearings that

followed Ms. Greene's 1996 revelations, one in 1997 and following the substitution of a new judge one in 1998).

The 1996 hearing which the State relies on was not a proper postconviction motion because Mr. Hitchcock's judgment and sentence had not become final. At the very least Mr. Hitchcock had the right to have his case investigated by postconviction counsel, just like every other death sentenced individual in this State. In 1996 Mr. Hitchcock did not have postconviction counsel assigned to him. The attorneys who handled this matter had neither the duty nor the resources to fully investigate claims of actual innocence. Moreover, Mr. Hitchcock was limited to what he could present by the lower court's order. See (1996 Vol XVI R. 1120-21,1152). Moreover, a fair reading of the 1996 hearing shows that defense counsel produced more evidence justifying their failure to discover Ms. Greene's testimony than actually showing that Richard Hitchcock confessed to the murder.

At the 1996 hearing only the testimony of Ms. Greene was presented. James Hitchcock, while he was an eye-witness to Richard Hitchcock's murder, was informed about Richard's confession for the first time following Ms. Greene's disclosure on television after he was last sentenced to death.

This Court rejected the claims surrounding the ill-timed motion as being without merit because as this Court stated "As with the fifth claim, this evidence was related only to the guilt phase of Hitchcock's trial, which is not the subject of this appeal of his third resentencing." *Hitchcock v. State*, 755 So. 2d at 644-45. Obviously, this Court understood that a direct appeal from a resentencing was not the proper forum to raise a postconviction claim of newly discovered evidence. Such a claim can only be made after the direct appellate process is final.

The raising of Wandalene Greene's disclosure of Richard's confession in 1996 did not have the effect of rendering any claim of actual innocence res judicata. Certainly this Court's use of "without merit" was not intended to forever preclude Mr. Hitchcock from raising a claim of actual innocence or pursuing postconviction remedies. As Argument I of the initial brief makes clear, this Court's opinion denying relief on issues 5, 15, and 16 was because the issues were properly raised in postconviction, not because they were without merit. This Court regularly denies claims of ineffective assistance of counsel raised on direct appeal because those claims are more properly raised in postconviction. When appellate counsel raises an issue



prematurely on direct appeal this Court has not found that the claim could not be raised later in postconviction. Res Judicata precludes an issue based on the premise that a party has had a full and fair opportunity to litigate. Here Mr. Hitchcock never had a full and fair opportunity to litigate this issue.

What the State's answer failed to consider is that each witness to Richard Hitchcock's actions and confessions has independent significance but requires that all of the new evidence be considered together in deciding whether Mr. Hitchcock should receive a new trial. Contrary to the State and the lower court's view, with the exception of Wandalene Hitchcock Greene, the testimony presented was discovered by postconviction counsel after the direct appeal was final and Mr. Hitchcock entered a postconviction posture. Most notably, the State and lower court ignored the fact that Rossi Meacham was discovered after Mr. Hitchcock's postconviction motion was filed. Postconviction counsel amended the motion to incorporate the newly discovered evidence that Ms. Meacham testified to at hearing. See (Vol. XI PCR. 764, 836).

Even if the testimony of Wandalene Greene was procedurally barred, which it was not, Mr. Hitchcock still could use her testimony to corroborate the other witnesses

that showed Mr. Hitchcock's actual innocence. For instance, the fact that Richard confessed to the murder of Ms. Greene corroborates Ms. Meacham's testimony that Richard Hitchcock confessed to her as well.

The State's Answer cited the lower court's finding that "these witnesses could have been discovered long before the instant motion" (Vol. XII PCR. 1128). This was particularly unfair and fails to comprehend the reality of death penalty representation. Until this Court's order appointing postconviction counsel following the affirmance of his last death sentence, Mr. Hitchcock did not have counsel who could fully reinvestigate his case and attempt to find this newly discovered evidence. Moreover, Richard Hitchcock did not start confessing to the murder until well after the United States Supreme Court granted Mr. Hitchcock relief in *Hitchcock v. Dugger*. After that time Mr. Hitchcock only had resentencing counsel whose sole function was to represent Mr. Hitchcock in resentencing proceedings. Without postconviction counsel the only person or entity which could have "discovered" these witnesses "long before the instant motion" was Mr. Hitchcock. Considering the fact that Mr. Hitchcock has remained incarcerated on death row or in the Orange County Jail since 1976, it is absurd to expect that he should have to

personally locate initially reluctant witnesses himself.

The State also offers no explanation of how Mr. Hitchcock could have or should have raised this claim on direct appeal when these witnesses were unknown or not presented on direct appeal. See Answer at 38-39 fn22. The most glaring example of this would be Rossi Bell Meacham. Mr. Hitchcock could not have raised the failure to grant him a new trial based on the newly discovered evidence that Rossi Bell Meacham presented at hearing on appeal because no one knew of her existence at the time of Mr. Hitchcock's appeal. Ms. Meacham was discovered after the filing of the instant motion and her evidence had to be pled by amendment. Neither Mr. Hitchcock nor any of his counsel through the years should be required to have foreseen the future.

This claim in postconviction went beyond the 1996 claim. Since entering postconviction Mr. Hitchcock discovered new evidence of his innocence. The lower court never considered the merits of all the witness testimony in support of a new trial and instead relied solely on procedural grounds to deny Mr. Hitchcock relief. As detailed in Argument I of the initial brief and in reply here, this was clearly in error. Mr. Hitchcock could clearly present a newly discovered evidence claim that encompassed some of the same evidence presented at

the illegitimate 1996 hearing in a properly filed postconviction motion.

The postconviction claim presented by Mr Hitchcock here went well beyond the 1996 claim by presenting new witnesses and new arguments. This Court has no findings of fact to which it must defer because the lower court chose to rely erroneously on procedure. Justice demands more because the testimony of these witnesses was compelling and the conclusion that is inescapable is that James Hitchcock is innocent and should be given a new trial.

Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT VIII**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. As detailed in Mr. Hitchcock's initial brief and postconviction motion, this claim for relief presented a multiple bases for relief. 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 State, in its answer, addressed this claim almost solely as a *Brady* claim, and did so mostly on procedural grounds. Neither the State or the lower court's order addressed how compelling the proffered testimony concerning Ms. Bass was at the hearing. For all the reasons urged by Mr. Hitchcock in postconviction and appeal, this Court should reverse.

The State's reliance on *Preston v. State*, 528 So. 2d 896, 898 (Fla. 1988) was clearly misplaced. Fundamental fairness and due process demand that Mr. Hitchcock receive an individualized proceeding. Here the State used *Preston* without reference to two areas which distinguish Mr. Hitchcock's case from *Preston*. First, Mr. Hitchcock's postconviction claim was multifaceted. While it did raise *Brady* concerns, the claim itself and the supportive proffered testimony showed violations of differing areas of the law.

Second, *Brady* and *Giglio*, besides offering independent grounds for relief, offered further justification for Mr. Hitchcock proceeding on the Bass issue because the State's misconduct prevented the full discovery of the issues concerning her performance. Specifically, as Steven Platt's testimony at the evidentiary hearing showed, the State misinformed the Court about Ms. Bass' availability as a witness in 1988. (VOL. VI PCR. 247). Mr. Hitchcock does note that unlike in *Preston* he has never been allowed to test the hair evidence, either through DNA or by simple forensic hair testing. Mr. Hitchcock asked for hair testing in his DNA motion and filed a separate motion to allow hair testing which the lower court denied. See (Vol XI PCR. 850-51).

For the reasons offered in the initial brief and in reply Mr. Hitchcock was entitled to a new trial. Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT IX**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. As detailed in Mr. Hitchcock's initial brief, any sexual contact between Mr. Hitchcock and the victim was over before the homicide took place. While it was his brother Richard Hitchcock who committed the murder, Mr. Hitchcock could not challenge his guilt during his 1996

resentencing. His trial counsel should have argued for a jury instruction on the elements of sexual battery so that the jury could have seen that any alleged sexual battery was complete before the homicide began. Resentencing counsel should have argued this essential point to the jury. Counsel's performance in this regard was deficient.

By not properly refuting or otherwise challenging this aggravating factor, trial counsel allowed the jury to consider it in recommending a death sentence for Mr. Hitchcock. Due to this deficiency of trial counsel it was reasonably probable that the scale was tipped for one or more jurors in favor of death. The homicide did not occur during the course of a sexual battery, thus the jury should not have considered this in recommending a sentence. All evidence at the resentencing showed that the sexual contact between Mr. Hitchcock and the victim was over, not ongoing, as the State and the lower court have argued.

As the State points out, a conviction for the underlying enumerated felony is not a "condition precedent to the application of this aggravator." See Answer at 43. While the unconstitutionality of this system is another matter it is nevertheless an accurate statement of Florida's law. Apart from the paucity of Florida's death penalty charging

procedure, the State still has the burden of proving this aggravating factor beyond and to the exclusion of every reasonable doubt. While the State did not meet its burden and the resentencing court should not have considered this factor in sentencing Mr. Hitchcock to death, counsel still had a duty to challenge this in front of the jury. Without a specific verdict form detailing which aggravating factors the jury found beyond a reasonable doubt, it is reasonably probable that the jury found that this was the only aggravating factor entitled to any weight and used this as the sole reason to support the jury's death recommendation.

Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT X**

Mr. Hitchcock stands by the argument made in his initial brief on this matter. This claim was not procedurally barred. The lower court erred in denying this claim and this Court should reverse.

As detailed in Argument I of Mr. Hitchcock's initial brief and above in this reply, Mr. Hitchcock could properly raise issues in postconviction that arose during his 1977 guilt phase trial. The lower court erroneously denied Mr. Hitchcock relief based on a nonexistent procedural bar. This Court should reverse and grant Mr. Hitchcock the



constitutional remedy that has eluded him for so long.

This postconviction claim raised the issue of trial counsel's ineffectiveness for failing to protect Mr. Hitchcock's rights at Mr. Hitchcock's 1977 guilt phase trial. Mr. Hitchcock had the right under the United States Constitution to be present during each critical stage of the proceedings against him under the Fifth, Sixth, Eighth and Fourteenth Amendments.

This Claim does not seek retroactive application of any decision of this Court. Rather, during postconviction, and now on appeal, Mr. Hitchcock seeks a remedy for the denial of effective assistance of counsel. Counsel's performance in failing to ensure that his own client was present during bench conferences and during jury selection was deficient. The right to be present during the crucial stages of the proceedings against him and for proper transcription of all the proceedings were such important rights that the prejudice was not just apparent but overwhelming.

Contrary to the lower court, this claim was not procedurally barred. Contrary to the State's answer this claim demands relief. Accordingly, this Court should reverse.

**REPLY TO APPELLEE'S ANSWER TO ARGUMENT XI**

Mr. Hitchcock stands by the argument made in his initial

brief on this matter. Mr. Hitchcock raised this issue to preserve it for further review. Whether this Court grants relief on Ground V of Mr. Hitchcock's Petition for Writ of Habeas Corpus or on this Argument from the appeal of the denial of postconviction relief, this Court should grant relief based on *Ring v. Arizona* and *Apprendi v. New Jersey*. *Ring* in particular was issued after Mr. Hitchcock's appeal was final and rendered Florida's death penalty scheme unconstitutional. While this Court has declined to provide *Ring* relief and the United States Supreme Court has yet to decide *Ring*'s implications for Florida's death penalty scheme, relief is still appropriate at this time rather than later.

The State's procedural bar argument is without merit. Mr. Hitchcock could not have raised the arguments concerning *Ring* on direct appeal because the supporting case law did not exist at the time of his direct appeal. While this Court has refused to grant relief based on *Ring*, it has never done so because a claim was procedurally barred because the claim could have been raised on direct appeal. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and every other case cited in the State's Answer brief on page 46.

Lastly, this claim is not without merit. This Court should grant relief because *Ring* and *Apprendi* make clear that this

State's death penalty scheme is unconstitutional.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF THE APPELLANT has been furnished by United States mail to all counsel of record on this day of \_\_\_\_ December, 2004

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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:

Kenneth S. Nunnelly  
Senior Assistant Attorney  
General  
444 Seabreeze Blvd., 5<sup>th</sup> Floor  
Daytona Beach, Florida 32118

James E. Hitchcock  
DOC#058293;P1206  
Union Correctional Institution  
7819 NW 228<sup>th</sup> Street  
Raiford, Florida 32026



**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing REPLY BRIEF OF THE APPELLANT was generated in a courier new 12 point font, pursuant to Fla. R. App. P. 9.210.

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