In The Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v. CASE NO. SC08-99

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

Appellant, JEFFREY GLENN HUTCHINSON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. The symbol "EH" will refer to the evidentiary hearing. The symbol "DA T" will refer to the trial record. The symbol "PC R." will refer to the postconviction record. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a 3.851 motion, following an evidentiary hearing, in a capital case. The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, are:

> On the evening of the murders, Hutchinson and Renee argued. Hutchinson packed some of his clothes and guns into his truck, left, and went to a bar. Renee then called her friend, Francis Pruitt (Pruitt), in Washington and told her that she thought Hutchinson had left for good. The bartender testified that Hutchinson arrived around 8 p.m. Hutchinson told the bartender that "Renee is pissed off at me," drank one and a half glasses of beer and then left the bar muttering to himself. Other witnesses testified that Hutchinson drove recklessly after he left the bar.
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> Approximately forty minutes after Hutchinson left the bar, there was a 911 call from Hutchinson's home. The caller stated, "I just shot my family." Two of Hutchinson's close friends identified the caller's voice as Hutchinson's. Hutchinson said to the 911 operator, "there were some guys here." He told the operator that he did not know how many people were there, he did not know how many had been hurt, and he did not know how they had been injured. Deputies arrived at Hutchinson's home within ten minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone nearby. The phone call was still connected to the 911 operator. Deputies found Renee's body on the bed in the master bedroom, Amanda's body on the floor near the bed in the master bedroom, and Logan's body at the foot of the bed in the master bedroom. Each had been shot once in the head with a shotgun. Deputies found Geoffrey's body on the floor in the living room between the couch and the coffee table. He had been shot once in the chest and once in the head. The murder weapon, a Mossberg 12-gauge pistol-grip shotgun which belonged to Hutchinson, was found on the kitchen counter. Hutchinson had gunshot residue on his hands. He also had Geoffrey's body tissue on his leg.

Hutchinson v. State, 882 So.2d 943, 948 (Fla. 2004).

Hutchinson's defense at trial was that two men came into the house, he struggled with them, and they shot Renee and the children and fled. Hutchinson was examined by an EMT at the scene and a jail nurse. He

had no injuries. Hutchinson also presented the defense of intoxication, arguing this was a crime of passion, not first-degree murder. *Hutchinson*, 882 So.2d at 948-949. The jury found Hutchinson guilty of four counts of first-degree murder with a firearm. *Hutchinson*, 882 So.2d at 948. At the penalty phase, Hutchinson waived his right to a jury. *Hutchinson*, 882 So.2d at 949 (noting the trial court conducted a colloquy, found the waiver voluntary, and excused the jury). So, there was no jury recommendation in this case.

> At sentencing, the State presented several witnesses, including Dr. Michael E. Berkland, a forensic pathologist. Dr. Berkland testified that the events occurred as follows: The front door had been locked with a dead bolt. The front door was "busted" down, and Geoffrey's blood was found on the top of the door indicating that Geoffrey was shot after the door was "busted" down. The shooting started in the master bedroom. Renee was the first victim, shot once in the head-a conclusion drawn from the fact that Renee was still lying on the bed at the time she was shot. Amanda was shot second with one shot to her head. Dr. Berkland reached this conclusion because not much of Logan's blood was on Amanda, and there would have been more of his blood on her had Logan been shot second. Logan was the third to be shot. Three shell casings were found inside the master bedroom in front of the closet. Dr. Berkland concluded from the shell casings that Hutchinson was standing in front of the closet when he shot the first three victims. Hutchinson then shot Geoffrey twice. Geoffrey was first shot just outside the doorway of the master bedroom. The first shot went through his arm, which was in a defensive posture, and through his chest. Dr. Berkland concluded that Geoffrey was able to see the bodies of his mother, sister, and brother from this location. The second shot was to Geoffrey's head. Geoffrey was kneeling at the time of the second shot, and, Dr. Berkland concluded, Geoffrey "absolutely was conscious" at the time of the second shot. He died in the living room on the floor between the couch and the coffee table.
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> The defense presented evidence of mitigation, including but not limited to evidence involving Hutchinson's diagnosis of Gulf War Syndrome and Attention Deficit Disorder, the testimony of Hutchinson's family, and evidence of awards and honors Hutchinson had received. The State presented evidence in rebuttal.

Hutchinson, 882 So.2d at 949. Both parties presented sentencing memoranda, and the trial court held a *Spencer* hearing.

The trial court then held a sentencing hearing and imposed a life sentence for the murder of Renee Flaherty and three death sentences for the murders of the three children. *Hutchinson*, 882 So.2d at 949. The trial court found three statutory aggravators in the murder of Geoffrey Flaherty: (1) previously convicted of another capital felony; (2) the victim was less than 12 years of age; and (3) that the murder was heinous, atrocious and cruel. The trial court found two statutory aggravators in the murder of Amanda Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age. The trial court found two statutory aggravators in the murder of Logan Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age.[1] The trial court found one statutory mitigator and twenty non-statutory mitigators. The trial court found no significant history of prior criminal activity as a statutory mitigator and accorded it "significant weight". § 921.141(6)(a), Fla. Stat. (1997). The trial court considered but rejected two other statutory mitigators as not proven: (1) the extreme mental or emotional disturbance mitigator and (2) the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired mitigator. §

[1] The trial court merged the "defendant engaged in the commission of an aggravated child abuse" and the "less than 12 years of age" aggravator and therefore, considered only the "less than 12 years of age" aggravator. The State cross-appealed this ruling.

921.141(6)(b), Fla. Stat. (1997); § 921.141(6)(f), Fla. Stat. (1997). The trial court found the following twenty non-statutory mitigators: (1) the defendant was a decorated military veteran of the Gulf War which the trial court accorded "significant weight"; (2) the defendant is the father of a son who he has provided financial and emotional support which the trial court accorded "some weight"; (3) the defendant has potential for rehabilitation and productivity while in prison which the trial court accorded "some weight"; (4) the defendant's intoxication with a BAC of .21 to .26 on the night of the murders which the trial court accorded "some weight"; (5) the defendant was an honorably discharged soldier for eight years which the trial court accorded "slight weight"; (6) the defendant provided financial and emotional support to his family which the trial court accorded "slight weight"; (7) the defendant has the ability to show compassion which the trial court accorded "slight weight"; (8) the defendant's employment history which the trial court accorded "slight weight"; (9) the defendant's family support of him which the trial court accorded "slight weight"; (10) the defendant's ability as a mechanic which the trial court accorded "slight weight"; (11) the defendant seeking motorcycle patents which the trial court accorded "slight weight"; (12) the defendant was diagnosed with Gulf War Illness which the trial court accorded "minimal weight" because there was no connection between the illness and the murders; (13) the defendant was security officer of the year which the trial court accorded "minimal weight"; (14) the defendant never abused drugs which the trial court accorded "little weight"; (15) the defendant

is a high school graduate which the trial court accorded "little weight"; (16) the defendant was active in disseminating information about Gulf War Illness which the trial court accorded "little weight"; (17) the defendant's religious faith which the trial court accorded "little weight"; (18) the defendant's distress during the 911 call which the trial court accorded "little weight"; (19) the defendant's friends which the trial court accorded "very little weight"; and (20) the defendant was diagnosed with Attention Deficit Disorder which the trial court accorded "very little weight".[2] The trial court found that the aggravators outweighed the mitigators.

On appeal to the Florida Supreme Court, Hutchinson raised ten issues. *Hutchinson*, 882 So.2d at 949-950 (listing issues).[3] The

[2] The trial court considered but rejected six other non-statutory mitigators either finding them to be not mitigating in nature or not proven or not worthy of any weight. The trial court found that the appropriateness of a life sentence did not qualify as a mitigating factor. The trial court found that mercy did not qualify as a mitigating factor. The trial court reviewed the tape of the defendant's statement to the investigating officers that it had suppressed at the defendant's request and found no mitigating circumstances contained in these statements. The trial court found that the officer's belief that this was a crime of passion was not proven. The trial court accorded no weight to the fact that the defendant is an accomplished athlete and motorcycle racer. The trial court also accorded no weight to the defendant's decision not to testify.

[3] The ten issues were: (1) whether the trial court improperly instructed the jury; (2) whether the trial court erred in admitting certain testimony as an excited utterance; (3) whether the trial court erred in repeatedly overruling objections to the State's closing argument; (4) whether the trial court erred in denying Hutchinson's motion for mistrial; (5) whether the trial court erred in denying Hutchinson's motion for judgment of acquittal; (6) whether the trial court erred in denying Hutchinson's motion for a new trial; (7) whether the trial court erred in considering section 921.141(5)(1), Florida Statutes (2000), as an aggravating circumstance; (8) whether

Florida Supreme Court affirmed the convictions and sentences. *Hutchinson v. State*, 882 So.2d 943 (Fla. 2004). The Florida Supreme Court issued its opinion on July 1, 2004. The Florida Supreme Court issued the mandate on July 22, 2004.

Hutchinson did not seek certiorari review in the United States Supreme Court. So, Hutchinson's convictions and sentences became final 90 days after the Florida Supreme Court's opinion which was Wednesday, September 29, 2004.

The Honorable G. Robert Barron, who presided at the trial, also presided over the post-conviction proceedings. Postconviction counsel for Hutchinson filed an initial 3.851 motion for post-conviction relief on October 20, 2005, raising seven claims. (PCR Vol. I 1-71). On December 21, 2005, the State filed a response. (PCR Vol. I 72-104). On February 27, 2006, the trial court held a *Huff* hearing.[4] On March 13, 2006, the trial court summarily denied two of the seven claims. (PCR Vol. I 105-202).

Original postconviction counsel, Jeff Hazen, was allowed to withdraw. (PCR Vol. IV 665-669; 672-674). The trial court then appointed new postconviction counsel, Clyde Taylor, who filed a second amended 3.851 motion on August 13, 2007. (PCR Vol. IV 677-750). The second motion raised four claims and contained an assertion of

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the trial court erred in finding that Hutchinson committed the murder of the children during the course of an act of aggravated child abuse; (9) whether the trial court erred in finding heinous, atrocious, or cruel (HAC) as an aggravating circumstance in the murder of Geoffrey Flaherty; and (10) whether death is a proportional sentence. *Hutchinson*, 882 So.2d at 949-950.

[4] *Huff v. State*, 622 So. 2d 982 (Fla. 1993)

actual innocence. The State filed a response. (PCR Vol. IV 751-786). On October 11, 2007, the Court entered an order summarily denying the actual innocence claim and one of the four claims, *i.e.*, the conflict of interest. (PC Vol. IV 787-788).

On October 22, 2007, an evidentiary hearing was held. Mr. Hutchinson was represented by Clyde M. Taylor and Baya Harrison at the evidentiary hearing. At the evidentiary hearing, Mr. Hutchinson did not testify.

The State filed a post-evidentiary hearing memorandum and a proposed order. (PCR Vol VI 1017-1067; 1068-1075). On January 2, 2008, the trial court denied Hutchinson's 3.851 motion. (PCR Vol VI 1077- Vol. VII 1320).

EVIDENTIARY HEARING

At the evidentiary hearing, defense counsel presented Darryl Fields, an investigator. (Vol. I 19). He has investigated numerous homicides. (Vol. I 21). Investigator Fields was involved in this case as an investigator for Hutchinson's prior attorneys Mr. Harrison and Mr. Peterson (Vol. I 26).[5] He testified that in his experience, in murders cases involving high velocity weapons fired at close range, there would be blood found on the weapon. (Vol. I 25). This back spatter occurred in every murder case involving such weapons he investigated. In cases where the murder weapon was a shotgun, the blood splatter often resulted in blood inside the barrel. (Vol. I 25). From the reports of the case, he understood that no blood was found on the murder weapon in this case but he did not personally examine the shotgun nor did he examine the photographs of the shotgun. (Vol I 26,33,34).[6] Investigator Fields testified that he went to the crime scene as part of his investigation. (Vol I 27). The house had been repainted and cleaned by this time. (Vol I 27). He found that the rear door had pry marks on it. (Vol I 27). He also found a tan nylon stocking in the back yard near the patio and swimming pool. (Vol I 28,40,42). He was interested in the nylon stocking because Hutchinson had stated that the alleged perpetrators were wearing

[5] Mr. Harrison is now deceased. (Vol. I 32).

[6] The murder weapon in this case was Hutchinson's Mossberg 12-gauge pistol-grip shotgun which was located on counter of the victim's home. (XXII 621; XXVI 1547, 1552, 1557; XXVII 1710).

black stocking masks. (Vol I 28).[7] He prepared a report which included his finding of the stocking for the previous attorneys. (Vol I 30). He contacted Mr. Cobb and informed him of his work so far. (Vol I 30-31). Mr. Cobb indicted that he had his own investigator. (Vol I 31). On cross, Investigator Fields admitted that Mr. Cobb would have had his report if Mr. Peterson gave Cobb his files. (Vol I 32-33). He admitted the front door of the victim's house had been shattered with the entire casing bashed in. (Vol I 38). The prosecutor noted for the record, the defendant's statement the two perpetrators were wearing black ski masks, not stocking masks. (Vol I 44).[8] He turned the stocking over to Mr. Harrison or Mr. Peterson. (Vol I 49). The stocking was muddy and wet (Vol I 49). It was one stocking leg; not panty hose. (Vol I 49).

Postconviction counsels presented one of the lawyers, Kimberly Cobb Ward. (Vol I 52). She had never handled a capital case prior to Hutchinson's penalty phase. (Vol I 52). She had handled one felony trial prior to this case. (Vol I 53). She had handled an accessory after the fact to murder case . (Vol. I 74). She had handled less than five jury trials prior to this case. (Vol. I 60). She had never put together a mitigation case previously. (Vol I 53).

Their office had a paralegal who was a former military police investigator to help them. (Vol I 61). They did not hire an outside

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[7] Hutchinson claimed that two masked men with a Remington 870 shotgun, not the Mossberg shotgun, committed these murders

[8] Hutchinson's statement is part of the trial and appellate record and is located on pages 41 and 187.

investigator. (Vol I 62). She never meet with Investigator Fields. (Vol. I 63).

She was second chair at Hutchinson's trial. (Vol I 53). She prepared the evidence for the penalty phase. (Vol I 53,82). She did not present evidence or witnesses in either the guilt or penalty phase, Mr. Cobb handled both phases. (Vol I 54,82). The decisions such as what defense to present were made by lead counsel, her ex-husband, because he had more experience in criminal jury trials. (Vol. I 84-85).

She took some of the depositions. (Vol I 55). She recalled handling the deposition of the State's DNA expert. (Vol I 55). She had previously been co-counsel in a case with DNA evidence but had not taken any courses on DNA. (Vol I 55). They did not file a motion for independent DNA testing. (Vol I 56).

She and lead counsel discussed waiving the jury at penalty phase. (Vol I 56). She did not discuss the waiver with other experienced capital defense attorneys but lead counsel may have. (Vol. I 59-60). The jury had come back quickly with a guilty verdict. (Vol I 57). The jury had returned the verdict in under two hours. (Vol. I 57). They both agreed that the jury recommendation should be waived. (Vol I 57). They did not think the jury "could be fair" due to the little tiny bloody clothes of the children victims in this case. (Vol I 58,90). They discussed the waiver with Mr. Hutchinson. (Vol I 59). The final decision to waive the jury recommendation at the penalty phase was Hutchinson's. (Vol I 81). She did not recall Hutchinson disagreeing with their advice to waive the jury. (Vol I 81,89-90). Neither she

or her husband made any threats or promises to Hutchinson to induce his agreement to the waiver. (Vol I 82).

The theory of defense was that Mr. Hutchinson did not commit the murders because that was the defense Mr. Hutchinson wanted presented. (Vol I 63-64,83). Mr. Hutchinson's version was that two masked men committed the murders. (Vol I 64). Her husband thought the better defense was a combination of insanity and voluntary intoxication. (Vol. I 83). But Hutchinson refused to permit a defense of insanity to be presented. (Vol. I 83-84). There was "blood work" that was not attributable to any person who lived in the house. (Vol I 64). However, the State's DNA expert testified at trial that the other person's DNA could have come from a cough or sneeze. (Vol. I 87). She was aware the Hutchinson lived at the house and had a key. (Vol I 65). They did not request that particular blood be DNA tested. (Vol I 66). The did not request that Hutchinson's watch be tested. (Vol I 67). They did not request either Hutchinson's or the victim's fingernail clippings be tested. (Vol I 67-68).

She recalled the 911 tape. (Vol I 68). She recalled that both Creighton and Deanna Adams testified that the voice on the 911 tape was Hutchinson's voice. (Vol I 69). She did not interview any of Hutchinson's family concerning the voice on the 911 tape. (Vol I 69). Their paralegal thought the voice on the 911 tape was Hutchinson's. (Vol. I 70). She thought, based on caselaw, that the 911 tape would not be admissible at trial. (Vol I 70). They did not investigate further. (Vol I 71-72). She did not think that any of the witnesses could properly identify the voice as Hutchinson's due to the stress

in the voice. (Vol I 72). She testified that Hutchinson claimed the voice was not his. (Vol. I 85). She did not recall Hutchinson giving her a list of names of persons who could testify that the voice was not his. (Vol I 91).

On cross, she testified that she had the wealth of mitigating information that prior counsel Mr. Harrison and Mr. Peterson had collected who were very experienced attorneys. (Vol I 75). They had already traveled to Washington state to conduct a mitigation investigation of family and friends. (Vol I 75). She recalled that the prior defense team of Mr. Harrison and Mr. Peterson were on the case about one year prior to their appointment. (Vol I 92). She did not recall any mitigation evidence that Hutchinson wanted presented that was not presented. (Vol I 83).

She also had the file of the original attorney who was Assistant Public Defender Earl Loveless. (Vol I 76). ADP Loveless had investigated Gulf War mitigation. (Vol I 76).

The prosecutor introduced the FDLE report of Candy Zuleger dated March 27, 2000, as State's Ex. #1. (Vol I 77). The report reflected that the watch had been tested by FDLE. (Vol I 78). There was no blood on the watch. (Vol I 78). Hutchinson never asserted that Renee or any of the children fought with the two masked men to get DNA under their fingernails. (Vol I 80). Hutchinson claimed that only he fought with them and his fingernails were tested. (Vol I 80).

Postconviction counsel presented seven witnesses that testified the voice on the 911 tape was not Hutchinson's voice. (Vol I 95). Kay

Master; Dane Nelson; Amy Helm; Kelly Hutchinson; Daniel Hutchinson and Robert Hutchinson testified. (Vol I 98-161).[9]

Stephen G. Cobb, lead trial counsel for both guilt and penalty phase, testified. (Vol I 165). He has been a member of the Florida Bar since 1989. (Vol I 165). He worked for the Public Defender's office for over seven years from July 1990 until October 1997 when he went into private practice. (Vol I 168,172). He was board certified in criminal trial practice in 2002, which was shortly after Hutchinson's trial. (Vol. 174, Vol II 210). He was court appointed to handle this case. (Vol I 166). He had previously tried a capital case, *State v. Kemp*, which resulted in a second degree verdict. (Vol I 166). He was lead counsel in the guilt phase and another attorney handled preparation for the penalty phase which never occurred due to the second degree verdict. (Vol. I 167). He had handled the capital case of *State v. Frank Walls*, but that case settled prior to trial. (Vol I 166).

Postconviction counsel introduced a letter to the court dated April 26, 2000, outlining Mr. Cobb's qualifications as exhibit #C. (Vol I 168). He met with the prior attorneys who worked on this case, APD Loveless, Mr. Harrison and Mr. Peterson. (Vol I 170). His opinio effective defense "at all." (Vol I 170). He thought the most effective defense would be either insanity or that the murder was not premeditated; rather, it was a crime of passion. (Vol I 170-171). The more the team examined presenting a SODIT defense (some other dud

[9] Claim IV, which was a shackling issue, was withdrawn at the evidentiary hearing. (Vol. I 162).

did it), "the worse it got." (Vol. I 171). The team was him, his wife and Heather Bryant, their investigator. (Vol I 171). He did not think it was an effective defense and was "highly dangerous" and "likely to result in a death sentence." (Vol I 172). It was also likely to result in a "quick conviction." (Vol I 172).

Mr. Cobb explained that the damaging evidence against Mr. Hutchinson included DNA and statements on the 911 tape. (Vol I 176). Two officers and both Deanna and Creighton Adams identified the voice on the 911 tape as Hutchinson's. (Vol I 177). The prosecutor played the tape repeatedly at trial. (Vol I 177). While he considered it, it was not a "viable route" to challenge the voice identification on the 911 tape. (Vol I 178). They started running into problems, such as the defendant's father seemed to change his position that it was not his son's voice. (Vol I 178-179). The voice sounded like Mr. Hutchinson's voice to Mr. Cobb. (Vol I 179). He investigated challenging the voice and decided not to do so. (Vol I 179). He thought he filed a motion to exclude the 911 tape but did not think that he could keep the tape out. (Vol I 180). He did not request an analysis of the tape because such a request would involve standards that he did not want the prosecutor to have. (Vol I 181). He was concerned that if he got an expert that expert's opinion could be that the voice on the tape was consistent with Hutchinson's voice which would strengthen the State's case. (Vol I 181-182, Vol II 233). He did not recall telling any family members that, if they wanted to testify that the voice was not Hutchinson's, then he was not going to call them to testify. (Vol I 182).

He recalled that there was some problem with the first DNA analyst but that the second analyst was Zuleger who testified at trial. (Vol I 183). Hutchinson's version was that he hit the masked men with his fists, not that he scratched them, which would not result in DNA under Hutchinson's fingernails. (Vol I 184-185, Vol II 232).

He did not request a blood splatter expert be appointed because the expert may well agree with the State's experts and that would add to the "already difficult case" and "make it worse." (Vol I 185-186).

Mr. Hutchinson fought them about everything. (Vol I 186). Mr. Hutchinson would change his mind. (Vol I 186). Mr. Hutchinson mounted a "series" of "fantasy defenses." (Vol I 187). Mr. Hutchinson was "forever" asking them to "run down rat trails" - he would tell them to go interview a witness who would testify to X and they would go talk to the witness, who would say Y, instead. (Vol I 187).

He was saddled with an expert, Dr. Baumzweiger, who diagnosed Hutchinson as suffering from Gulf War syndrome, who was a "pseudo expert." (Vol I 188).[10] Dr. Baumzweiger would have made "one of the worse" expert witnesses he had ever seen in his career. (Vol I 189). He was not going to present Dr. Baumzweiger. (Vol I 189). He spent hundreds of hours investigating and thinking about this case. (Vol I 189). Mr. Hutchinson would not agree to being evaluated by a mental health expert until a few days prior to the trial. (Vol I 191). One mental health expert said Hutchinson had a major mental

[10] In his letter to the Florida Bar, Mr. Cobb explained that he had made a motion for another expert but that the trial court denied the motion.

illness and two other experts said a personality disorder. (Vol I 191). So, the insanity defense was "out the window" (Vol I 191).

Co-counsel prepared most of the penalty phase but he presented the mitigation and arguments. (Vol I 192). Dr. Dillon diagnosed Hutchinson as having bipolar affective disorder. (Vol I 193).

He noted that the jury came back with a guilty verdict "faster than most DUI misdemeanor juries." (Vol I 195). If you have a jury recommendation of death, it is very difficult to get the judge to disregard it. (Vol I 196).

The idea that a jury would have said to themselves that testimony that the voice was not Hutchinson was "utter crap." (Vol I 197). Mr. Cobb went to Mr. Harrison and Mr. Peterson's offices in Shalimar and got their files regarding this case. (Vol I 198). Mr. Harrison and Mr. Peterson had a room full of material on this case which was turned over to Mr. Cobb. (Vol II 246).

The stocking found in the backyard was used as a replacement for a commercial pool sock to catch pollen. (Vol I 200). The nylon stocking was a pool filter. (Vol. I 200). The stocking was another fantasy defense. (Vol I 200). Someone explained - maybe Deanna or Creighton Adams - that the stocking was used by Renee as a filter. (Vol I 200). He heard from multiple sources that the nylon stocking was a pool sock. (Vol. II 201-202). On cross, trial counsel explained that he was present for the deposition of Deanna Adams taking by the prosecutor where she explained that Hutchinson himself admitted to her that the nylon was used as a pool filter. (Vol II 219-220). This deposition was introduced as State's exhibit #4. (Vol II 220).

Mr. Cobb argued that there was mishandling of evidence in this case which may have referred to the prior series of DNA tests that did not meet the protocols but he could not recall. (Vol II 202). Trial counsel testified that asking for more DNA testing on additional items when the DNA on some items already connects your client to the murders is the "kiss of death." (Vol II 202). He was aware as a court appointed attorney he could ask for the appointment of experts. (Vol II 209).

On cross, trial counsel, Mr. Cobb, agreed that he was present when the prosecutor deposed Hutchinson's father and mother, Robert and Deloris Hutchinson. (Vol II 211). The depositions were introduced as State's exhibit #2 and #3. (Vol II 211). Due to the pitch, his father testified that he could not "tell with any certainty if it even his voice." (Vol II 212). His father's statement in the deposition was he could not tell, not that it definitely was not Hutchinson's voice. (Vol II 213). Hutchinson's parents would have been "destroyed on the stand." (Vol II 214). If he had challenged the voice, trial counsel felt very strongly that the jury would have concluded that it was indeed Hutchinson's voice and then the jury would not have believed anything else he said. (Vol II 215).

Trial counsel acknowledged that the prosecutor could have argued that the family members and friends willing to testify that it was not Hutchinson's voice were biased. (Vol II 223). Trial counsel testified that he made a tactical decision not to challenge the voice. (Vol II 223-224). Such a challenge would result in his losing credibility with the jury. (Vol II 224).

Trial counsel did not want Hutchinson to testify. (Vol II 226). Presenting the two other men defense would have probably required Hutchinson to testify because there was no other evidence of this defense. (Vol II 227). Hutchinson's statement was that there were two intruders wearing black ski masks with eye holes. (Vol II 228). Trial counsel noted the difficulty of presenting a defense that the government sent two military men from Quantico to kill an innocent women and three children to silence Mr. Hutchinson regarding the Gulf War to a jury in a community with large numbers of military personnel. (Vol II 237-238). Trial counsel testified that such a defense was not going "to fly at all." (Vol II 238).

Defense counsel was aware of Dr. Berkland's medical license being revoked. (Vol II 238). Prior defense counsel, Mr. Peterson, had taken Dr. Berkland's deposition in which the doctor explained that a political rival complained that he falsified autopsy reports. (Vol II 238). There was never any question about the cause or manner of death in this case. (Vol II 239). The only real possible attack regarding Dr. Berkland's opinion was the sequencing of the victim's deaths. (Vol II 239). This testimony was used to establish the HAC aggravator. (Vol II 240). Trial counsel, however, thought that the expert's opinions made sense from his prior experience. (Vol II 240).

Trial counsel presented evidence of Hutchinson's mental condition at penalty phase and thinks that Hutchinson suffers from a major mental illness and brain dysfunction which is why he was a difficult

client. (Vol II 244). Hutchinson refused to be examined by the court appointed mental expert, Dr. Allen Waldman. (Vol II 245).

The State presented Mr. Peterson who was previous trial counsel in the case. (Vol II 257). He is currently a hearing officer. (Vol. II 258). He was admitted to the Bar in 1977. (Vol II 258). Until three years ago, a major portion of his practice was criminal law. (Vol II 258). He was death qualified until three years ago when he let the certification lapse because he had become a hearing officer. (Vol II 258,259). He was death qualified for approximately 10 years. (Vol II 258). He was qualified from about 1994 until 2004, which would have included the time period of his representation of Hutchinson. (Vol II 259). He had handled eight to ten capital cases. (Vol II 259). He was appointed as lead counsel in this case with Mr. Harrison as co-counsel. (Vol II 260). Mr. Harrison was even more qualified than Mr. Peterson, according to Mr. Peterson. Mr. Harrison was a senior prosecutor in Bay county for a long time who had handled more capital cases than anyone else in the county. (Vol II 260). Mr. Harrison was also death qualified. (Vol II 261).

They took a lot of depositions in this case. (Vol II 261). They had a mitigation checklist. (Vol II 261). They talked to Hutchinson's parents, neighbors here and family in Washington. (Vol II 262). They both went to Washington. (Vol II 262). They obtained school records and military records. (Vol II 262). He investigated an explosion of the chemical plant in Iraq. (Vol II 262). Hutchinson succeeded in some areas in the military but he also had some problems. (Vol II 263).

Hutchinson requested that they withdraw as his attorneys. (Vol II 264). They had boxes and boxes of files regarding this case which they turned over to the Cobbs. (Vol II 264). They sat down with Mr. Cobb to go over the case. (Vol II 264).

Mr. Peterson also investigated challenging the voice on the 911 tape. (Vol II 265). He had Hutchinson parents and the Adams' listen to the 911 tape at his office. (Vol II 265). They all agreed that the voice was Hutchinson's voice (Vol II 266). Indeed, his mother said that the high pitch is what happens when Hutchinson gets excited. (Vol II 266). Mr. Peterson told Mr. Cobb about the fact that Hutchinson parent's agreed that the voice on the tape was Hutchinson's voice. (Vol II 266).

On cross, he testified that he may have taken the 911 tape out to Washington with him and played it for some family members. (Vol II 266). He went to Deerpark, Washington while Mr. Harrison went to Spokane, Washington. (Vol II 267). He did not remember any conversation with Hutchinson's brothers in which they stated that the voice was not their brother's voice. (Vol II 267). He did not recall whether he made notes of the meeting with the parents and the Adams but he probably did. (Vol II 272).

SUMMARY OF ARGUMENT

ISSUE I -

Hutchinson asserts that his defense counsels, Stephen and Stephanie Cobb, were ineffective at the guilt phase for failing to refute the state's evidence regarding the identification of the voice on the 911 call as Hutchinson's. IB at 43. There is no deficient performance. As the trial court found, relying on the evidentiary hearing testimony of trial counsel, this was a reasonable strategic decision to maintain credibility with the jury. As trial counsel testified, if he had challenged the voice on the 911 tape, he felt very strongly that the jury would have concluded that it was indeed Hutchinson's voice and then they would not have believed anything else he said. Furthermore, this was not a viable line of attack. If trial counsel presented a parade of other family members to say that it definitely was not Hutchinson's voice, the State could have presented Hutchinson's own parents statements in their depositions that they could not tell if it was or was not their son's voice. In their depositions, Hutchinson's parents could not exclude their son's voice as the voice of the 911 caller. Moreover, as the trial court found, there was no prejudice. The jury's verdict of guilt would have remained the same. The jury would have rejected any claim that Hutchinson was not the caller. The location of the phone when the officers arrived at the house; the fact that 911 was called at all and the content of the 911 tape all pointed to Hutchinson as the person who made the 911 call. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE II -

Hutchinson asserts that his trial counsel was ineffective for failing to present evidence that a tan nylon stocking was found in the back yard to support Hutchinson's claim that two masked intruders committed the murders. Investigator Fields testified at the evidentiary hearing that he found a tan stocking near the pool. However, according to defendant's statement, the two perpetrators were wearing black ski masks, not a tan nylon stocking mask. Neither the color nor the type of material supported Hutchinson's claim. Furthermore, there was reasonable explanation for the presence of the stocking near the pool. The tan nylon stocking was used as a filter for the swimming pool. Thus, the trial court properly determined that trial counsel was not ineffective for failing to present evidence that a tan nylon stocking had been found near the pool.

ISSUE III -

Hutchinson asserts that the trial court erred in summarily denying his actual innocence claim and his conflict of interest claim. Actual innocence claims, not based on newly discovered evidence, are improper in postconviction litigation. They are attempts to relitigate the sufficiency of the evidence addressed in the direct appeal of every capital case by this Court in violation of the law of the case doctrine. Neither an attorney's dislike of his client nor the client filing a bar complaint against the attorney is a conflict of interest situation under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As the United States Supreme

Court has recently explained, the concept of "conflict of interest" is limited to the multiple representations situation. This is not a multiple client situation. Nor may Hutchinson create a "conflict" by filing a meritless bar complaint. The trial court properly summarily denied both claims.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DETERMINED THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY REGARDING WHOSE VOICE WAS ON THE 911 TAPE? (Restated)

Hutchinson asserts that his defense counsels, Stephen and Stephanie Cobb, were ineffective at the guilt phase for failing to refute the state's evidence regarding the identification of the voice on the 911 call as Hutchinson's. IB at 43. There is no deficient performance. As the trial court found, relying on the evidentiary hearing testimony of trial counsel, this was a reasonable strategic decision to maintain credibility with the jury. As trial counsel testified, if he had challenged the voice on the 911 tape, he felt very strongly that the jury would have concluded that it was indeed Hutchinson's voice and then they would not have believed anything else he said. Furthermore, this was not a viable line of attack. If trial counsel presented a parade of other family members to say that it definitely was not Hutchinson's voice, the State could have presented Hutchinson's own parents statements in their depositions that they could not tell if it was or was not their son's voice. In their depositions, Hutchinson's parents could not exclude their son's voice as the voice of the 911 caller. Moreover, as the trial court found, there was no prejudice. The jury's verdict of guilt would have remained the same. The jury would have rejected any claim that Hutchinson was not the caller. The location of the phone when the officers arrived at the house; the fact that 911 was called at all

and the content of the 911 tape all pointed to Hutchinson as the person who made the 911 call. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Trial

At trial, the State introduced a 911 tape, where the 911 caller stated: "I just shot my family." (XXII 701). Two close friends of Hutchinson, Crieghton and Deanna Adams, identified the voice on the 911 tape as Hutchinson's voice. (XXII 673-674; XXIV 1148). The deputies arrived at the residence within 10 minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone receiver eight inches from Hutchinson's hand. (XXII 768-769). The phone was still connected to the 911 operator. (XXII 769).

Standard of review

This Court employs a mixed standard of review when analyzing ineffective assistance of counsel claims, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*. *Evans v. State*, 2008 WL 3926721, *4 (Fla. August 28, 2008)(citing *Sochor v. State*, 883 So.2d 766, 771-772 (Fla. 2004)).

The trial court's ruling

The trial court denied this claim of ineffectiveness, ruling:
911 Call:

> Defendant alleges his trial attorneys were ineffective for failing to contest the 911 tape evidence. At trial, the State

introduced a tape recording of a telephone call made to 911 in which the caller stated, "I just shot my family."[11] Creighton Adams and Deanna Adams testified at trial they were close friends of Defendant and the four victims, they had spoken to Defendant numerous times over the telephone and had heard audio recordings of Defendant's voice, and the voice on the 911 tape stating, "I just shot my family," was the voice of Defendant.[12] Deputies of the Okaloosa County Sheriff's Office arrived at the victims' residence, where the crimes occurred, within seven minutes of the 911 call and found Defendant in the garage of the residence with the cordless telephone within six to eight inches of his hands and head, and the telephone still connected to the 911 call.[13] Defendant's postconviction counsel called three friends of Defendant's family and three family members of Defendant to testify at the evidentiary hearing.[14] They all stated they had heard the 911 tape and did not believe it was Defendant's voice on the tape; however, the Court is not persuaded by this testimony due to their relationship with Defendant. The Court is also not persuaded that Defendant's trial attorneys were aware of these witnesses' opinions before trial. These witnesses differed on their ability to recall statements on the tape made by the caller other than "I just shot (or killed) my family," and statements made by the 911 operator. Dana Nelson, Kay Masters, and Amy Helm, all friends of Defendant's family, testified all they could remember being on the tape was the statement "I just killed (or shot) my family" and that voice was not Defendant's.[15] Dana Nelson stated there were no attorneys present at the time the 911 tape was played for him

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[11] Record on Appeal (ROA), Vol. XXII, Trial transcript, Volume IV, pages 701-709, tape recording of 911 call attached hereto as Exhibit A.

[12] ROA, Vol. XXII, Trial transcript, Volume IV, pages 662-665; 671-674; and 698-701, portions of trial testimony of Creighton Adams attached hereto as Exhibit B. ROA, Vol. XXIV, Trial transcript, Volume VI, pages 1108-1110; 1114-1115; and 1146-1151, portions of trial testimony of Deanna Adams attached hereto as Exhibit C.

[13] ROA, Vol. XXI, Trial transcript, Volume III, pages 593-595 and 599-601; and ROA, Vol. XXII, Trial Transcript, Volume IV, pages 604-606, portions of trial testimony of Deputy Larry Ward attached hereto as Exhibit D. ROA, Vol. XXII, Trial transcript, Volume IV, pages 763-765 and 768-769, portions of trial testimony of Deputy Tommy Frederick attached hereto as Exhibit E.

[14] An additional witness, Harlin Helm, was called to testify but was excused as he had difficulty speaking. (Evidentiary hearing transcript, Volume 1, pages 129-131.)

[15] Evidentiary hearing transcript, Volume 1, pages 102 (Dana Nelson), 111-112 (Kay Masters), and 122-123 (Amy Helm).

at Daniel Hutchinson's house.[16] Kay Masters believed a male lawyer was present at the time she heard the tape at Defendant's parents' house, but she did not discuss her opinion about the voice on the tape that day, nor did she ever tell anyone before trial that it was not Defendant's voice on the tape.[17] Amy Helm stated the only people present at her house when the tape was played was Daniel Hutchinson, her husband and herself.[18] Kelly Hutchinson, Defendant's sister-in-law and Daniel Hutchinson's wife, testified she listened to the 911 tape at her house with Valerie and Kurt Hutchinson and her husband, Daniel.[19] She stated she spoke to an attorney who came in the beginning to visit and she did or believes she did tell the attorney her opinion that Defendant's voice was not on the 911 tape.[20]

Daniel Hutchinson, Defendant's brother, testified two of Defendant's court appointed attorneys came to Washington and one of them played the 911 tape for him and he told the lawyer that Defendant's voice was not on the tape.[21] Daniel stated he came to the trial and asked Defendant's trial attorney, Mr. Cobb, about the tape and Mr. Cobb told him they would get to it and nothing ever came of it.[22] Daniel stated on cross examination he only came down for the penalty phase of trial after Defendant had been found guilty by the jury; he listened to the playing of the entire 911 tape in court, but does not recall any statements made by the caller about two men being there at the residence.[23] Daniel said he knows Defendant's defense has been that two men came in the residence in black ski masks and knocked him out and killed the family.[24] Daniel stated he played the entire 911 tape for the other witnesses testifying about the tape at the evidentiary hearing.[25]

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[16] Evidentiary hearing transcript, Volume 1, page 104.

[17] Evidentiary hearing transcript, Volume 1, pages 113, and 116-117.

[18] Evidentiary hearing transcript, Volume 1, page 126.

[19] Evidentiary hearing transcript, Volume 1, pages 134-135.

[20] Evidentiary hearing transcript, Volume 1, pages 140-141.

[21] Evidentiary hearing transcript, Volume 1, pages 144-147, and 153.

[22] Evidentiary hearing transcript, Volume 1, page 148.

[23] Evidentiary hearing transcript, Volume 1, pages 149-151.

[24] Evidentiary hearing transcript, Volume 1, page 150.

[25] Evidentiary hearing transcript, Volume 1, pages 152-153.

Kurt Hutchinson, another brother of Defendant, testified he first listened to the 911 tape at his brother Danny's house in Deer Park, Washington in 1998.[26] Kurt stated he told Defendant's trial attorney, Mr. Cobb, the voice on the tape was not Defendant's and he asked Mr. Cobb, before or during the trial, if they were going to be called to testify about the voice on the 911 tape, but Mr. Cobb said no, and it seemed like his inclination was that the family's testimony in this matter would be of marginal use.[27]
Nickolas Petersen,[28] one of Defendant's initial pretrial court appointed attorneys, testified at the evidentiary hearing he played the 911 tape in his office in the presence of Defendant's parents, Robert and Delores Hutchinson, and Defendant's friends, Creighton and Deanna Adams. Mr. Petersen said the voice on the tape was not a normal voice, but a higher octave voice, and either Defendant's mother or father said Defendant gets like that when excited. Mr. Petersen testified everyone in the room that day agreed the voice on the 911 tape was Defendant's voice, and he made Mr. Cobb aware that his investigation revealed the voice on the 911 tape to be Defendant's when he turned his file over to Mr. Cobb.[29] Mr. Petersen could not recall whether he took the 911 tape with him to Washington and played it, or whether any of Defendant's family or friends told him it was not Defendant's voice on the tape.[30] The Court finds Mr. Petersen's testimony credible.
Stephen Cobb, Defendant's lead trial counsel, testified at the evidentiary hearing he considered attacking the trial testimony identifying Defendant's voice on the 911 tape; however, he decided not to pursue it as it was not viable.[31] Mr. Cobb felt very strongly that if he had challenged the identity of the voice on the tape, the jury would have concluded that it was indeed the Defendant's voice and then the jury would not have believed anything else he said to them.[32] Mr. Cobb did not recall if he discussed with Defendant's family any testimony concerning the 911 tape.[33] Any testimony from

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[26] Evidentiary hearing transcript, Volume 1, page 156.

[27] Evidentiary hearing transcript, Volume 1, page 157.

[28] Identified as Nicholas Peterson in the evidentiary hearing transcript.

[29] Evidentiary hearing transcript, Volume 2, pages 265-266 and 271.

[30] Evidentiary hearing transcript, Volume 2, pages 266-268.

[31] Evidentiary hearing transcript, Volume 1, page 179.

[32] Evidentiary hearing transcript, Volume 2, page 215.

[33] Evidentiary hearing transcript, Volume 1, page 182.

Defendant's family as to the voice on the 911 tape would be argued by the State to be biased, and Mr. Cobb was concerned about losing credibility with the jury in both phases of the trial if the jury considered this testimony to be false.[34] Defendant's own parents, Robert and Delores Hutchinson, were equivocal about the voice on the tape when deposed by the State, and could not state with any certainty if the voice was Defendant's.[35] Mr. Cobb attended the depositions of Defendant's parents and stated at the evidentiary hearing "they (the parents) would have been destroyed on the stand."[36] Mr. Cobb considered having the tape analyzed by an expert; however, he was deeply concerned the expert would have concluded the voice on the tape was Defendant's thereby strengthening the State's case.[37] The Court finds Mr. Cobb's testimony credible.

The Court finds there was no deficient performance by Defendant's trial counsel as to the 911 tape. Trial counsel made a reasonable strategic decision not to challenge the identification of the voice on the 911 tape in order to maintain credibility with the jury. Trial counsel argued at trial the evidence was consistent with other men being at the house and committing these murders as the caller stated on the 911 tape.[38] The caller stated later in the 911 tape, "There were some guys here. They're gone. Please help" and "Those fucking bastards," after the caller initially stated, "I just shot my family."[39] Defendant's trial counsel also argued the defense of voluntary intoxication.[40] The caller on the 911 tape when asked how many people were shot, responded, "I don't

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[34] Evidentiary hearing transcript, Volume 2, pages 223-225.

[35] Deposition of Robert Hutchinson, State's Exhibit 2 at the evidentiary hearing, pages 23 and 25. Deposition of Delores Hutchinson, State's Exhibit 3 at the evidentiary hearing, pages 54-56.

[36] Evidentiary hearing transcript, Volume 2, page 214.

[37] Evidentiary hearing transcript, Volume 1, pages 181-182.

[38] ROA, Vol. XXX, Trial transcript, Volume XII, page 2241, portions of closing argument of defense counsel, Stephen Cobb, attached hereto as Exhibit F.

[39] ROA, Vol. XXII, Trial transcript, Volume IV, page 707 of Exhibit A attached hereto.

[40] ROA, Vol. XXX, Trial transcript, Volume XII, pages 2214-2217 and 2237-2239, portions of closing argument of defense counsel, Stephen Cobb, attached hereto as Exhibit F.

know. I'm drunk. Please help me."[41] Trial counsel further argued at trial that Defendant had a loving relationship with the victims based on the testimony of Creighton and Deanna Adams and the pain in the voice on the 911 tape.[42] The caller on the 911 tape tells the 911 operator three times he loves his family.[43] Mr. Cobb explained at the evidentiary hearing his strategy was to contest the meaning of the words, "I just shot my family," instead of the identity of the voice on the 911 tape,[44] which is what he did at trial.[45] This strategy was reasonable based on the content of the 911 call, the defenses presented at trial, and Defendant's own parents' uncertainty as to the identification of the voice on the tape.

The Court further finds there was no prejudice to Defendant for his trial counsel's decision not to challenge the identification of the caller on the 911 tape, as there is not a reasonable probability that but for any alleged deficiency by counsel, the result of the trial would have been different based on the evidence presented at trial. The testimony of Defendant's family and friends at the evidentiary hearing that Defendant's voice is not on the 911 tape does not account for the incriminating content of the 911 tape, such as the statements, "I just shot my family;" "I love my family;" and the caller stating his "girlfriend," not his wife, is bleeding.[46] These statements along with the testimony of Creighton and Deanna Adams identifying the Defendant's voice as the caller on the 911 tape; the Deputies finding Defendant at the residence within seven minutes of the 911 call, with the telephone near him still connected to the 911 call; and the evidence that Defendant had gunshot primer residue on his hands

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[41] ROA, Vol. XXII, Trial transcript, Volume IV, page 703 of Exhibit A attached hereto.

[42] ROA, Vol. XXIX, Trial transcript, Volume XI, pages 2205-2206, portions of closing argument of defense counsel, Stephen Cobb, attached hereto as Exhibit F.

[43] ROA, Vol. XXII, Trial transcript, Volume IV, page 702 of Exhibit A attached hereto.

[44] Evidentiary hearing transcript, Volume 2, pages 223-224.

[45] ROA, Vol. XXIX, Trial transcript, Volume XI, pages 2202-2203; and ROA, Vol. XXX, Trial transcript, Volume XII, page 2238, portions of closing argument of defense counsel, Stephen Cobb, attached hereto as Exhibit F.

[46] Defendant was Renee Flaherty's boyfriend and resided with the victims. ROA, Vol. XXIV, Trial transcript, Volume VI, pages 1109-1110, portions of trial testimony of Deanna Adams attached hereto as Exhibit C.

> and Geoffrey's body tissue on his leg[47] show there is no prejudice to Defendant even if trial counsel's performance was deficient in failing to contest the identity of the caller's voice on the 911 tape.

(PCR Vol VI 1079-1086)(footnotes included but renumbered).

Merits

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003),

[47] See testimony cited hereinabove and the Florida Supreme Court's recitation of facts in Hutchinson v. State, 882 So. 2d 943, 948 (Fla. 2004).

citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc)(discussing the performance prong of *Strickland* at length).

There is no deficient performance. This was a reasonable strategic decision. (Vol II 223-224). As trial counsel testified at the evidentiary hearing, if he had challenged the voice, trial counsel felt very strongly that the jury would have concluded that it was indeed Hutchinson's voice and then the jury would not have believed anything else he said. (Vol II 215). It is not deficient performance to wish to retain credibility with the jury. *Atwater v. State*, 788 So.2d 223, 230 (Fla. 2001)(observing that sometimes concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility and acceptance of the jury.); *Henry v. State*, 948 So.2d 609, 620 (Fla. 2006)(finding no ineffectiveness where counsel took "extreme measures" to maintain credibility with the jury).

Furthermore, as trial counsel testified at the evidentiary hearing, it was not a "viable route" to challenge the voice identification on the 911 tape. (Vol I 178). The defendant's father, in a deposition taken by the prosecutor, testified that he could not be sure that it was his son's voice due to the pitch. (Vol II 212-213). Hutchinson's mother's deposition testimony was that she could not tell either. (Vol II 213). Even if trial counsel presented a parade of other family members to say that the voice definitely was not Hutchinson's voice, the State could have presented Hutchinson's own

parents statements in their depositions saying that they could not tell if it was or was not their son's voice. Hutchinson mother's and father's deposition foreclosed any viable challenge to the voice identification. As trial counsel noted, Hutchinson's parents they would have been "destroyed on the stand." (Vol II 214).

Furthermore, defense counsel choose to use the 911 call in support of mitigation rather than deny it was Hutchinson's voice on the tape. Defense counsel presented the defendant's distress during the 911 call as mitigation in sentencing which the trial court found and accorded weight ("little weight"). *Hutchinson*, 882 So.2d at 960 (noting that the trial court found as a non-statutory mitigator that the "defendant was distressed during the 911 call").
Defense counsel made a reasonable strategic decision that rather than mounting a hopeless challenge to the identity of the 911 caller, he would use the distress in Hutchinson's voice during the 911 call as mitigation. Collateral counsel does not acknowledge that the cost of challenging the identity of the 911 caller would be to forgo this non-statutory mitigator.

Nor was there any prejudice. The jury would have rejected this testimony. The physical evidence supported the Adams' and the officers' testimony that it was Hutchinson's voice on the 911 tape and contradicted the evidentiary hearing witnesses' testimony. The officers testified that they found Hutchinson with the phone, that was still connected to the 911 operator, a few inches from Hutchinson's hand. The evidentiary hearing witnesses' testimony that it was not Hutchinson's voice cannot account for why the phone

was found near Hutchinson. The evidentiary hearing witnesses' testimony that it was not Hutchinson's voice cannot account for the caller stating "**I** just shot my family." Their testimony does not explain the pronoun "I". The 911 caller stated: "I love my family" which would be an inexplicable statement if two unrelated masked men had committed this crime. The 911 caller made the statement that his "girlfriend" was bleeding, not his "wife" or "ex-wife" was bleeding, as would be expected if Renee's ex-husband were the perpetrator. Indeed, their testimony cannot account for the perpetrator making such a call at all. Why would two unidentified masked perpetrators make a 911 call? The physical evidence and the content of the 911 conversation rebuts the testimony of the family and friends presented at the evidentiary hearing.

Moreover, if trial counsel had challenged the voice, the jury would have played the 911 tape over and over again to make the determination themselves thereby highlighting some of the most damaging evidence against Hutchinson. There was no prejudice.

Counsel was not ineffective for failing to challenge the voice identification testimony. The trial court properly found that counsel was not ineffective for failing to present testimony regarding the identity of the voice on the 911 tape.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT INVESTIGATING THE NYLON STOCKING? (Restated)

Hutchinson asserts that his trial counsel was ineffective for failing to present evidence that a tan nylon stocking was found in the back yard to support Hutchinson's claim that two masked intruders committed the murders. Investigator Fields testified at the evidentiary hearing that he found a tan stocking near the pool. However, according to defendant's statement, the two perpetrators were wearing black ski masks, not a tan nylon stocking mask. Neither the color nor the type of material supported Hutchinson's claim. Furthermore, there was reasonable explanation for the presence of the stocking near the pool. The tan nylon stocking was used as a filter for the swimming pool. Thus, the trial court properly determined that trial counsel was not ineffective for failing to present evidence that a tan nylon stocking had been found near the pool.

The trial court's ruling

The trial court denied this claim of ineffectiveness, ruling:

> Defendant alleges his trial attorneys were ineffective for failing to present exculpatory evidence at the crime scene which was discovered by an investigator, Darryl Fields, hired by Defendant's initial conflict attorneys.
>
> **(i) Nylon stocking**:
>
> Mr. Fields testified at the evidentiary hearing he went to the residence where the crimes occurred some time after the house was vacant and had been repainted and cleaned up. He found a lady's nylon stocking outside the back door near the patio in some mud, which he thought was significant due to information from Defendant that the attackers were wearing

> black stocking masks.[48] The nylon stocking did not have any eye holes cut in it.[49] Mr. Cobb, trial counsel, testified at the evidentiary hearing he was aware of the nylon stocking; however, further investigation revealed this nylon stocking was used as a pool filter at the residence.[50] Deanna Adams testified in her deposition she had found the nylon stocking and Defendant told her it was used for pool filtration.[51] In addition, the nylon stocking did not match the description of the information Defendant gave to detectives, that two men wearing black ski masks broke in and attacked the victims.[52]

(PCR Vol VI 1092)(footnotes included but renumbered).

Merits

Trial counsel was not ineffective for failing to present evidence that a tan nylon stocking was found in the back yard to support Hutchinson's claim that two masked intruders committed the murders. Investigator Fields testified at the evidentiary hearing that he found a tan stocking near the pool. However, according to defendant's statement, the two perpetrators were wearing black ski masks, not a tan nylon stocking mask. Neither the color nor the type of material supported Hutchinson's claim.

Furthermore, there was reasonable explanation for the presence of the stocking near the pool. The tan nylon stocking was used as a filter for the swimming pool. This evidence would simply be seen by

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[48] Evidentiary hearing transcript, Volume 1, pages 27-28.

[49] Evidentiary hearing transcript, Volume 1, page 50.

[50] Evidentiary hearing transcript, Volume 1, pages 199-200.

[51] Deposition of Deanna Adams, State's Exhibit 4 at the evidentiary hearing, page 22.

[52] ROA, Vol. XI, pages 1999, 2036, and 2188, portions of interview of Defendant by law enforcement, attached hereto as Exhibit N.

the jury as an irrelevant red herring. Thus, the trial court properly determined that trial counsel was not ineffective for failing to present evidence that a tan nylon stocking had been found near the pool.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE ACTUAL INNOCENCE CLAIM AND THE CONFLICT OF INTEREST CLAIM? (Restated)

Hutchinson asserts that the trial court erred in summarily denying his actual innocence claim and his conflict of interest claim. Actual innocence claims, not based on newly discovered evidence, are improper in postconviction litigation. They are attempts to relitigate the sufficiency of the evidence addressed in the direct appeal of every capital case by this Court in violation of the law of the case doctrine. Neither an attorney's dislike of his client nor the client filing a bar complaint against the attorney is a conflict of interest situation under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As the United States Supreme Court has recently explained, the concept of "conflict of interest" is limited to the multiple representations situation. This is not a multiple client situation. Nor may Hutchinson create a "conflict" by filing a meritless bar complaint. The trial court properly summarily denied both claims.

The trial court's ruling

On October 11, 2007, the Court entered an order summarily denying the two additional claims raised in the amended motion. (PC Vol. IV 787-788). The trial court rejected the Defendant's claim of actual innocence. The trial court quoted Hutchinson's assertion in his amended motion that the "findings of the Supreme Court of Florida, as far as they incriminate Hutchinson are mistaken and in error",

finding that claims of innocence "are not cognizable in a 3.850/3.851 motion absent a showing of newly discovered evidence" which Hutchinson did not make. (PC Vol. IV 787-788). The trial court explained that it was improper for a trial court to review the findings of the Florida Supreme Court as to the sufficiency of the evidence. (PC Vol. IV 788). The trial court also rejected the claim that Hutchinson was denied conflict-free counsel based on his trial attorney's personal dislike of him because "[a]ny alleged dislike of Defendant by his trial attorney does not constitute a conflict of interest."(PC Vol. IV 787-788).

Standard of review

The trial court summarily denied both claims as a matter of law and therefore, the standard of review is *de novo*. While normally, this Court speaks in terms of conclusively rebutted by the record that standard is for factually matter, not an claim that is summarily denied as a matter of law. *Taylor v. State*, 2008 WL 2445486, * 10 (Fla. June 19, 2008)(stating that a summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record citing *McLin v. State*, 827 So.2d 948, 954 (Fla. 2002)).

ACTUAL INNOCENCE

In his postconviction motion filed in the trial court, Hutchinson asserted that he did not commit these murders. Rather, he asserted that Renee's estranged husband, Geoffrey Flaherty, was the actual perpetrator of this crime. In his postconviction motion, postconviction counsel asserted "[t]he findings of the Supreme Court of Florida, as far as they incriminate Hutchinson are mistaken and in error." Here, the trial court correctly determined it was not proper for a trial court to review this Court's findings.

The Florida Supreme Court reviews the sufficiency of the evidence, including the identity of the perpetrator, in every capital case, whether the issue is raised on appeal or not. *Buzia v. State*, 926 So.2d 1203, 1217 (Fla. 2006)(explaining that "[a]lthough Buzia has not challenged the sufficiency of the evidence, we have the independent duty to review the record in each death penalty case to determine whether competent, substantial evidence supports the murder conviction); Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). Moreover, issue V in the direct appeal was the sufficiency of the evidence of premeditation. The Florida Supreme Court concluded the evidence was sufficient to sustain a conviction of premeditated first-degree murder.

This Court should not entertain claims of actual innocence in postconviction appeals when the claim is not premised on newly

discovered evidence. This Court has already reviewed the evidence based on the existing record in the direct appeal and this Court's decision on the sufficiency of the evidence is law of the case. Hutchinson presents no new evidence. The record in this postconviction case is exactly the same record, in terms of evidence, that this Court already reviewed in the direct appeal, so this is just a second appeal of the same issue. Claims of actual innocence, not based on newly discovered evidence, are procedurally barred in postconviction appeals.

This Court recently rejected a claim of actual innocence in postconviction proceedings based on its prior opinion in the direct appeal. *Jimenez v. State*, 2008 WL 2445461, 11 (Fla. June 19, 2008)(rejecting an actual innocence claim in postconviction appeal, quoting the direct appeal opinion explaining the evidence and concluding there was no reasonable hypothesis of innocence on the facts in the direct appeal and then similarly concluding "that the evidence currently before us does not support the claim that Jimenez is innocent."). The evidence here, like the evidence in *Jimenez*, does not support the claim that Hutchinson is innocent.

This Court concluded the evidence was sufficient to sustain a conviction of premeditated first-degree murder based on both the weapon used, a pump-action shotgun, which "requires the user to pull the pump before aiming and firing each time" and "the period of time from the argument, which occurred between 7 and 7:30 p.m., to the actual murders, which occurred at approximately 8:30 p.m., was certainly enough time for Hutchinson to become conscious of the nature

of the act he was about to commit and the probable result of that act." *Hutchinson*, 882 So.2d at 956.

As the Florida Supreme Court explained in the direct appeal opinion, Hutchinson presented two theories of defense at trial: "Hutchinson's defense at trial was that two men came into the house, he struggled with them, and they shot Renee and the children and fled" but "Hutchinson also presented the defense of intoxication, and he argued that this was a crime of passion, not first-degree murder." *Hutchinson v. State*, 882 So.2d 943, 948-949 (Fla. 2004). The alternative defense of intoxication and heat of passion was an admission of being the shooter. In the 911 call, the caller stated: "I just shot my family." Both in the 911 call and in his alternative defense at trial, Hutchinson admitted his guilt. The deputies arrived at the residence within 10 minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone receiver eight inches from Hutchinson's hand. (XXII 768-769). The phone call was still connected to the 911 operator. *Hutchinson*, 882 So.2d at 948. Additionally, the State's DNA expert at trial, Candance Zuleger, testified that Hutchinson had Geoffrey's tissue on his leg. (XXIV 1174; XXVII 1616-1617). Hutchinson had gun shot residue on his hands according the test performed at 10:20 p.m. that night. (XXV 1250). The murder weapon was a Mossberg 12-gauge pistol-grip shotgun which was located on counter in the house. (XXII 621; XXVI 1547, 1552, 1557; XXVII 1710). Hutchinson's shotgun was positively identified as the murder weapon. *Hutchinson*, 882 So.2d at 943 (noting "[t]he murder weapon, a Mossberg 12-gauge pistol-grip

shotgun which belonged to Hutchinson, was found on the kitchen counter."). Hutchinson's version of events, *i.e.* two masked men with a Remington 870 shotgun committed these murders, was refuted by the evidence that the murder weapon was not that type of shotgun.

Furthermore, as the Florida Supreme Court observed in its direct appeal opinion, Hutchinson's first defense regarding the two men, with whom he struggled, was further rebutted. Hutchinson was examined by an EMT at the scene and a jail nurse and he had no injuries. *Hutchinson*, 882 So.2d at 948-949. Even if this Court allowed Hutchinson to, in effect, file a motion for rehearing years out of time by allowing him to attack these findings, Hutchinson does not point to any particular flaw on any of these findings. Rather, he merely assert the findings are mistaken and in error. He does explain how the findings are mistaken and does not point to where in the record they are refuted - just that they are mistaken and in error.

On appeal, Hutchinson attempts to morph his actual innocence claim presented to the trial court into an ineffective assistance of counsel claim for failing to present evidence of his innocence. Hutchinson may not raise a claim for the first time on appeal. *Connor v. State*, 979 So.2d 852, 866 (Fla. 2007)(denying relief because the confrontation issue was not raised in the 3.851 motion and explaining that an issue "may not be heard for the first time on appeal of a postconviction motion"); *Evans v. State*, 975 So.2d 1035, 1042 (Fla. 2007)(rejecting a claim as not preserved in appellate proceeding because it was not raised in the postconviction motion). Parties may not raise one version of a claim in the trial court and then raise

another different version of the claim in the appellate court. *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982)("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Hutchinson should not be permitted to morph his claim on appeal.

Counsel was not effective for not presenting this evidence of innocence. There was no evidence that Renee's husband killed his own children by blowing them away with Hutchinson's shotgun for counsel to present. As Judge Easterbrook had observed, lawyers are not miracle workers. Most convictions follow ineluctably from the defendants' illegal deeds, and nothing the lawyers do or omit has striking effect. *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995).

Hutchinson asserts that the case should be remanded to the trial court, so that he may "shore up" his 3.851 motion. IB at 58. Evidentiary hearings are not held to "shore up" 3.851 motions. Postconviction motions must be fully plead when filed. The trial court properly summarily denied this claim of actual innocence.

Conflict of interest

Hutchinson asserts that his attorney had a "conflict of interest" based on his attorney's personal dislike of him and because of the complaint Hutchinson filed in the Florida Bar against his attorney, Mr. Cobb. IB at 58-61.

Evidentiary hearing & Bar complaint

At the evidentiary hearing, postconviction counsel argued that Mr. Cobb was "representing two competing entities" because "ironically", Mr. Cobb was representing himself. (Vol. I 7-8). Postconviction counsel stated that a lawyer who has had a bar complaint filed against him has an interest in protecting his good name. (Vol. I 8). Postconviction counsel admitted the bar complaint was resolved favorably to Mr. Cobb prior to the trial. (EHVol. I 9; PCR Vol. V 965). Postconviction counsel requested that Hutchinson's bar complaint and the June 26, 2000 letter from Mr. Cobb to the Florida Bar responding to the bar complaint be made part of the record. (Vol. 11-12). The State did not object and the postconviction court granted the request. (Vol. I 12-13). The entire file including the findings and recommendation of the Florida Bar were made part of the record. (PCR Vol. V 962-1005)[53]. Mr. Cobb's response to the Florida Bar concluded with the statements: "I would like you to know while Mr. Hutchinson is a difficult client, I am used to it. A litigation lawyer in my field has to develop a thick skin or they don't survive. I intend

[53] The record of the bar complaints contains numerous duplicates of the same letters.

to fight for him tenaciously at trial, just as I have before trial." (PCR Vol. V 986). Mr. Cobb's August 18, 2000 letter to the Florida Bar contains a description of a conversation in which the defendant "admitted that he was quarreling with his lawyers (we are the fifth and sixth lawyers appointed) to 'help his case on appeal.'" (PCR Vol. V 988). That letter also explains that "Mr. Hutchinson hasn't liked any of his previous lawyers, frequently changes his story, is argumentative upon visits, lies to and about us repeatedly, and has enlisted his parents to aid him in acts of deception including blatantly perjured testimony at their deposition."(PCR Vol. V 989).

Merits

Neither personal dislike nor the filing of a bar complaint are conflict of interest situations under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). As the United States Supreme Court has explained, conflicts of interest claims are limited to multiple client situations.

In *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), the United States Supreme Court held that, where trial court failed to inquire into potential conflict of interest, defendant had to establish that this conflict of interest adversely affected counsel's performance. The *Mickens* Court noted, with disapproval, that Courts of Appeals had "unblinkingly" applied *Sullivan* to "all kinds of alleged attorney ethical conflicts". *Mickens*, 535 U.S. at 174, 122 S.Ct. at 1245. The *Mickens* Court explained that Courts of Appeal have invoked *Sullivan* not only when

there was a conflict rooted in successive representation, "but even when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, a job with the prosecutor's office, the teaching of classes to Internal Revenue Service agents, a romantic entanglement with the prosecutor, or fear of antagonizing the trial judge." *Mickens*, 535 U.S. at 174-175, 122 S.Ct. at 1245 (citations omitted). It quoted with approval *Beets v. Scott*, 65 F.3d 1258, 1266 (5th Cir. 1995)(en banc)(explaining the *Sullivan* rule of "not quite *per se*" prejudice makes eminent sense in the clearest context of divided loyalty due to multiple representation but not in the context of conflicts that are not as clear; *Strickland* is the better test in those contexts.). The *Mickens* Court stated that "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application." The Court noted that both *Sullivan* and *Holloway* "stressed the high probability of prejudice arising from multiple concurrent representation" but explained that "[n]ot all attorney conflicts present comparable difficulties." The *Mickens* Court explained that this was not to suggest that one ethical duty is less important than another but the purpose of the *Sullivan* exception from the ordinary requirements of *Strickland* was not to enforce the Canons of Legal Ethics. *Mickens*, 535 U.S. at 176, 122 S.Ct. at 1246. Rather, the purpose of the *Sullivan* exception was to apply prophylaxis in situations where *Strickland* was inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. The *Mickens* Court explained that *Strickland* is adequate to assure vindication of the

defendant's Sixth Amendment right to counsel in other ethical conflict situations by citing and quoting *Nix* where *Strickland* was applied. *Id citing Nix v. Whiteside*, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). Thus, other types of ethical conflicts are analyzed under *Strickland*, not *Sullivan*. Indeed, the court questioned whether *Sullivan* even extended to the successive representation situations. See also *United States v. Goodley*, 183 Fed.Appx. 419, 420, 2006 WL 1388439, 1 (5th Cir. 2006)(finding *Strickland*, not *Sullivan*, applied where the defense attorney was indicted for a separate and unrelated drug conspiracy five days after the defendant's conviction and explaining "[r]ecent instruction from the Supreme Court . . . have reaffirmed the strict limitation of *Sullivan* to cases involving multiple representation and the application of *Strickland* to most other alleged conflicts.")

There was no multiple representation in this case. Hutchinson was the sole perpetrator of these murders. The Cobbs represented only Hutchinson at this trial. There were two attorneys but only one client. Therefore, *Sullivan* does not apply.

Florida's district courts are misapplying *Sullivan* to other situations and granting new trials without a showing of prejudice because they believe this Court's precedent requires them to do so.

In *Alessi v. State*, 969 So.2d 430, 432, 435 (Fla. 5th DCA 2007), the Fifth District remanded for a new trial based on a finding of a conflict of interest due to the defense attorney's knowledge of the

delay in turning over of the murder weapon to the authorities without any finding of prejudice. Alessi was convicted of first degree murder for the murder of his wife; attempted murder of his wife's brother and armed burglary. He filed a motion for postconviction relief claiming his attorney suffered from a conflict of interest which the trial court denied. The Fifth District noted there was a threshold issue of whether *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), applied to these types of conflicts. *Alessi*, 969 So.2d at 432. The Court noted, that under *Sullivan*, prejudice is presumed. *Alessi*, 969 So.2d at 435. The Court explained the issue of whether *Sullivan* even applies to claims not involving an attorney representing multiple clients "has never been expressly acknowledged or addressed by the Florida Supreme Court" but explained that "because the Florida Supreme Court continues to apply *Sullivan* to all types of conflict cases, we must do so as well." The Court noted that *Sullivan* was a multiple representation case. *Alessi*, 969 So.2d at 435. The Fifth District also explained that in *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), the Supreme Court stated in dictum that the federal circuit courts had "unblinkingly" applied the *Sullivan* exception to "all kinds of alleged attorney ethical conflicts" beyond the multiple representation scenario. The Fifth District observed that "none of these post-2002 Florida Supreme Court cases have even acknowledged *Mickens*." *Alessi*, 969 So.2d at 437.[54] The Fifth District stated that

[54] This Court cited to *Mickens* recently in its November 2007 decision in *Connor v. State*, 979 So.2d 852, 861 (Fla. 2007)(citing *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)

the "extension of *Sullivan* to other conflicts of interest remains an open question." *Alessi*, 969 So.2d at 436 (citing *Schwab v. Crosby*, 451 F.3d 1308, 1324-1328 (11th Cir. 2006)).[55] The Fifth District

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as "explaining the 'actual conflict of interest' language from *Cuyler v. Sullivan*." The State's answer brief in *Connor* asserted that conflict of interest claims were limited to multiple representations situations and quoted *Mickens* at length but then seemed to argue that there was no actual conflict rather than *Sullivan* did not apply at all. Answer brief SC04-1283 at 57-58. This Court's opinion in *Connor* was released a few days after the Fifth district's opinion in *Alessi*.

[55] It is not an open question. Both the Fifth District and the Eleventh Circuit in one case have misread this part of *Mickens*. *Quince v. Crosby*, 360 F.3d 1259, 1263 n.4 (11th Cir. 2004)(stating that "[t]he Supreme Court expressly left open the issue of whether or not the *Cuyler* standard should be applied in cases involving successive representation or other conflicts of interest."). The *Mickens* Court stated:

> In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the Sullivan prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

Mickens, 535 U.S. at 176, 122 S.Ct. at 1246. Whether *Sullivan* applies other types of situations is not an open question. The United State Supreme Court limited *Sullivan* to joint representation situations albeit technically in dicta. It disapproved applying *Sullivan* to any other situation than multiple representations situations. What remains an open question is how far *Sullivan* applies even in multiple representations situations. See also *Whiting v. Burt*, 395 F.3d 602, 618 (6th Cir. 2005)(explaining that the open question referred to in *Mickens* is whether *Sullivan* should be extended to successive representation cases); *Stewart v. Wolfenbarger*, 468 F.3d 338, 350-351 (6th Cir. 2006)(noting that the *Mickens* Court explicitly left open the question of whether the *Sullivan* applied to a conflict of interest due to successive representation); *Alberni v. McDaniel*, 458 F.3d 860, 873 (9th Cir. 2006)(noting the question of whether prejudice must be shown in cases of successive representation is one that the Supreme Court specifically left open in *Mickens*); *Chandler v. Lee*, 89 Fed.Appx. 830, 840, n.12 2004 WL 406313, 8 n.12 (4th Cir. 2004)(unpublished)(noting the Supreme Court has expressly left open the question of whether it is appropriate to presume prejudice in a

wondered if this Court has overlooked *Mickens* or whether this Court's "broad application" of *Sullivan* was based on the state constitutional right to effective assistance of counsel. *Alessi*, 969 So.2d at 437 (citing Article I, Section 16 of the Florida Constitution).[56] The

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case, like this one, in which a conflict is alleged to arise from successive representation citing *Mickens*, 535 U.S. at 176); *Tueros v. Greiner*, 343 F.3d 587, 593 (2d Cir. 2003)(noting that certiorari had been granted in *Mickens* on the presumption that *Sullivan* applied to successive representation cases, and that "[w]hether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question."). The open question is whether *Sullivan* applies to successive multiple representations or is limited to concurrent multiple representation. *Sullivan* may be limited to the situation of one attorney simultaneously representing multiple clients at the same time. It may not even apply to past representations. The *Mickens* Court noted that the "Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation." *Mickens*, 535 U.S. at 175, 122 S.Ct. at 1245-1246.

The State is not advocating that this Court limit *Sullivan* to simultaneous multiple representation only. *Lordi v. Ishee*, 384 F.3d 189, 193 (6th Cir. 2004)(holding that *Sullivan* is inapplicable even to cases of successive representations). *Sullivan* should apply to both simultaneous multiple representation and successive representations until further notice by the United States Supreme Court. The underlying issue is the Sixth Amendment right to counsel and the denial of the right to counsel is a serious constitutional violation. Moreover, limiting *Sullivan* too narrowly could create problems in federal habeas. *Sullivan* should be applied to both concurrent and successive representations but it should not be applied to any other situations.

[56] It is extremely dangerous for state courts to have separate jurisprudence under their state constitutions in the area of the right to counsel because the Sixth Amendment right to counsel involves mutually exclusive rights including the right to counsel versus the right to proceed *pro se* under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) versus the right to retained counsel of the defendant's choice. These various wings of the Sixth Amendment intersect and the expansion of one may violate the other.

Court explained that "[w]hatever the basis for our supreme court's failure to address *Mickens*, because we are bound by its decisions, and because it continues to apply *Sullivan* to all types of conflict cases, we believe that we must address Mr. Alessi's conflict claims under the *Sullivan* exception."

This Court should address the issue to guide district courts; explicitly adopt *Mickens* and hold that *Sullivan* conflict of interest claims are limited to multiple client situations. Currently, this Court is conflating a claim of conflict of interest under *Sullivan* where no prejudice is required with a claim of ineffectiveness under *Strickland* where prejudice is required. *Overton v. State*, 976 So.2d 536, 561 (Fla. 2007)(characterizing the claim as "the failure of his counsel to declare a conflict of interest constituted ineffective assistance."). Yes, a defendant may present any set of facts regarding ethical matters, including bar complaints, book deals, etc., as an ineffectiveness claim under *Strickland* but he must establish prejudice. *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 (stating that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.").

Dislike of a client is not a conflict of interest. An attorney is not required to be bosom buddies with his clients. There is no

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This Court would create the risk of reversal of state criminal convictions in federal habeas if it expansively interprets one wing of the right to counsel under the state constitution at the expense of one of the other wings of the federal right to counsel.

constitutional right to an attorney client relationship free of animosity. *Morris v. Slappy*, 461 U.S. 1, 13, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983)(explaining the Sixth Amendment does not guarantee a meaningful relationship between accused and his counsel); *Hale v. Gibson*, 227 F.3d 1298, 1310 (10th Cir. 2000)(finding "personal dislike, distrust and animosity" because the lawyer believed the defendant had burglarized his office was not a conflict of interest); *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008)(en banc)(explaining that the Sixth Amendment is not violated because the defendant refuses to cooperate with his lawyer because of dislike or distrust.). Whether Mr. Cobb liked Hutchinson simply is not part of the Sixth Amendment right to counsel.

Nor does the filing of a bar complaint create a conflict of interest under *Sullivan*. In *Foote v. Del Papa*, 492 F.3d 1026 (9th Cir. 2007), *cert. denied*, *Foote v. Masto*, - U.S. -, 128 S.Ct. 808, 169 L.Ed.2d 609 (2007), the Ninth Circuit denied federal habeas relief finding that the state court's rejection of a conflict of interest claim was not contrary to or unreasonable application of federal law where question was an open one in Supreme Court jurisprudence. Foote was convicted following a jury trial, of battery with intent to commit a crime, sexual assault, and sexual assault with a deadly weapon. A deputy Public Defender represented Foote at his arraignment. Foote filed a complaint in federal district court, naming the deputy Public Defender and the Public Defenders Office as defendants, alleging that his public defender refused to ask him pertinent questions; approached him with a plea bargain, even though he demanded his right

to trial; that all efforts to contact his public defender to prepare his defense were futile; that his public defender refused to supply him with all copies of records concerning his arrest"; and thereby, failing to afford him his Sixth Amendment right to counsel. The Public Defenders Office filed a motion to withdraw as Foote's counsel, asserting that the lawsuit "created a clear conflict of interest." The motion was granted and retained counsel replaced the public defender. The federal district court dismissed Foote's action. After the jury trial where Foote was represented by retained counsel, the Public Defenders Office was reappointed to represent Foote in his direct appeal. The Nevada Supreme Court dismissed the direct appeal. In a state habeas, Foote asserted a claim of ineffective assistance of appellate counsel based on the conflict of interest with the office based on his prior complaint against his trial public defender. The Nevada Supreme Court rejected the "conflict of interest" claim.

On appeal to the Ninth Circuit, Foote asserts a violation of his Sixth Amendment right to conflict-free appellate counsel. The Ninth Circuit explained that there was no United States Supreme Court case holding that an appellate public defender had a conflict of interest due to the defendant's dismissed lawsuit against the public defenders office. The Ninth Circuit noted that the Supreme Court has never held that the *Sullivan* exception applies either to a defendant's "irreconcilable conflict" with his appointed appellate counsel or to such counsel's conflict of interest. Indeed, the Ninth Circuit observed that "*Mickens* explicitly concluded that *Sullivan* was limited

to joint representation." *Foote*, 492 F.3d at 1030. The Ninth Circuit affirmed.

Hutchinson had numerous attorneys prior to trial and two attorneys in postconviction. As the trial court's order explains, after the Public Defender withdrew due to a conflict, John Harrison and Nickolas Peterson, were appointed to represent Hutchinson. However, prior to trial, these attorneys withdrew and were replaced by Stephen Cobb and Kimberly Sisco Cobb (now Ward). Hutchinson filed a bar complaint against Mr. Cobb. In the postconviction proceedings, the original postconviction counsel withdrew and was replaced with current postconviction counsel. Hutchinson had three different sets of attorneys prior to trial and two different sets of attorneys in postconviction. Hutchinson simply refuses to get along with his own attorneys. Hutchinson may not use his own obstreperous behavior as a basis for establishing a conflict of interest. There was no conflict of interest.

Sullivan does not apply to bar complaints. By allowing bar complaints, even when the Florida Bar finds the complaint to be meritless, to serve as the basis for a conflict of interest claim, this Court is allowing a defendant to create a conflict himself. *Connor v. State*, 979 So.2d 852, 861 (Fla. 2007)(analyzing a bar complaint, that was dismissed as meritless by the Florida Bar, that a capital defendant filed against his attorney as "ineffective assistance of counsel because of a conflict of interest" claim but denying relief); but see *Huggins v. State*, 889 So.2d 743, 769 (Fla. 2004)(concluding that the filing of a bar complaint against the

prosecutor by the defendant does not provide a basis for the removal of a prosecutor in and of itself.).[57] Defendants should not be allowed to create conflict by filing frivolous bar complaints. Defendants can file a bar complaint and then file a motion to disqualify their attorney based on the "conflict" the defendant himself created. And they can do this *ad infinitum* resulting in every new attorney assigned to their case being disqualified by the defendant's own actions.

Furthermore, even if a "conflict" existed, as postconviction counsel acknowledged at the evidentiary hearing, the bar complaint was resolved in Mr. Cobb's favor prior to the trial. So, any "conflict" ceased to exist prior to the trial.

Counsel's reliance on *Wright v. State*, 857 So.2d 861 (Fla. 2003); *Huggins v. State*, 889 So.2d 743 (Fla. 2004); *Randolph v. State*, 853 So.2d 1051 (Fla. 2003); and *Overton v. State*, 976 So.2d 536 (Fla. 2007), is misplaced. In *Wright*, this Court concluded that defense counsel's status as a special deputy sheriff which allowed counsel to carry a firearm "did not pose a conflict of interest." *Wright*, 857

[57] Three District Courts have held that the filing of a bar complaint does not create a conflict of interest. *Gaines v. State*, 706 So.2d 47, 49 (Fla. 5th DCA 1998)(concluding the filing of a bar complaint against the Office of the Public Defender does not automatically create a conflict of interest requiring the appointment of substitute counsel); *Jones v. State*, 658 So.2d 122, 125, n.2 (Fla. 2d DCA 1995)(explaining that a criminal defendant filing a bar complaint against court-appointed counsel does not automatically create a conflict situation requiring the appointment of new counsel); *Boudreau v. Carlisle*, 549 So.2d 1073 (Fla. 4th DCA 1989)(holding that the trial court is not obligated to grant a motion for substitute counsel based merely on the filing of a bar complaint).

So.2d at 871-872. In *Huggins*, this Court held the failure of the prosecutor to disclose *Brady* material during the first trial did not require disqualification of the prosecutor at the second trial and the filing of a bar complaint against the prosecutor also did not provide a basis to disqualify the prosecutor. *Huggins*, 889 So.2d at 767-769. In *Randolph*, this court rejected a conflict of interest claim based on defense counsel's status as a honorary deputy sheriff which merely allowed counsel to carry a firearm as "clearly without merit." *Randolph*, 853 So.2d at 1063. In *Overton*, this Court found a conflict of interest claim based on a claim that defense counsel improperly revealed the defense to the prosecutor to be "without merit" because there was "no evidence in the record that Overton's interests were compromised by any type of conflict of interest." *Overton*, 976 So.2d at 561-562. These cases do not cite or distinguish *Mickens*. The trial court properly found that neither counsel's dislike of his client nor the unfounded bar complaint were conflict of interest under *Sullivan*. The trial court properly summarily denied the conflict of interest claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,
BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Clyde M. Taylor JR. 119 East Park Avenue, Tallahassee FL 32301 1st day of October, 2008.

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.