IN THE SUPREME COURT OF FLORIDA

JEFFREY GLENN HUTCHINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Capital Post Conviction Case

Case No. SC08-99

L. C. Case No. 98-1382-CF

INITIAL BRIEF OF APPELLANT

On Direct Appeal from a Final Order of the Circuit Court for the First Judicial Circuit, in and for Okaloosa County, Florida, that denied Hutchinson's Sworn Amended Motion for Post Conviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.851.

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PRELIMINARY STATEMENT

This is a direct appeal of a final Order Denying Defendant's Sworn Amended Motion for Post Conviction Relief and Sworn Supplemental Insert rendered by the Hon. G. Robert Barron, Circuit Judge, on January 3, 2008 (R. Vol. VI, pp. 1077-1200; Vol. VII, pp. 1201-1320). The final order effectively rejected Hutchinson's sworn amended Florida Rule of Criminal Procedure 3.851 motion for post conviction relief in a capital case.

The appellant, Jeffrey Glenn Hutchinson, was the defendant in the lower tribunal, the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida. He will be referred to as "Hutchinson" or as "the defendant." The appellee, State of Florida, was the plaintiff in the trial court, and will be referred to here as "the state."

The record on appeal is in nine volumes.

Volumes I-VII contain post conviction pleadings, orders and related documents. The Clerk of the Circuit Court has placed a page number in the lower right hand corner of each page of these volumes. Thus, this part of the record will be referred to by the letter "R" (to designate the record on appeal), followed by an appropriate volume and page number.

Volumes VIII and IX contain the transcripts of the October 22, 2007, evidentiary hearing in the lower tribunal regarding Mr. Hutchinson's sworn

amended motion for post conviction relief. The court reporter has provided a page number in the upper right hand corner of each page of these transcripts. This part of the record will be referenced by the letter "R," followed by a volume number (either Volume VIII or IX), the letters "EH" (for evidentiary hearing) and an appropriate page number.

References to the record on appeal regarding Mr. Hutchinson's original direct appeal of his judgments and sentences in SC04-500 will be by the designation "OR" (or original record) followed by an appropriate volume and page number.

Any emphasis or additions to quotes or text will be acknowledged.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case:

This is a direct appeal of a final order rendered by the Hon. G. Robert Barron, Circuit Judge, on January 3, 2008 (R. Vol. VI, pp. 1077-1200, Vol. VII, pp. 1201-1320), denying Hutchinson's sworn amended Florida Rule of Criminal Procedure 3.851 motion for post conviction relief in a capital case.

B. Jurisdiction:

This court has jurisdiction to review the lower court order denying Mr. Hutchinson's Florida Rule of Criminal Procedure 3.851 sworn amended motion for post conviction relief. Art. V, Sec. 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(i); Fla. R. Crim. P. 3.850(g).

C. Course of the Proceedings:

On October 5, 1998, Hutchinson was indicted by an Okaloosa County, Florida, grand jury and charged with four counts of first-degree murder. (R. Vol. I, p. 2). Hutchinson was originally represented in the trial court by the Office of the Public Defender for the First Judicial Circuit of Florida. That office withdrew because of a conflict of interest. Hutchinson was then represented by John Harrison, Esq., (deceased) and Nicholas Peterson, Esq., private, court appointed conflict attorneys. Prior to trial, these conflict

attorneys withdrew and were replaced by the husband and wife legal team of Stephen Cobb, Esq., and Kimberly Sisco Cobb (now Ward), Esq. The Cobbs became Hutchinson's trial counsel on September 2, 1999. (R. Vol. VI, p. 1079).

On January 8-18, 2001, Hutchinson was tried by jury in the guilt/ innocence phase of the trial. (R. Vol. I, p. 2). On January 18, 2001, the jury returned guilty as charged verdicts as to all counts. (R. Vol. I, p. 2; *Hutchinson v. State*, 882 So. 2d at 948).

A penalty phase trial per the provisions of Section 921.141, Florida Statutes, was held before the court only[1] on January 25, 2001. After conducting a *Spencer*[2] hearing, the trial court, on February 6, 2001, sentenced Hutchinson to life imprisonment for the murder of Renee Flaherty, and to death for each of the murders of her children, Logan, Amanda and Geoffrey Flaherty. (R. Vol. I, pp. 2-3; R. Vol. VI, pp. 1078-079).

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[1] Hutchinson waived his right to a jury during the penalty phase. *Hutchinson v. State*, 882 So. 2d at 948.

[2] *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

There was a direct appeal of the judgments of conviction and sentences under attack, including the death sentences. The defendant raised ten issues on appeal:

1. The trial court improperly instructed the jury.

2. The trial court erred in admitting certain testimony as an excited utterance.

3. The trial court erred in repeatedly overruling objections to the state's closing argument.

4. The trial court erred in denying Hutchinson's motion for mistrial.

5. The trial court erred in denying Hutchinson's motions for judgments of acquittal.

6. The trial court erred in denying Hutchinson's motion for a new trial.

7. The trial court erred in considering Section 921.141(5)(a), Florida Statutes, as an aggravating factor.

8. The trial court erred in finding that the murder of the children occurred during the course of an act of aggravated child abuse.

9. The trial court erred in finding heinous, atrocious or cruel as an aggravating factor in the murder of Geoffrey Flaherty.

10. The death sentences were not constitutionally proportional. *Hutchinson v. State*, 882 So. 2d at 949-50.

On July 1, 2004, the Supreme Court of Florida affirmed Hutchinson's judgments of conviction and sentences. *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004). On July 22, 2004, the mandate was issued.

The defendant did not file a petition for writ of certiorari in the United States Supreme Court. (R. Vol. VI, pp. 1024-025).

An initial state court motion for post conviction relief per the provisions of Florida Rule of Criminal Procedure 3.851 was timely filed on October 20, 2005. (R. Vol. I, pp. 1-72). Hutchinson was represented at this time by Jeffrey Hazen, Esq. (R. Vol. I, p. 71; R. Vol. VI, p. 1024). Hutchinson raised seven collateral claims:

1. Trial counsel was ineffective during the guilt/innocence phase of the trial.

2. The state improperly withheld relevant, exculpatory evidence during the trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and knowingly presented false evidence to the jury and judge, in violation of the constraints set forth in *Giglio v. United States*, 405 U.S. 150 (1972).

3. Hutchinson's constitutional rights were violated when he was shackled and restrained with an electronic device during trial.

4. Trial counsel was ineffective during the penalty phase of the state court trial.

5. Newly discovered evidence demonstrated that Hutchinson was denied a fair trial and due process of law.

6. Hutchinson's death sentences violated his right to trial by jury as provided for in *Jones v. United States*, 526 U.S. 227 (1999), ("under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.") *See* also *Apprendi v, New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002).

7. Hutchinson's trial was so fraught with errors that the cumulative effects of same denied him a fair trial and due process of law. (R. Vol. I, pp. 4-72).

The state filed a response to the post conviction motion on December 21, 2005. (R. Vol. I, pp. 73-104). While not admitting the correctness of any of the claims and raising the defense of procedural bar to some of them, the state did not object to an evidentiary hearing regarding Claims 1, 2 (on the *Brady* claim only), 3 (to the extent it was an ineffective claim), 4 and 7.

On March 13, 2006, the trial court, after a *Huff*[3] hearing, ruled that the defendant was entitled to an evidentiary hearing regarding Claim 1 except for the assertion that the state had engaged in misconduct regarding a "jailhouse snitch" since no "jailhouse snitch" testified. (R. Vol. I, p. 105). The trial court granted an evidentiary hearing as to Claim 2 except for the *Giglio* claim that defense counsel withdrew. (R. Vol. I, pp. 105-06). The trial court granted an evidentiary hearing regarding Claims 3 and 4. The trial court denied an evidentiary hearing as to Claims 5 and 6, but granted an evidentiary hearing as to Claim 7. (R. Vol. I, pp. 106-08).

On October 16, 2006, after firing his registry counsel, Hutchinson filed a *pro se* amended initial motion for post conviction relief. (R. Vol. III, pp. 401-27). On October 17, 2006, the trial court ordered registry counsel to turn over their files to the defendant. (R. Vol. III, pp. 428-29). On that same day, Hutchinson filed a *pro se* corrected initial motion for post conviction relief. (R. Vol. III, pp. 430-96). On October 25, 2006, Hutchinson filed a *pro se* motion for leave to correct his amended motion for post conviction relief. (R. Vol. III, pp. 501-72). On October 27, 2006, the trial court denied Mr. Hutchinson's request to proceed *pro se* and struck all the *pro se* pleadings he had filed. (R. Vol. III, pp. 573-75). On November 3,

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

2006, the trial court denied Hutchinson's motion for DNA testing. (R. Vol. III, pp. 576-600; R. Vol. IV, pp. 601-64).

On March 29, 2007, the trial court granted Hazen's motion to withdraw as Hutchinson's registry counsel and appointed Clyde M. Taylor, Jr., Esq., in his stead. (R. Vol. IV, pp. 672-74; R. Vol. VI, p. 1077).

On July 25, 2007, the trial court granted Hutchinson's motion (prepared by Mr. Taylor) for leave to again amend the Rule 3.851 motion. (R. Vol. IV, pp. 675-76). On August 15, 2007, a Sworn Amended Motion for Post Conviction Relief, including an actual innocence claim, was filed on Hutchinson's behalf by Taylor. (R. Vol. IV, pp. 677-750.) In this motion, Hutchinson abandoned some of the claims set forth in the original motion for post conviction relief and realleged others contained in that original motion, included the following claims:

Claim I: Various claims of ineffective assistance of trial counsel during the guilt/innocence phase of the trial that resulted in prejudice to the defendant. Hutchinson asserted in this regard a claim of actual innocence.

Claim II: Various claims that trial counsel were ineffective during the penalty phase of the trial.

Claim III: Cumulative ineffectiveness of trial counsel that was prejudicial to the defendant.

Claim IV: Hutchinson's assertion that he had been shackled and shocked with a high voltage electrical device during the trial to the extent that his constitutional rights were violated.

(R. Vol. IV, pp. 677-750).

On September 6, 2007, the state filed a response to the amended post conviction motion. (R. Vol. IV, pp. 751-86).

On October 11, 2007, the trial court rendered an order summarily denying the claims of "actual innocence" and that Hutchinson was not represented by conflict-free counsel, as alleged in the August 15, 2007, sworn amended motion. (R. Vol. IV, pp. 787-89; *see* also R. Vol. VI, p. 1077).

An evidentiary hearing on Hutchinson's Sworn Amended Motion for Post Conviction relief came on for consideration on October 17, 2007, in Shalimar, Florida, with Judge Barron presiding. (R. Vol. VIII, pp. 1-200; Vol. IX, pp. 202-82). At the beginning of the hearing, Hutchison filed a Sworn Supplemental Insert to Motion for Post Conviction Relief that alleged that trial counsel were ineffective for failing to present evidence, during the

penalty phase, that the defendant suffered from a bipolar mental disorder. (R. Vol. IV, pp. 794-96). The trial court took that motion under advisement.

Judge Barron then heard testimony from various witnesses on Hutchinson's remaining post conviction claims. That testimony is summarized in the statement of the facts section of this brief at pages 19 – 39 below. Mr. Hutchinson did not testify at the evidentiary hearing. (R. Vol. VI, p. 1024).

On October 29, 2007, the state filed a formal response to the sworn supplemental insert to the motion for post conviction relief in which it addressed Hutchinson's bipolar claim. (R. Vol. V, pp. 1009-016.)

D. Disposition in the Lower Tribunal

On January 3, 2008, the trial court rendered a final Order Denying Defendant's Sworn Amended Motion for Post Conviction Relief and Sworn Supplemental Insert to Motion for Post Conviction Relief. (R. Vol. VI, pp. 1077-1200; R. Vol. VII, pp. 1201-1320). On January 23, 2008, Mr. Hutchinson filed a timely notice of appeal of Judge Barron's final order. (R. Vol. VII, pp. 1321-322).

E. Statement of the Facts:

The basic facts of the case as relied upon by the Supreme Court of Florida on direct appeal of the original judgments and sentences.

The facts of the case as recited by this court on direct appeal 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. Hutchison 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.

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 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).

The matters raised, considered and resolved, and the testimony presented, at the October 22, 2007, evidentiary hearing on the Sworn Amended Motion for Post Conviction Relief.

At the beginning of the evidentiary hearing, Mr. Taylor asked the trial court to revisit the issue of the claim that during much of the time that Mr. Cobb was representing Mr. Hutchinson, he had a conflict of interest based upon the Florida Bar complaint that Hutchinson filed against him. (R. Vol. VIII, EH, pp. 6-9). Ms. Millsaps responded for the state by noting that as a matter of law a claim of conflict of interest under these circumstances was limited to those situations where one attorney represented multiple defendants. (R. Vol. VIII, EH, pp. 9-10). The trial court, treating Mr. Taylor's motion as a request for reconsideration of his previous ruling[4] (that the conflict of interest claim should be summarily denied), denied it. (R. Vol. VIII, EH, pp. 10-11.) The trial court then allowed the entire Florida Bar complaint file to be made a part of the record so that the Supreme Court would have a full account of what had transpired. (R. Vol. VIII, EH, pp. 12-14).

[4] *See* Judge Barron's October 11, 2007 Order Summarily Denying Additional Claims Raised in Defendant's Sworn Amended Motion for Post Conviction Relief. (R. Vol. IV, pp. 787-89; *see* also R. Vol. VI, p. 1077).

Next, Mr. Elmore asked for clarification regarding issues of alleged ineffective assistance of counsel raised in Hutchinson's original post conviction motion to vacate his judgments and sentences filed on October 20, 2005 (R. Vol. I, pp. 1-72) by Mr. Hazen that were not included in the August 15, 2007, Sworn Amended Motion for Post Conviction Relief filed on Mr. Hutchinson's behalf by Mr. Taylor (R. Vol. IV, pp. 677-750). Mr. Taylor assured the trial court that he was proceeding only on what was in the August 15, 2007 motion. (R. Vol. VIII, EH, p. 18).

Private Investigator Darryl Fields was the first witness called by the defense at the evidentiary hearing. He was appointed by the court to assist Mr. Peterson and Mr. Harrison. (R. Vol. VIII, p. 29). He has an extensive background as an investigator and in the field of law enforcement. (R. Vol. VIII, EH, p. 20-2). He said that, in all his years in law enforcement, he had never investigated a shooting at close range with a high velocity weapon that did not include blood being found on the weapon involved in the incident. (R. Vol. VIII, EH, p. 25). He read the police reports in the Hutchinson case which did not reveal the presence of blood on the murder weapon. (R. Vol. VIII, EH, p. 26). He visited the crime scene and was allowed inside the Hutchinson residence. (R. Vol. VIII, EH, p. 27). He noticed that the front door had pry marks on it and that the door had been repaired after sustaining

obvious damage. The back door had pry marks as well. (R. Vol. VIII, EH, pp. 27-8; see also R. Vol. VIII, EH, pp. 37-9). He located what he described as "a lady's stocking, nylon stocking," in the back yard of the residence. He reported his findings to attorneys Peterson and Harrison. (R. Vol. VIII, EH, pp. 27-9). His findings were contained in a written report that he provided defense counsel. (R. Vol. VIII, EH, p. 30).

Fields later learned that there had been a change of attorneys, and made repeated efforts (a half dozen times) to speak to Mr. Cobb about his findings, but Cobb never returned his calls. (R. Vol. VIII, EH, pp. 30-1). He finally was able to speak to Cobb and, after explaining what investigative work he had done on the case, offered his services. Cobb advised him that he had his own investigator and that his (Fields') services were no longer needed. Cobb never asked him for a copy of the report he (Fields) had furnished prior counsel. (R. Vol. VIII, EH, pp. 31-2; see also R. Vol. VIII, EH, pp. 45-6).

On cross examination, Fields said that he had been qualified in the past as an expert witness in crime scene investigation. (R. Vol. VIII, EH, p. 33). He did not examine the shotgun used in the homicides. Nor did he examine crime scene photographs, police photographs or autopsy reports. (R. Vol. VIII, EH, pp. 33-5, 37). It was his understanding that the victims

were shot at a range of between 1-3 feet. (R. Vol. VIII, EH, p. 35). In answer to a series of questions from the court, he indicated that the house had been repaired at the time he inspected it. He could not recall how long after the homicides he did so. (R. Vol. VIII, EH, pp. 39-40).

Fields testified that the nylon stocking was found somewhere between the back of the residence and the pool located in the back yard. It was 5 or 6 feet from the house and about that same distance, or a little more, from the pool. He did not recall discussing the stocking with the defendant. He was not aware of what Mr. Hutchinson had said during the 911 call. (R. Vol. VIII, EH, pp. 41-4).

In response to questions from Judge Barron, Fields could not recall how he came to refer to the nylon stocking found in the back yard as a mask, but he thought it (the characterization of the item as a mask) may have come from one of the defense counsel. (R. Vol. VIII, EH, pp. 46-8). He turned the stocking over to either Mr. Harrison or Mr. Peterson. No eye holes were cut in it. (R. Vol. VIII, EH, pp. 49-50).

Kimberly Ward (formerly Cobb) was at the time of the trial married to and practicing criminal law with Mr. Cobb. (R. Vol. VIII, EH, p. 52). She had not previously handled a capital case. (R. Vol. VIII, EH, pp. 52-3). Nor had she had previously prepared mitigation evidence in a death case.

(R. Vol. VIII, EH, pp. 53-4). According to Cobb, Ms. Ward did not meet the requirements for appointment as counsel in capital cases per the provisions of Florida Rule of Criminal Procedure 3.112 since she had not been lead or counsel in a previous murder case. (R. Vol. VI, pp. 1007, 008). She took the deposition of Ms. Zuleger, the DNA expert. (R. Vol. VIII, EH, p. 55). She did not seek to have any of the items collected at the crime scene, including those that might have contained blood of them, tested for DNA. (R. Vol. VIII, EH, pp. 55, 66-7). Because the jury came back with guilty verdicts so quickly after the guilt/innocence phase of the trial, both she and Mr. Cobb felt that it was best to waive a jury during the penalty phase. (R. Vol. VIII, EH, pp. 56-8). She did not think that Mr. Cobb had handled a first-degree murder case where the state was seeking the death penalty before he assumed the representation of Mr. Hutchinson. (R. Vol. VIII, EH, pp. 60-1). She and Mr. Cobb had a paralegal assistant who worked in the office at the time but they did not avail themselves of an outside investigator, including Mr. Fields, to assist in defending Hutchinson. (R. Vol. VIII, EH, pp. 62-3). She was aware that Hutchinson claimed that two men attacked him in his residence and were the perpetrators of the homicides, not him. (R. Vol. VIII, EH, p. 64). She was not involved in conducting any inquiry regarding the stocking mask that was found. (R.

Vol. VIII, EH, p. 64). She was not involved in the matter of the 911 call and whether it was Hutchinson's voice on the audio tape of the call. Both she and her husband believed that the audio tape was not admissible in evidence. (R. Vol. VIII, EH, pp. 68-72).

On cross examination, Ward was reminded that she had handled a serious homicide case, and that the charges against her client had been dismissed. (R. Vol. VIII, EH, p. 74). As second chair counsel, she had the benefit of the files from previous counsel, Peterson and Harrison. (R. Vol. VIII, EH, pp. 75-6). She recalled having a copy of Zuleger's DNA report at her disposal prior to trial. There was no indication of blood or DNA on the wristwatch taken from Hutchinson. (R. Vol. VIII, EH, pp. 77-9). She added that Hutchinson's decision to waive a jury during the penalty phase was confirmed by him on the record and in their private conversations. (R. Vol. VIII, EH, pp. 80-2). She noted that Dr. Vincent Dillon, a psychiatrist, testified during the penalty phase, as did several of Hutchinson's family members. She did not think that any witness who Hutchinson wanted to testify was prevented by defense counsel from doing so. (R. Vol. VIII, EH, pp. 81-3). Hutchinson himself insisted that the defense of insanity not be presented at trial. Therefore, defense counsel presented evidence and argued

that Hutchinson was innocent and that the voluntary intoxication defense was applicable in the case. (R. Vol. VIII, EH, pp. 83-5).

At this point in the proceedings, the defense was permitted to present the telephonic testimony of a number of Hutchinson's friends and family members regarding the issue of whether it was his voice on the 911 audio tape and whether they would have been available to testify in that regard had they been called upon to do so at trial.

Dana Nelson, who resides in Deer Park, Washington, is a long-time friend of the Hutchinson family. He often spoke to the defendant prior to his trial in January of 2001. Some of their conversations were over the phone. The witness listened to the audio tape. It was played for him by one of Hutchinson's trial attorneys. Nelson stated that it was not Hutchinson's voice on the tape. He was available to testify but never called upon to do so by defense counsel. (R. Vol. VIII, EH, pp. 99-103). On cross examination, he acknowledged his close friendship with the defendant and his brother, Daniel Hutchinson. (R. Vol. VIII, EH, p. 103). He said that it had been some eight years since he had listened to the audio tape, that he could not recall the names of the attorneys who had him listen to it and that he did not recall what other voices he heard on the tape. (R. Vol. VIII, EH, pp. 103-05).

Kay Masters is also a Hutchinson family friend. She had spoken to Hutchinson in person, not on the telephone. She also listened to the audio tape of the 911 call. When asked whether it sounded like Hutchinson's voice on the tape, she said, "(n)o, it did not." (R. Vol. VIII, EH, p. 112). She was available to testify but not asked to do so by Hutchinson's trial counsel. (R. Vol. VIII, EH, p. 112). On cross examination, she reaffirmed that she and her parents were close friends with the Hutchinson family, that she did not remember the name of the person who played the 911 audio tape for her and that she did not tell Hutchinson's attorneys that she would testify to what she heard. (R. Vol. VIII, EH, pp. 113-17).

Amy Helm testified that she had known the defendant for more than 20 years. She first met him in 1983. They were family friends. They spoke with each other quite often. She sometimes spoke to him by phone. She listened to the 911 tape. She did not think it was Hutchinson's voice on the tape. She would not have been available to appear personally at the trial but was willing to give a written statement to this effect in lieu of her personal appearance. Hutchinson's counsel made no effort to speak with her prior to trial. (R. Vol. VIII, EH, pp. 120-24, 127). She conceded on cross examination that she was a very close friend of the Hutchinson family and

acknowledged that all she could recall being on the tape was a person saying that "I just shot my family." (R. Vol. VIII, EH, p. 126).

Kelly Hutchinson is married to one of the defendant's brothers. She met the defendant 17 years prior to her post conviction testimony. She was with him at family functions and often spoke to him by phone. She would recognize his voice over the phone without him identifying himself. She also listened to the 911 audio tape prior to trial. She paid attention to the part of the tape where the person said that he has just shot his family or words to that effect. (R. Vol. VIII, EH, pp. 133-36). She was confident that "(i)t's just not Jeff's voice." (R. Vol. VIII, EH, p. 135). She too was available to testify at trial but never asked to do so. (R. Vol. VIII, EH, p. 136). She said on cross examination that, due to the passage of time, all she could remember on the audio tape were the five words, "I just shot my family." (R. Vol. VIII, EH, p. 138). She spoke to the defendant after the shooting incident, and he did not ask her to testify for him. However, she did tell one his attorneys what she thought about the voice on the tape prior to trial. (R. Vol. VIII, EH, pp. 139-41).

Daniel Hutchinson is one of the defendant's brothers. He was able to recognize his brother's voice. He recalled that two lawyers came out to Washington to work on the case and met with him during that time. (R. Vol.

VIII, EH, pp. 144-45). The lawyers asked him to listen to the 911 tape, and he did. When asked whether it was the defendant's voice on the tape, Daniel stated, "(a)bsolutely not." (R. Vol. VIII, EH, p. 147.) He came to Shalimar for the trial and advised Mr. Cobb as to what he knew, but Mr. Cobb did not ask him to testify. (R. Vol. VIII, EH, p. 148.) On cross examination, Daniel added that the defendant had always maintained his innocence, contending that two men came in the house and killed the victims. (R. Vol. VIII, EH, pp. 150-51.) In response to a question from Judge Barron, Daniel stated that he played the entire tape for the persons who testified before him and that he had no explanation as to why they could not recall other parts of the taped conversation. (R. Vol. VIII, EH, pp. 152-53).

Kurt Hutchinson testified that he spent a lot of time on the telephone with the defendant over the years. He listened carefully to the September 11, 1998, 911 audio tape. He heard a copy provided him by the Cobbs. He was asked, "(w)as that Jeffrey Hutchinson's voice on the tape saying I just killed my family or words to that effect plus other things?" He answered, "(a)bsolutely, unequivocally not." (R. Vol. VIII, EH, p. 156). He said that "I traveled 3000 miles to do that and I was never called to testify to that effect." (R. Vol. VIII, EH, p. 156). He added that he could pick the defendant's voice out from a million other voices, and the voice on the tape

was not his. *Id*. He said that he told Cobb that it was not his brother's voice on the tape. When asked whether he would be called to testify, Cobb told him that he would not. (R. Vol. VIII, EH, p. 157).

On cross examination, Kurt agreed with Mr. Elmore that Cobb told him that, because he and the defendant were brothers, his testimony would be of marginal value. (R. Vol. VIII, EH, p. 157). He acknowledged also hearing someone on the tape say that two men had committed the crimes. (R. Vol. VIII, EH, pp. 159-60).

At this time, the hearing was postponed for the lunch hour.

When the proceedings resumed, Mr. Taylor, with the defendant's consent, abandoned the shackling and electric shock assertions as set forth in Claim IV of the sworn amended motion for post conviction relief. (R. Vol. VIII, EH, pp. 162-64).

Stephen Cobb, Hutchinson's lead counsel at trial, was the next witness. He acknowledged being the author of a letter (defendant's Ex. C in evidence) written during the course of his representation of Mr. Hutchinson. (R. Vol. VIII, EH, p. 169). He met with previous counsel, Peterson, Loveless and Harrison, during the course of his representation. (R. Vol. VIII, EH, p. 170). He felt strongly that Hutchinson's contention that two men had committed the homicides was "not sustainable." (R. Vol. VIII, EH,

p. 170, *see* also R. Vol. VIII, EH, pp. 171-72, 175). He believed that the most effective defenses would be insanity at the time of the crimes or those that would avoid a conviction for first-degree murder. (R. Vol. VIII, EH, pp. 170-71). He said that the DNA evidence, the statements Hutchinson made to law enforcement and the 911 call were the most damaging evidence against his client. (R. Vol. VIII, EH, pp. 176-77).

Cobb took some depositions regarding the 911 tape and "started running into problems." (R. Vol. VIII, EH, pp. 178-79). For example, Hutchinson's father told him once that it was not the defendant's voice on the tape, and then changed his story. Cobb listened to the tape himself and it sounded to him like the defendant's voice on the tape. (R. Vol. VIII, EH, p. 179). The defense team felt that the tape was coming into evidence in any event so the best thing to do was to dispute the meaning of the words, "I shot my family." (R. Vol. VIII, EH, p. 179-80). He did not seek to have the tape subjected to voice analysis because he believed that the results might be harmful to the client. (R. Vol. VIII, EH, pp. 181-82). He did not recall some of Hutchinson's family members asking to testify about the voice on the tape. (R. Vol. VIII, EH, p. 182).

As far as the DNA evidence was concerned, Cobb did not recall any discussions about it with Hutchinson. Nor did he obtain information

regarding the defendant's fingernail clippings that were sent off for study, in part because he did not think finding someone else's DNA under his fingernails would have any significance. (R. Vol. VIII, EH, pp. 183-85).

Cobb said that the blood splatter evidence was important to him but he did not obtain a blood splatter expert of his own because he did not feel that another expert would come up with a conclusion different than the state's expert. (R. Vol. VIII, EH, p. 185-86). He added that Hutchinson was ". . . forever asking us to run down rat trails . . ." and insisting that he call witnesses who, when confronted, did not say what the defendant claimed they would say. (R. Vol. VIII, EH, p. 187). He said that he did not use Dr. Baumzweiger to testify about Gulf War Syndrome because he was a "pseudo expert," -- and the theory regarding the syndrome was questionable and still being debated by the APA (American Psychological Association). (R. Vol. VIII, EH, pp. 185-87).

While he could not be specific, Cobb said that he recalled spending hundreds of hours investigating the facts of the case. But he did not recall how many witnesses he, his wife and his paralegal assistant actually interviewed. (R. Vol. VIII, EH, p. 190). He did not call witnesses to testify regarding the 911 call because he did not think it would be a good idea. (R. Vol. VIII, EH, p. 192).

Cobb said that his wife prepared most of the penalty phase materials but he actually presented the witness testimony and argument. He indicated that Dr. Dillon, a psychiatrist, had diagnosed Hutchinson with bipolar disorder. (R. Vol. VIII, EH, pp. 193-94).

The decision by the defense team to waive a jury during the penalty phase was based, in part, upon the swiftness of the verdicts returned once the guilt/innocence phase concluded -- and the fact that the defendant was "universally hated by people in Okaloosa County." (R. Vol. VIII, EH, p. 195). He did not feel that presenting witnesses regarding the 911 tape would have swayed the jury during the penalty phase because it (the suggestion that it was not Hutchinson's voice on the tape) was "utter crap." (R. Vol. VIII, EH, p. 197). He met with Peterson and Harrison once he was appointed. (R. Vol. VIII, EH, p. 198). He was reminded that Darryl Fields worked on the case prior to his appointment but could not recall speaking with him. (R. Vol. VIII, EH, p. 199). He was aware that a nylon stocking was found in the back yard but said that it was used as a swimming pool skimmer or filter, not a mask. (R. Vol. VIII, EH, pp. 199-200.)

Cobb was asked about his assertion in his closing argument that evidence was mishandled. He could not recall what he was referring to in this regard but agreed that it might have been related to DNA evidence.

(R. Vol. VIII, EH, p. 202). As far as not testing items that the state had not subjected to DNA analysis, Cobb said that the results might backfire on the client by incriminating him even more. (R. Vol. VIII, EH, pp. 203-05). He believed that he personally interviewed Deanna and Creighton Adams. (R. Vol. VIII, EH, pp. 203-05). He could not recall what he meant when he said in his opening statement that crucial evidence had been ignored. (R. Vol. VIII, EH, pp. 205-06). Nor did he recall asking Zuleger about the assertion that the state asked her not to test certain of the items that were provided to her. (R. Vol. VIII, EH, p. 208).

On cross examination, Cobb noted that he was board certified in criminal law as of September 2002, and that he gained most of his experience for that designation prior to Hutchinson's jury trial. (R. Vol. IX, EH, p. 210).

With regard to the 911 call, he affirmed that he was present when the depositions of the defendant's parents were taken. Hutchinson's father, Robert Hutchinson, said that he could not tell whether it was or was not the defendant's voice on the tape. (R. Vol. IX, EH, p. 212-13). Hutchinson's mother said that she could not tell either, and at one point said that "well, I don't feel like it's his voice." (R. Vol. IX, EH, p. 213). Cobb vaguely remembered speaking to several of Hutchinson's brothers and felt that they

were going to say that it was his voice on the tape -- which is why he did not call them to testify. (R. Vol. IX, EH, p. 215). Cobb agreed with the prosecutor that there was strong circumstantial evidence that the voice on the tape was his client's. (R. Vol. IX, EH, pp. 215-18). He said he also faced the fact that the state had strong evidence that the client was feigning unconsciousness when the law enforcement officers arrived at the murder scene. (R. Vol. IX, EH, pp. 216-17). He was not aware of any strong forensic evidence that suggested that someone other than Hutchinson committed the crimes. (R. Vol. IX, EH, pp. 218-19). He recalled that Deanna Adams, who for some time felt that Hutchinson was innocent, got her hopes up when the nylon stocking was found in the back yard. However, Hutchinson told her that he used it as a pool filter. (R. Vol. IV, EH, pp. 219-20). He recalled reading some letters that Mrs. Adams had written to the client prior to trial and had thought about using them at trial. However, in the end, he did not do so. (R. Vol. IX, EH, pp. 221-23). He also had to face the fact that the law enforcement officers who spoke with Hutchinson and listened to the 911 tape were confident that it was the defendant's voice on that tape. (R. Vol. IX, EH, p. 223). Under these circumstances, Cobb felt that it would be counterproductive to put family members on the stand to say that it was not the defendant's voice on the

tape. Instead, it made more sense to contest the meaning of the words. (R. Vol. IX, EH, p. 224).

He did not want Hutchinson to take the stand but the client made that ultimate decision. (R. Vol. IX, EH, p. 227). Nor did he want to claim that the pool sock was a mask used by the alleged intruders since Hutchinson told the police that these intruders were wearing black ski masks. (R. Vol. IX, EH, p. 228).

Cobb was aware that the state's original DNA expert had mishandled that evidence and he exploited that point before the jury. He also made a point of claiming that the powder residue found on his client could have come from the law enforcement officers who physically restrained Hutchinson. (R. Vol. IX, EH, pp. 228-30). As far as the defendant's fingernail clippings not being examined was concerned, he saw no reason to do that since the client did not claim that he had scratched the assailants. (R. Vol. IX, EH, pp. 230-32). He did not want to subject the tape to expert voice analysis since he was concerned that the results would implicate Hutchinson. (R. Vol. IX, EH, pp. 232-33). He had no information to the effect that Renee Flaherty's husband had an insurance policy on her life. (R. Vol. IX, EH, pp. 234-35). He was also aware that Geoffrey Flaherty had an alibi for the night of the homicides, in that he was in Alaska. (R.

Vol. IX, EH, p. 236). He said that he did not pursue Hutchinson's claim regarding Gulf War Syndrome (that the Flaherty family had been killed in the course of governmental action to silence Hutchinson due to his political activities regarding the syndrome) because the claim was baseless. (R. Vol. IX, EH, pp. 234-35). He also saw no need to attack Dr. Berkland's (the medical examiner's) testimony since there was no real issue involved in the causes of the deaths of the victims. (R. Vol. IX, EH, pp. 238-41). He did call Laura Barfield to take issue with Dr. Berkland's testimony to the effect that Mr. Hutchinson was not intoxicated around the time of the homicides. (R. Vol. IX, EH, pp. 240-41). Nor did he feel it would be beneficial to advise the jury that the officers who interviewed Hutchinson later were sanctioned regarding improper involvement with sheriff's office interns since that conduct happened long after they had completed their investigations and submitted their reports. (R. Vol. IX, EH, pp. 242-43). He presented the testimony of Dr. Vincent Dillon during the penalty phase to the effect that Hutchinson had a bipolar disorder. (R. Vol. IX, EH, pp. 243-44). He was reminded that Hutchinson's prior counsel took many depositions in the case and he read them. (R. Vol. IX, EH, pp. 245-46).

Nicholas Peterson was qualified to handle capital cases from 1994 until 2004, at which time he became a state hearing officer regarding child

support matters. He handled many serious felony cases and between 8 and 10 capital cases during this time. (R. Vol. IX, EH, pp. 258-59). He worked on some of the cases with John Harrison, Esq., who had an office in the same building as he did and was death penalty qualified as well. (R. Vol. IX, EH, pp. 259-61). They worked as a team in representing Hutchinson until the Cobbs assumed the representation. (R. Vol. IX, EH, p. 261). He recalled that they took a lot of depositions in the case. (R. Vol. IX, EH, p. 261).

As far as mitigation was concerned, Peterson conferred with Hutchinson's parents and with his friends in Spokane, Seattle and elsewhere. He also obtained his school records, spoke with some of his friends in Germany and gathered information (some good, some not good) regarding his military record. (R. Vol. IX, EH, pp. 261-63). He turned over to the Cobbs all the files he accumulated. As far as he recalled, this would have included the report from Darryl Fields. (R. Vol. IX, EH, pp. 263-64). He played the 911 tape for Hutchinson's parents, and one of them said that it is how the defendant talked when he was excited. (R. Vol. IX, EH, pp. 265-66, 271). He passed this information on to Mr. Cobb. (R. Vol. IX, EH, p. 266).

On cross examination by Mr. Taylor, Peterson said that he did not recall playing the 911 tape for Daniel or Kurt Hutchinson, or whether they told him that it was not Hutchinson's voice on the tape. (R. Vol. IX, EH, pp. 267-68). He vaguely recalled discussing the nylon stocking found in the back yard by Mr. Fields. (R. Vol. IX, EH, pp. 269-70).

In response to questions from the trial court, Peterson said that either the state or the agency that recorded the 911 call did in fact turn over a copy of the tape for his review. (R. Vol. IX, EH, p. 272).

SUMMARY OF THE ARGUMENT

Trial counsel failed to provide Hutchinson with effective assistance of counsel during the guilt/innocence phase of the trial. The defendant suffered prejudice as a result within the context of *Strickland v. Washington*, 466 U.S. 668 (1984).

The most damning piece of evidence the state possessed was the 911 audio tape that purportedly included the voice of the defendant telling the operator, "I just shot my family." (R. Vol. VI, p. 1106; *Hutchinson v. State*, 882 So. 2d 943, 948 [Fla. 2004]).

The state presented four witnesses, Deputy Sheriffs Neil Woodward and Michael Stewart (R. Vol. VI, p. 1097), and two of Hutchinson's supposed friends, Crieghton and Deanna Adams, who testified that in fact it was his voice on the tape. The defense essentially did nothing to refute this testimony except to quibble over the meaning of the words on the tape. This is so despite the fact that there were a host of individuals who listened to the tape and were prepared to testify that the person who spoke those fateful words was not Hutchinson. Daniel and Kurt Hutchinson, brothers of the defendant, were adamant in this regard. (R. Vol. VIII, pp. 144-47, 153, 156.) Yet, Cobb refused to let them (or anyone else for that matter) testify. His reasoning was that they would not be believed since they obviously

cared for the defendant. This is so despite the fact that the state argued that the jurors should believe Mr. and Mrs. Adams for that very reason -- that they were friends of the defendant and had been in his presence often enough to recognize his voice.

There is simply no excuse for this seriously deficient omission. The core function of defense counsel is to challenge the state's case-in-chief. The state had the burden of proof and the witnesses who were primed to refute the state's claim as to whose voice was on the tape (including Daniel and Kurt Hutchinson) would almost certainly have created reasonable doubt about this critical issue. This is especially true given the fact that there was no eye witness to the homicides who testified for the state, the defendant's fingerprints or DNA were not found on the murder weapon and the defendant's statement to the arresting officers that others had committed the homicides was certainly plausible.

Defense counsel compounded their ineffectiveness by failing to introduce in evidence a nylon stocking that was found in the defendant's back yard. The presence of the stocking was consistent with and corroborated Hutchinson's statement to law enforcement that the actual perpetrators of the homicides were masked men. What possible tactical reason could defense counsel have for not placing this compelling piece of

evidence before the jury? There is none. Once again, defense counsel was advised prior to trial of evidence that was tailor made to create reasonable doubt in the minds of the jurors, but -- once again, trial counsel failed to exploit it.

The trial court erred in not recognizing these deficiencies of trial counsel and the prejudice they caused the defendant. Hutchinson is entitled to a new trial so that he may introduce this evidence of innocence and let the jury decide.

The trial court also erred in summarily preventing the defense from continuing to demonstrate during the post conviction hearing that Hutchinson was innocent of the crimes charged and that the complaint the defendant filed with the Florida Bar helped to explain why defense counsel failed to aggressively and fully represent him. The defense was not attempting to inject an "actual innocence" claim based upon newly discovered evidence into the proceedings. Nor was it suggesting that the Florida Bar complaint created a *per se* conflict of interest between Cobb and the defendant as a matter of law. The defense was merely attempting to show a motive for Cobb's inaction on behalf of his client in furtherance of the assertions of ineffective assistance of counsel.

ARGUMENT

Point I. Defense counsel were ineffective during the guilt/innocence phase of the trial for failing to present evidence that Hutchinson's voice was not on the 911 audio tape.

The trial court rejected Hutchinson's post conviction claim that he was denied effective assistance of counsel when the Cobbs failed to present the testimony of various friends and family members who would have stated that the voice on the 911 tape was not the defendant's. (R. Vol. VI, pp. 1078-86). The defendant assigns this finding as error.[5]

Standard of Appellate Review

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Hutchinson's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief after an evidentiary hearing is entitled to plenary, *de novo* review except that findings of fact made by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. In *Schwab v. State*, 814 So. 2d 402, 408 (Fla. 2002), the court held:

> We review whether counsel was ineffective and whether the defendant was prejudiced by any ineffectiveness as mixed questions of law and fact.

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[5] The text of the 911 call is set forth at R. Vol. VI, pp. 1106-114.

Accord, *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005). Such factual findings will not be disturbed absent the showing of an abuse of discretion. *Heath v. State*, 648 So. 2d 660 (Fla. 1994).

The Merits

In *State v. Duncan*, 894 So. 2d 817, 823 (Fla. 2004), this court held:

> Following the United States Supreme Court decision in Strickland, this Court held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:
>
> > A claim of ineffective assistance of counsel, to be considered meritorious, must contain two components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the proceedings that confidence in the outcome is undermined,

citing *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Even under this high standard of proof, it is clear that the trial court abused its discretion in the course of rejecting Hutchinson's claim of ineffective assistance of counsel for failure to contest the state's claim that the voice on the audio tape was the defendant's.

Initially, the trial court rejected the claim because the witnesses who said that it was not Hutchinson's voice on the tape were friends and family members. The trial court found in this regard: "They all stated they had heard the 911 tape and did not believe it was the Defendant's voice on the tape; *however, the Court is not persuaded by this testimony due to their relationship to the defendant*." (R. Vol. VI, p. 1080, emphasis added.) Yet, by the trial court's own acknowledgement, Craighton and Deanna Adams, who testified that it was Hutchinson's voice on the tape, were believable and had the ability to recognize the defendant's voice precisely because they were ". . . *close friends of Defendant and the four victims*." (R. Vol. VI, p. 1080, emphasis added). The Supreme Court also relied on the assumption that the voice on the 911 tape was Hutchinson's based upon the identification provided by Hutchinson's "close friends," Mr. and Mrs. Adams, stating:

> 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 v. State, 822 So. 2d at 948, emphasis added. And the prosecutor made a point throughout the trial of emphasizing the close, friendly, relationship between Mr. and Mrs. Adams and the defendant in the course of attempting to convince the jury that their identification of the latter's voice

on the 911 tape was accurate. *See* for example prosecutor Elmore's direct examination of Craighton Adams during the jury trial including the following:

> Q. All right. Did you -- sometimes families' children play and consort together and the families facilitate that without the adults being really close social friends and sometimes everybody's close, how would you describe this relationship?
>
> A. We were very close.
>
> Q. Okay. Would you consider yourself a close friend of Jeffery Hutchinson?
>
> A. Yes.

(R. Vol. VI, p. 1117).[6]

Clearly, the fact that witnesses who could refute the state's claim that it was Hutchinson's voice on the 911 tape were family or friends of the defendant (and, therefore, could identify his voice) was all the more reason that they testify and all the more reason for the trial court not to reject their testimony as it did. Stated differently, according to the trial court, the Adams' testimony was believable precisely because they were friends of Hutchinson who would recognize his voice and have no reason to want to harm him. (R. Vol. VI, p. 1080). This was the same position taken by the

[6] The critical importance of the 911 tape to the prosecution is reflected by the fact that it was admitted in evidence as state's Exhibit 1 at trial. (R. Vol. VI, p. 1128).

Supreme Court and advocated by the prosecutor. Thus, it was critical that defense counsel present witnesses similarly situated who could refute the Adams' and the sheriff's deputies' testimony. Who could do that better than the very people who had known and interacted with Hutchinson much of his life?

The trial court also justified defense counsel's decision to essentially concede that it was his client's voice on the 911 tape as a " . . . reasonable strategic decision." (R. Vol. VI, p. 1084). The trial court was correct to note that trial counsel cannot escape responsibility in the context of an ineffective claim for making poor decisions that are not reasonable. Counsel's actions, including "tactical" decisions, must be ". . . reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). However, under these circumstances, it was unreasonable for defense counsel to fail to contest the most incriminating part of the state's case against Hutchinson.

The trial court found further that it was "not persuaded that Defendant's trial attorneys were aware of these witnesses' opinions before trial." (R. Vol. VI, p. 1080). This is hard to imagine[7] and refuted by the evidence. For example, Kurt Hutchinson testified that the copy of the tape

[7] Cobb acknowledged that the 911 tape was a "critical" piece of evidence. R. Vol. VIII, EH, p. 177.

he was provided came from the Cobbs themselves. (R. Vol. VIII, p. 156). He was upset that he had ". . . traveled 3000 miles to do that (testify about the 911 tape) and I was never called to testify to that effect." (R. Vol. VIII, p. 156). He added that he could pick the defendant's voice out from a million other voices, and the voice on the tape was not his brother's. *Id*. He said that he told Mr. Cobb that it was not his brother's voice on the tape. When asked whether he would be called to testify, Mr. Cobb told him that he would not. (R. Vol. VIII, p. 157). In addition, Daniel Hutchinson testified that the lawyers (Peterson and Harrison) asked him to listen to the 911 tape, and he did. When asked whether it was the defendant's voice on the tape, Daniel stated, "(a)bsolutely not." (R. Vol. VIII, EH, p. 147). He came to Shalimar for the trial and advised Mr. Cobb as to what he knew, but Cobb did not ask him to testify. (R. Vol. VIII, EH, p. 148.) Cobb went to great lengths to state that he conferred at length with Peterson and Harrison during the course of his representation. (R. Vol. VIII, EH, p. 170). Thus, it is crystal clear that, contrary to the trial court's assumption, Cobb knew about the exculpatory evidence that could be presented by Hutchinson's friends and family members, but arbitrarily decided not to present it.[8]

[8] Cobb said that he did not call the family members and friends to dispute the 911 call, not because he did not know about these witnesses, but because he "didn't think it was a good idea." (R. Vol. VIII, EH, p. 192.)

The record affirms that, at the very least, the defense team was in a state of confusion, unpreparedness and disorganization in terms of how to respond to the state's intent to introduce the 911 audio tape evidence. According to Mr. Cobb, the defense team felt that the tape was coming into evidence in any event so the best thing to do was to dispute the meaning of the words, "I shot my family," on the 911 tape. (R. Vol. VIII, EH, p. 179-80). But that is not what Ms. Ward testified to. She said that both she and her husband were convinced that the audio tape was not admissible in evidence in the first place. (R. Vol. VIII, EH, pp. 68-72). Thus, when asked about it during his post conviction testimony, Ms. Ward stated:

> A. I -- my thought remembrance of the issue of the telephone 911 tape was that we did not believe based on case law that the tape would have gotten into the trial.
>
> Q. And who is we when we believed the tape wouldn't have gotten into the trial?
>
> A. Me and my ex-husband.
>
> Q. So lead counsel and you felt that the tape wouldn't come in, is that right?
>
> A. That's true.

(R. Vol. VIII, EH, p. 70.)

Ward's recollection of events strongly suggests the real reason that none of the witnesses who could have brought into question whether it was

Mr. Hutchinson's voice on the tape were called to testify. Defense counsel assumed incorrectly that the tape was inadmissible as evidence against their client. Therefore, they did not think it necessary to present evidence to refute it. This was obviously a very damaging miscalculation.

What defense counsel actually understood to be the situation regarding the admissibility of the tape notwithstanding, the fact remains that no meaningful effort was made to brunt the force of this most incriminating part of the state's case -- other than Cobb's anemic argument regarding the meaning of the rather unequivocal statement, "I just shot my family." (R. Vol. VIII, EH, p. 180).[9]

The failure to call material witnesses in support of a defendant's innocence claim and the failure to impeach the state's key witnesses can

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[9] In answer to a question from Mr. Taylor at the evidentiary hearing, Mr. Cobb stated:

Q. You did not think you could keep it (the 911 tape) out. So you were going to ignore it because that's what happened, isn't that right? You put no evidence on concerning the 911 tape, isn't that true?

A. You're asking a compound question. It started out with so you ignore it. No, we did not ignore it.

Q. You didn't put on any testimony from any witness who could rebut the state's witnesses, true?

A. That is a matter of record.

(R. Vol. VIII, EH, pp. 180-81.)

constitute ineffective assistance of counsel. *Happ v. State*, 922 So. 2d 182 (Fla. 2005); *State v. Duncan*, 894 So. 2d 817 (Fla. 2004); *Johnson v. State*, 921 So. 2d 490 (Fla. 2005). To do less renders the Sixth Amendment right to counsel a nullity and brings into serious question the fairness and reliability of the resulting jury verdict, judgment and sentence, especially in a death case like this one. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 446 U.S. 668, 685. (1984) Thus, defense counsel has a solemn "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

When determining whether prejudice resulted from the failure to call innocence and impeachment witnesses, the court must consider whether there is a distinct likelihood that the evidence not presented would have changed the outcome of the proceedings. *Cole v. State*, 841 So. 2d 409 (Fla. 2003). In this case, the refutation of the claim that it was the defendant's voice on the 911 tape would have done serious and, most likely, irreparable

damage to the prosecution's case, especially where the state had the burden of proving Hutchinson's guilt beyond a reasonable doubt. The testimony of Kurt and Daniel Hutchinson was especially forceful and precise. They were certain the voice on the tape was not their brother's. Dana Nelson, Kay Masters and Amy Helm were also adamant that it was not the defendant's voice on the tape. If for no other reason, the sheer number of witnesses ready, willing and able to swear that the voice on the tape was of someone other than Mr. Hutchinson would have called the state's assertions into serious question. There was no eyewitness to the homicides who testified at trial. Other than the 911 tape, there was precious little other evidence to prove that Hutchinson was the culprit. Clearly then, Hutchinson suffered prejudice due to his trial counsels' failure to challenge the state's claim that it was the defendant who said, "I just killed my family."

Point II: Trial counsel were ineffective for failing to introduce in evidence at trial the nylon stocking found at the crime scene.

Standard of Appellate Review

The standard of appellate review is the same for Point II as it is for Point I above. This is a post conviction capital case involving mixed questions of fact and law. The legal issues resolved by the trial court are entitled to plenary, *de novo* review except that findings of fact made by the

trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *State v. Duncan*, 894 So. 2d 182, 192-93 (Fla. 2005). Such factual findings will not be disturbed absent the showing of an abuse of discretion. *Schwab v. State*, 814 So. 402, 408 (Fla. 2002).

Merits

The failure to present exculpatory evidence can constitute ineffective assistance of trial counsel. *McLin v. State*, 827 So. 2d 948 (Fla. 2002); *Jennings v. State*, 782 So. 2d 853 (Fla. 2001). As set forth in the statement of the facts on pages 21-23 of this brief, Private Investigator Darryl Fields found a woman's nylon stocking in the backyard of the Hutchinson residence. He reported his findings to attorneys Peterson and Harrison (R. Vol. VIII, EH, pp. 27-29) and he included this turn of events in his written report to counsel (R. Vol. VIII, EH, p. 30). Peterson testified at the post conviction hearing that "what Mr. Hutchinson was saying was two people broke in and had black suits on and their heads were covered and I don't remember a nylon stocking jumping out at me and saying, 'hey this is evidence that someone else was there.' " (R. Vol. IX, pp. 269-270.) Fields' repeated efforts to share the information with Mr. Cobb were rejected by

him out of hand. (R. Vol. VIII, EH, pp. 30-2, 40-4). Cobb did not introduce the nylon stocking in evidence at trial because either Mr. or Mrs. Adams told a member of his staff that it was nothing more than a pool sock used as a filter device. (R. Vol. VIII, EH, pp. 199-200.) This constituted ineffective assistance of counsel, and Hutchinson was prejudiced as a result.

Hutchinson told law enforcement that he had been set upon and attacked by two hooded men. Cobb was aware of the client's claim in this regard. (R. Vol. VIII, EH, p. 184). He knew that Hutchinson referred to the hoods as "black ski masks." (R. Vol. VIII, EH, p. 220). At one point, the Adams, or one of them, advised Cobb that the sock ". . . could have went over somebody's head . . ." (R. Vol. VIII, EH, p. 220). Obviously, the probative value of this piece of evidence had its problems since, for example, Deanna Adams also stated that Hutchinson told her that he used it as a pool filter and it was tan in color, not black. (R. Vol. VIII, EH, p. 227). By the same token, the nylon stocking would clearly have served to corroborate the defendant's story that the killers were masked. By unilaterally keeping what clearly would have been compelling evidence from the fact finders, Cobb was once again playing judge and jury, just as he prevented the defendant's friends and family from testifying that it was not

his client's voice on the 911 tape. Hutchinson suffered prejudice as a result of his lawyer's unwillingness to present the stocking evidence.

The trial court erred in not determining that defense counsel were ineffective in this regard and that prejudice resulted.

Point III: The trial court erred in summarily denying additional claims raised in the defendant's sworn amended motion for post conviction relief.

Standard of Appellate Review

Summary denial of post conviction motions involve mixed questions of law and fact. As a result, the order summarily denying the motion is reviewed by the appellate court *de novo* except that the trial court's findings of fact are afforded deference. *Foster v. State*, 810 So. 2d 910 (Fla. 2001). As the court said in *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002), "on appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief."

Merits

In its order rendered on October 11, 2007, the trial court found that "(a)though Defendant states in his amended motion that no new claims are raised, Defendant does allege in the amended motion that he is actually innocent of the crimes for which he was convicted and that '(t)he findings of

the Supreme Court of Florida, as far as they incriminate Hutchinson, are mistaken and in error.' Defendant also alleges that he was not represented by conflict-free counsel based on his trial attorney's personal dislike of him." (R. Vol. IV, p. 787). The trial court held in this regard that "defendant's claim of actual innocence is not cognizable in a 3.850/3.851 motion absent a showing of newly discovered evidence which Defendant does not allege in his amended motion. It is improper for this Court to review the Florida Supreme Court's findings as to the sufficiency of the evidence as to the Defendant's guilt. Any alleged personal dislike of Defendant by his trial attorney does not constitute a conflict of interest." (R. Vol. IV, p. 788, citing *Foster v. State*, 810 So. 2d 910 (Fla. 2002). The trial court concluded:

> ORDERED AND ADJUDGED that Defendant's claim of actual innocence and Defendant's claim that he was denied conflict-free counsel based on his trial attorney's personal dislike of him are hereby summarily denied and *Defendant is precluded from offering any testimony or evidence as to these claims at the evidentiary hearing . . .*

(R. Vol. IV, p. 788, emphasis added).

This was error because the trial court misconstrued the nature of these claims as set forth in the Sworn Amended Motion for Post Conviction Relief.

Hutchinson was not raising an actual innocence claim based upon newly discovered evidence as envisioned by Florida Rules of Criminal Procedure 3.851(c) or 3.852 in his Sworn Amended Motion for Post Conviction Relief. Instead, the defendant merely swore to facts that he asserts existed at the time of the trial and were known to his legal counsel but which were never brought to the attention of the jury. *See* Hutchinson's Sworn Amended Motion for Post Conviction Relief at R. Vol. IV, pp. 684-91. They included evidence as to (a) more precisely how he was attacked in his home by two men who killed Renee and her children, (b) the circumstances that would show that Deanna and Creighton Adams were not the close friends of the family that the state made them out to be, (c) the fact that he had a very positive relationship with Renee (and, therefore, a lack of a motive to kill her), (d) the fact that he may well have been attacked by someone on the way home from the Am Vet Club, and (d) the fact that Renee expressed concern that someone other than the defendant may have intended to do her harm shortly before she was killed. (R. Vol. IV, pp. 684-91). This evidence would have served to strengthen Hutchinson's consistent claim first made when he was arrested to the effect that he was not guilty of the homicides. It would also have supported Hutchinson's claim of ineffective assistance of counsel. Hutchinson would have testified in this

regard had the trial court not summarily ruled this testimony inadmissible. Under these circumstances, the testimony should not have been excluded in the post conviction proceedings. The case should be remanded to the trial court so that this evidence can be submitted to shore up the Rule 3.851 motion for post conviction relief.

Likewise, the trial court erred in not considering evidence that would have shown that Cobb was very angry with Hutchinson prior to trial to the extent that, less than three weeks before the trial was to commence, Hutchinson was not speaking to him. The defendant alleged in the Sworn Amended Motion for Post Conviction Relief in this regard that "Hutchinson contends that this was due to the failure of defense counsel to respect his views regarding protecting his legal interests and not keeping him advised of developments in the case." (R. Vol. IV, p. 692). To shore up this claim, Hutchinson wanted the trial court to consider in the post conviction proceedings the contents of a complaint the defendant filed with the Florida Bar prior to trial and Mr. Cobb's response thereto which included Cobb's assertion that Hutchinson "frequently changes his story, is argumentative upon visits (and) lies to and about us repeatedly." (R. Vol. IV, p. 693; *see* also the entire Florida Bar file on Hutchinson's complaint submitted [but not admitted in evidence] during the post conviction evidentiary hearing as the

defendant's Ex. A; R. Vol. V., pp. 962-1005). The defendant alleged that Cobb failed to send him a copy of the letter even though Florida Bar rules required him to do so. (R. Vol. IV, p. 693).

The trial court summary denial of this proffer may have been based upon the state's assertion that "(d)islike is not a conflict of interest. Conflicts of interest claims *are limited* to multiple client situations," citing *Mickens v. Taylor*, 535 U.S. 162 (2002). (R. Vol. IV, p. 766, emphasis added). The state was incorrect in this regard.

It is true that in *Wright v. State*, 857 So. 861 (Fla. 2003), this court held that in order to establish a conflict of counsel claim in a capital case, Wright had to show that defense counsel represented conflicting interests in that case and that the actual conflict adversely affected counsel's representation of the movant. However, the purported conflict in *Wright* had to do with the fact that the public defender also served as an honorary deputy sheriff, not that he represented multiple defendants in a case where the interests of those co-defendants were adverse to each other. See also, *Huggins v. State*, 889 So. 2d 743 (Fla. 2004). It seems clear that, when evaluating a claim of ineffective assistance of counsel based upon an alleged conflict of interest, the Florida courts look at the particular situation and require a showing that there was an actual, identifiable conflict between

counsel and the defendant that adversely affected counsel's performance in the case -- and the outcome of the proceedings as well. *Randolph v. State*, 853 So. 2d 1051 (Fla. 2003). Hutchinson concedes that the mere filing of a Bar complaint by the client against counsel does not create a *per se* conflict requiring a new trial. *Jimenez v. State*, 789 So. 2d 1122 (Fla. 3d DCA 2001). However, as the trial court found in *Connor v. State*, 979 So. 2d 852, 862 (Fla. 2007), ". . . although Connor's bar complaint against Jepeway was dismissed as meritless, *it was a factor creating a conflict of interest* between the defendant and attorney." (Emphasis added.) The Florida Supreme Court found in this regard that the filing of a bar complaint notwithstanding, "(i)n order to be entitled to relief based on ineffective assistance of counsel because of a conflict of interest, Connor must demonstrate that counsel labored under an actual conflict of interest that adversely affected counsel's performance," citing *Cuyler v. Sulliavan*, 446 U.S. 335 (2003).

Thus, it was error for the trial court to summarily prevent Hutchinson from presenting evidence of the alleged conflict of interest that he claims existed between him and his lead counsel, Mr. Cobb, by adopting the state's flawed argument that the *only* way to establish a conflict of interest in a capital case is to show that defense counsel represented multiple parties. In

this regard, this Court is asked to note that in *Connor*, it specifically discussed the holding in *Mickens*, supra, "explaining the 'actual conflict of interest language from *Cuyler v. Sullivan*." *Connor*, supra 979 So. 2d at 861. As Hutchinson alleged in his Sworn Amended Motion for Post Conviction Relief, the conflict (manifesting itself by the personal animosity between him and Mr. Cobb) would explain why, "during *voir dire* and in his opening statement to the jury, Cobb offered no theory of defense. It is also reflected (in) the fact that Cobb (i) never presented a viable defense during the entire trial, (ii) assigned his wife, who was inexperienced in capital litigation, to prepare for the penalty phase then waived a penalty phase jury, (iii) removed his firm's investigator from the case just days before trial, (iv) abandoned viable issues raised by the client, and (v) repeatedly asked questions to state witnesses on cross-examination that highlighted evidence detrimental to the defendant thereby opening the door for more damaging evidence from these witnesses on re-direct examination." (R. Vol. IV, p. 694). In other words, by the trial court's summary denial of Mr. Hutchinson's right to explore these matters of alleged conflict of interest, he was prevented from establishing *a motive* for Mr. Cobb's failure to aggressively represent him at trial. This was error that deprived Hutchinson of a full and fair post conviction evidentiary hearing.

This Court should, therefore, reject the summary denial of Mr. Hutchinson's post conviction claim so that the matters referenced above can be fully explored.

CONCLUSION

For the reasons set out above, the Court is requested to:

1. Reverse the October 11, 2007, order (R. Vol. IV, pp. 787-89) of the trial court that summarily denied the defendant's reassertion of his innocence and that Hutchinson was not represented by conflict-free counsel, as alleged in the August 15, 2007, sworn amended motion for post conviction relief, and grant the defendant an evidentiary hearing on these claims.

2. Reverse the January 3, 2008, final Order Denying Defendant's Sworn Amended Motion for Post Conviction Relief and Sworn Supplemental Insert to Motion for Post Conviction Relief. (R. Vol. VI, pp. 1077-1200; Vol. VII, pp. 1201-1320.)

3. Reverse and set aside the defendant's judgments of conviction and sentences, including the death sentences. Remand the cause to the trial court, requiring that court to grant the relief sought in the sworn amended motion for post conviction relief.

4. Order that Mr. Hutchinson be granted a new trial, and appoint retrial counsel for him.

5. Grant Mr. Hutchinson such other relief as is deemed

appropriate in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have furnished accurate copies of this initial brief of appellant by postage prepaid first class U.S. mail delivery to the persons identified below this _____ day of June, 2008.

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CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant has been prepared using a 14 point Times New Roman font not proportionally spaced in conformity with Rule 9.210(d), Florida Rules of Appellate Procedure.

_____
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