

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED
JUN 20 2002
PM 6:38

CLERK'S MINUTES - GENERAL

CASE NO. 8:97-Cv-2205-T-23MAP

DATE: May 20, 2002

TITLE: KEVIN RICHARD HERRICK

V

MICHAEL W. MOORE

TIME: 9:00a-12:00n 1:15-5:15p

Honorable MARK A. PIZZO, U.S. MAGISTRATE JUDGE

Deputy Clerk: J. Gordon

Tape: 63/612-End - 67/001-792

Court Reporter: Lisa Every (Montana) 800-432-2304

Attorney for the Respondent: Patricia McCarthy and Richard M. Fishkin

Attorney for Petitioner: E. Michael Gillick, Esq.

PROCEEDINGS: Evidentiary Hearing (2254 Petition)

Court to Order; Motion in Limine filed in open court by Respondent, DENIED.
Respondent's exhibits 1-34 were admitted in open court;
No opening statements by either side; Petitioner's witness: Rita Herrick was sworn and testified; Petitioner's witness: Petitioner's Exhibit #1 was admitted for purposes of this hearing; Lori Russo was sworn and testified; Petitioner Kevin Richard Herrick was sworn and testified

12:10p Recess until 1:15p

1:15p Testimony of Kevin Richard Herrick continued.

2:35p Respondent's witness (out-of-turn) Maryann Hildreth was sworn and testified.

3:05p Petitioner's witness Patrick Doherty, Esq., sworn and testified, offered and accepted as an expert in criminal defense; Petitioner rested; Respondent's Oral Motion for Summary Judgment = DENIED

Respondent's witness: Roy Edward Leinster was sworn and testified;

Respondent's witness: Joseph Bulone was sworn and testified.

5:15p Court recessed until 9:00a, May 21, 2002.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION **Date** 10

FILED

Date _____

10/8/02

THE

KEVIN RICHARD HERRICK,

Petitioner,

Vs.

MICHAEL W. MOORE,

Respondent.

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**CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA**

CASE NO:

8:97-cv-2205-T-23MAP

Tampa, Florida

May 20, 2002

9:05 a.m.

VOLUME I (1 - 143)
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE MARK A. PIZZO

APPEARANCES :

For the Petitioner:

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For the Respondent:

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Proceedings recorded by computer-aided transcription

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1 THE COURT: Good morning. We have
2 scheduled for this morning an evidentiary hearing
3 in the case of Kevin Herrick, Plaintiff, versus
4 Michael Moore and Robert A. Butterworth,
5 Respondents. This is Case No.
6 97-cv-2205-T-23MAP.

7 Will counsel please announce their
8 appearances?

9 MR. GILLICK: Good morning, Your Honor,
10 Mike Gillick on behalf of Kevin Herrick.

11 THE COURT: Thank you, Mr. Gillick.

12 MS. MCCARTHY: Good morning, Your Honor,
13 Patricia McCarthy appearing on behalf of
14 Respondent. I also have present Michael Hawkins,
15 a research assistant with our office, if he could
16 be allowed to sit at counsel table.

17 THE COURT: Okay.

18 MR. FISHKIN: Richard Fishkin on behalf
19 of the State of Florida, also, Your Honor.

20 THE COURT: Thank you. And Mr. Fishkin,
21 you're with the Attorney General's office?

22 MR. FISHKIN: That's correct.

23 THE COURT: I guess the first order of
24 business would be to attend to the Respondent's
25 motion in limine.

1 MS. MCCARTHY: Yes, Your Honor, if it
2 please the Court.

3 The 2254 petition filed in this case
4 contains a number of allegations of ineffective
5 assistance of trial counsel filed after the
6 AEDPA. At no time have I seen an amended
7 petition including a claim of ineffective
8 assistance for intoxication, or due to the
9 intoxication or condition of trial counsel,
10 former trial counsel, for the Petitioner. There
11 was filed in terms of newly discovered evidence
12 some news articles, in 1999 Mr. Gillick had
13 filed, but there's never been an independent
14 claim of omission that we've had to defend thus
15 far.

16 And we both agree to disagree in the
17 stipulation as to this issue. And the motion in
18 limine just further amplifies what we've
19 indicated in the stipulation: that we don't feel
20 that it's appropriate to entertain evidence as to
21 whether Ed Leinster was under the influence or
22 exhibited signs of alcohol when that's never been
23 a claim for relief.

24 THE COURT: All right.

25 MS. MCCARTHY: That's just to put it

1 simply. And the news accounts, together with the
2 testimony of the family members, seem to combine
3 from our viewpoint to try to link or show some
4 causation to delve into the substance of Ed
5 Leinster's personal difficulties, and these are
6 all new allegations.

7 In addition, they're time-barred. Under
8 2244(d), even if the Court were to entertain them
9 now, they're outside the one year time frame.
10 They're new allegations, and they're also
11 procedurally barred because they weren't brought
12 in his first 3.850. So on that basis, I'd ask
13 the Court to steer right along with the original
14 allegations in the petition.

15 THE COURT: Mr. Gillick.

16 MR. GILLICK: Thank you, Your Honor.

17 Judge, we just received this motion
18 moments ago, and I have had a brief opportunity
19 to review it. We disagree with the Attorney
20 General's version of the facts and the law here.
21 The reality is that Mr. Leinster's alcohol/drug
22 problems, his 23 arrests, his problems and
23 suspensions with the Bar, resignation from the
24 Bar, probation with the Florida Bar, all go to
25 his mental state. Those are factors that Kevin

1 Herrick certainly didn't know in 1990 when he
2 retained Mr. Leinster and in 1990 when
3 Mr. Leinster tried the case.

4 The fact is, Mr. Leinster had a
5 deteriorated mental state at the time due to
6 alcoholism, severe and chronic alcoholism, due to
7 cocaine use and abuse, and although it was not
8 specifically pled by Mr. Herrick, we believe it
9 does -- these factors do go towards his
10 credibility and his ability to perform as
11 competent counsel.

12 THE COURT: As I take it, Mr. Gillick,
13 you know, from your last statement, evidence of
14 Mr. Leinster's alcohol abuse and drug abuse, if
15 you're able to show that, does not add a claim
16 that Mr. Leinster was ineffective per se because
17 he was perhaps under the influence; but it serves
18 to, in your estimation, explain his conduct and
19 actions that are the subject matter of the 2254
20 action.

21 MR. GILLICK: Yes, sir.

22 THE COURT: All right.

23 MR. GILLICK: Thank you.

24 THE COURT: Well, given that, I'm going
25 to deny the Respondent's motion in limine and

1 permit Mr. Herrick to present testimony regarding
2 Mr. Leinster's conditions or permit that inquiry
3 during any cross-examination of Mr. Leinster;
4 but, of course, as to presentation of any
5 testimony, relevancy is going to have to be
6 shown.

7 All right. Does either side wish the
8 rule of sequestration of witnesses to be
9 invoked?

10 MS. MCCARTHY: Yes, Your Honor.

11 THE COURT: All right.

12 MS. MCCARTHY: We have witnesses who are
13 not present who we have informed, to represent to
14 the Court that we intend to call, have informed
15 them of the rule.

16 THE COURT: All right. Mr. Gillick,
17 have you discussed that with your witnesses at
18 all?

19 MR. GILLICK: Yes, I have, Your Honor.
20 We have two witnesses who are present here now.
21 I'll ask them to leave at this point.

22 THE COURT: All right. There is a
23 witness room just outside the courtroom on the
24 left, and you're certainly welcome to sit there,
25 and you should not discuss the case amongst

1 yourselves and your testimony

2 (Potential witnesses retire from the
3 courtroom)

4 MS. MCCARTHY: Your Honor, just one
5 other procedural point. I'd like to preserve on
6 behalf of Respondent all his procedural arguments
7 concerning the procedural bars applicable, and I
8 understand that the Court has not entered an
9 order yet as to whether any of the claims are
10 procedurally barred. I'm presuming that that is
11 still --

12 THE COURT: I'm presuming that you are
13 not waiving anything, Ms. McCarthy, so --

14 MS. MCCARTHY: Thank you. And I would
15 just like at the outset, so we can use the
16 exhibits, is to admit the exhibits that have been
17 compiled in a master list pursuant to stipulation
18 of the parties, Respondent's Exhibits 1 through
19 34.

20 THE COURT: What page of the
21 preevidentiary hearing stipulation are you
22 speaking of?

23 MS. MCCARTHY: That would be the last
24 page, Your Honor, or next to the last page, under
25 Exhibits, Subsection 8.

1 THE COURT: Do you have an exhibit list
2 for me?

3 MS. MCCARTHY: Yes, Your Honor, we
4 submitted it to the clerk.

5 (The Court and the clerk confer)

6 THE COURT: Would you come forward and
7 advise me if that's what you're speaking about?

8 MS. MCCARTHY: May it please the Court.
9 Yes, Your Honor. Those are a four-page
10 exhibit list listing for the Court's -- for the
11 Court the Exhibits 1 through 34.

12 THE COURT: Just a moment.

13 I'm somewhat confused about what you are
14 asking me to do, Ms. McCarthy. What are you
15 asking me to do at this time?

16 MS. MCCARTHY: To allow those to be
17 introduced into evidence.

18 THE COURT: Just scanning that exhibit
19 list when I came on the bench, that seems to be
20 what's already in the court file.

21 MS. MCCARTHY: It is, Your Honor. Just
22 as a formality, we do that so we can use that.

23 THE COURT: All right. Well, let me say
24 to you, please, in the future before me, you
25 don't have to do that. If they're part of the

1 record already, you need only adopt them.

2 MS. MCCARTHY: Yes, Your Honor.

3 THE COURT: But I take it that there's
4 no objection as to those exhibits.

5 MS. MCCARTHY: No objection, Your
6 Honor. We just discussed another, but I believe
7 we can do it through a -- the other procedure
8 that you just discussed. It's Patrick Porrey's
9 deposition, and Patrick Porrey's deposition is
10 already in the court file.

11 THE COURT: That's already been admitted
12 and --

13 MR. GILLICK: Yes.

14 THE COURT: It is -- I have it as
15 document 35 in the court file. So I take it at
16 least at this time the parties have no objection
17 at this stage to the admission of what I take it
18 are the Respondent's exhibits or joint exhibits.
19 How should I --

20 MS. MCCARTHY: Your Honor, those would
21 be --

22 THE COURT: You can stay right there.
23 That's fine.

24 MS. MCCARTHY: -- Respondent's
25 exhibits. And part of the reason of compiling

1 it, to add by way of explanation, is we are not
2 agreeing to introduction or dispute introduction
3 of the exhibits submitted in 1999, which were the
4 basis of the motion in limine, the news articles,
5 so we had not stipulated to their relevancy --

6 THE COURT: I understand.

7 MS. MCCARTHY: -- or introduction, so --

8 THE COURT: But I'm only speaking of
9 Exhibits 1 through 34 at this time.

10 MS. MCCARTHY: Yes, Your Honor. That
11 would not be a joint exhibit. It would be
12 Respondent's exhibit.

13 THE COURT: All right. Well, since you
14 may be referring to some of the exhibits during
15 the course of the presentation of your case,
16 Mr. Gillick, it's probably, as a housekeeping
17 matter, easier to admit these exhibits now, so I
18 will admit Respondent's Exhibits 1 through 34 at
19 this time.

20 (Respondent's Exhibits No. 1 through 34 were
21 received in evidence)

22 THE COURT: Very well. Are you prepared
23 to proceed, Mr. Gillick?

24 MR. GILLICK: Yes, Your Honor.

25 THE COURT: Is the Respondent prepared

1 to proceed?

2 MS. MCCARTHY: Yes, Your Honor.

3 THE COURT: All right. Call your first
4 witness. Well, let me say this. If either side
5 wishes to make an opening statement, you're
6 welcome to do so. Let me tell you, though, I've
7 read the trial transcript, I've reviewed
8 carefully the preevidentiary hearing stipulation,
9 so with that information, you can proceed as you
10 wish to proceed.

11 MR. GILLICK: Thank you, Your Honor. I
12 believe I'm going to go directly to the
13 evidence. Could I have about 30 seconds --

14 THE COURT: Sure.

15 MR. GILLICK: -- with Ms. McCarthy?

16 (Counsel confer)

17 MR. GILLICK: The Petitioner would call
18 Rita Herrick.

19 THE CLERK: Good morning, ma'am. Raise
20 your right hand, please.

21 RITA HERRICK, PETITIONER'S WITNESS, SWORN

22 THE CLERK: Ma'am, please state your
23 full name for the record, and spell your last
24 name.

25 THE WITNESS: Rita Herrick,

1 H-E-R-R-I-C-K.

2 THE CLERK: Thank you. Be seated.

3 DIRECT EXAMINATION

4 BY MR. GILLICK:

5 Q. Good morning, Mrs. Herrick.

6 A. Good morning.

7 Q. Ms. Herrick, where do you reside?

8 A. 4926 69th Court East, Palmetto, Florida.

9 Q. And Ms. Herrick, are you related to Kevin
10 Herrick, the Petitioner in this matter?

11 A. Yes. I'm his mother.

12 Q. I'm sorry?

13 A. I'm his mother.

14 Q. And were you present during Kevin's arrest in
15 July of 1989?

16 A. No, I was not.

17 Q. And did you have any contact with Kevin's
18 initial lawyer, the public defender, back in '89 or
19 '90?

20 A. Yes. We had, I believe, at least one phone
21 conversation, maybe two.

22 Q. Do you recall the nature of that conversation?

23 A. I remember her telling us that the judge --

24 MR. FISHKIN: I'm going to object to
25 what she was told or not told.

1 THE COURT: All right. Well, let me
2 also make this statement, Mr. McCarthy [sic], so
3 that you know, the local rules in this court
4 provide that whoever is making the objections to
5 the testimony is that witness who cross-examines.

6 MR. FISHKIN: We understand that, Your
7 Honor.

8 THE COURT: All right. For what purpose
9 is this offered, Mr. Gillick?

10 MR. GILLICK: Okay, Your Honor, I will
11 withdraw that question and get to Mr. Leinster.

12 THE COURT: All right.

13 Q. Did there come a time subsequent to Kevin's
14 arrest that you were involved in the hiring of a
15 lawyer?

16 A. Yes.

17 Q. And who was that lawyer?

18 A. Ed Leinster.

19 Q. Do you recall when that was?

20 A. I think it was either in January or February of
21 1990.

22 Q. And did you pay Mr. Leinster?

23 A. Yes, we did.

24 Q. And how much did you pay Mr. Leinster?

25 A. \$7,500 at that time.

1 Q. And did you actually give the money to
2 Mr. Leinster?

3 A. No. We met a representative of his at the
4 courthouse over there in Clearwater.

5 Q. Is that where Kevin was incarcerated --

6 A. Yes.

7 Q. -- in Clearwater?

8 A. Uh-huh.

9 Q. And do you recall that man's name?

10 A. Charles Tiffany.

11 Q. And after you gave it to Mr. Tiffany, is it
12 your understanding that he then met with Kevin?

13 A. Yes.

14 THE COURT: Who met with Kevin?

15 THE WITNESS: Mr. Tiffany.

16 THE COURT: All right.

17 Q. And when did you first meet Edward Leinster?

18 A. I never met him until the day of the trial,
19 which was October 2nd, I believe, of 1990, or
20 October 1st, something like that.

21 Q. What was his appearance at that time, physical
22 appearance?

23 A. He had long hair, and I think he had a beard
24 and a mustache. He looked kind of different than
25 what I expected.

1 Q. How did he arrive at the courthouse?

2 A. He had a Corvette, and then the second day he
3 had a limo.

4 Q. And you indicated you retained him in January,
5 but you didn't talk to him until October?

6 A. I didn't meet him.

7 Q. Didn't meet him?

8 A. Yes.

9 Q. Did you talk to him in the interim?

10 A. There were two or three phone conversations. I
11 tried calling him often. Kevin would have questions
12 he wanted answered and such, and he was very
13 difficult to get ahold of and he didn't return my
14 calls.

15 Q. Did Kevin have problems getting discovery,
16 police reports, lab reports --

17 A. Yes.

18 Q. -- and so forth?

19 A. Yes, he did.

20 Q. Did Kevin complain to you about that?

21 A. Yes.

22 Q. Did you try to obtain these materials from
23 Mr. Leinster prior to the trial?

24 A. Yes, I think we did.

25 Q. Did you ever receive any materials from

1 Mr. Leinster?

2 A. No.

3 Q. Did you attend Kevin's trial in October of
4 1990?

5 A. Yes.

6 Q. And did you observe anything unusual about
7 Mr. Leinster during the trial?

8 A. Well, I just thought when we first met him and
9 so on right before the trial started, we didn't
10 feel -- my husband and I didn't feel that he was
11 very prepared. That's just something we observed.
12 And then we later did smell alcohol on his breath.

13 MR. FISHKIN: Objection, Your Honor.

14 THE COURT: Mr. McCarthy [sic], you can
15 have a continuing objection as to this matter
16 given the denial of the motion for -- the motion
17 in limine, and it's not necessary to object
18 further to this line of inquiry.

19 MS. MCCARTHY: Thank you, Your Honor.

20 Q. At some point, ma'am, did you smell the odor of
21 alcohol on Mr. Leinster's breath?

22 A. Yes.

23 Q. When was that?

24 A. I believe it was the second day and I believe
25 it -- my recollection is, I'm not a hundred percent

1 sure, but I believe it was after the jury had been
2 sent out and we were out in the hallway talking.

3 Q. Did Mr. Leinster come out in the hallway and --

4 A. Yes.

5 Q. Are you certain that you smelled the odor of
6 alcohol on his breath at that time?

7 A. I'm certain.

8 Q. I've got no further questions. Thank you,
9 ma'am.

10 THE COURT: Ma'am. Ma'am. You still
11 need to sit down. You may be asked some more
12 questions.

13 CROSS-EXAMINATION

14 BY MR. FISHKIN:

15 Q. I gather from your prior answer regarding your
16 attempts to get files, reports and such from
17 Mr. Leinster, that you're not sure if it was before
18 the trial or after the trial. Is that right?

19 A. To get reports from him was before the trial.

20 Q. That's when you were trying to call him?

21 A. Yes.

22 Q. But you said you wanted to get lab reports,
23 police reports, whatever it was.

24 A. That was --

25 Q. Your answer was you think they tried to get

1 stuff prior to trial.

2 A. Well, it was before the trial that we tried to
3 get that information from him.

4 Q. And who is "we"?

5 A. My family members, my daughter and myself.

6 Q. Were you personally doing that?

7 A. No, my daughter was. And I would talk to
8 Mr. -- I was the one in touch with Mr. Leinster, but
9 in the end, my daughter had to get the information
10 elsewhere.

11 Q. So, basically, what you're telling us is what
12 your daughter told you?

13 A. No. Well, I would ask Mr. Leinster for things
14 and we didn't get them.

15 Q. Okay. What kind of things were you asking for?

16 A. Police report, I know my daughter had to go get
17 that, and depositions.

18 Q. That was before trial?

19 A. Yes.

20 Q. Now, you indicated that you smelled alcohol on
21 Mr. Leinster's breath?

22 A. Yes.

23 Q. And that was at the end of the trial, is that
24 right, after the second day of trial?

25 A. Yes.

1 Q. The jury was out?

2 A. Yes, I believe it was then.

3 Q. Okay. Now, did you report that to anybody?

4 A. Yes, I did.

5 Q. To who?

6 A. I wrote a letter to the Bar Association.

7 Q. Well, you didn't do that at that time, did you?

8 A. No.

9 Q. You did that after the fact?

10 A. Yes.

11 Q. And how much after the fact did you write a
12 letter?

13 A. I am not sure. I cannot answer that to be
14 exact.

15 Q. Did you tell your son?

16 A. Did I tell my son that I was going to do that?

17 Q. No. Did you tell your son that you smelled
18 alcohol on Mr. Leinster's breath?

19 A. I do not remember, sir, if I did. I'm sure I
20 did at some point. Well, not that day. I didn't
21 see him until later.

22 Q. You didn't see him?

23 A. To be able to talk to him, no.

24 Q. Didn't you see him at the very end of the trial
25 after the jury came back with their verdict?

1 A. Yes, but I didn't talk to him.

2 Q. You were unable to say goodbye to him before
3 they took him off to the jail?

4 A. We said goodbye, but I didn't talk about that
5 to him at that point, no.

6 Q. I see. So you didn't talk to him. Did you try
7 and tell the court, or the judge, that you thought
8 Mr. Leinster had been drinking?

9 A. No, I did not.

10 Q. Did you attempt to tell the prosecutor that you
11 thought Mr. Leinster had been drinking?

12 A. No.

13 Q. Up until the time you smelled alcohol on his
14 breath, did you have any reason to believe, based
15 upon his performance, his ability to ask and answer
16 questions, cross-examine, his summation, that
17 Mr. Leinster was impaired by alcohol?

18 A. No.

19 MR. FISHKIN: I have nothing further.

20 THE COURT: Any questions?

21 MR. GILLICK: One, Your Honor, if you'll
22 remain seated.

23 THE COURT: Ma'am. Ma'am. Let's do it
24 this way. When I can tell you you can leave,
25 then you can leave, all right?

1 THE WITNESS: Okay.

2 REDIRECT EXAMINATION

3 BY MR. GILLICK:

4 Q. The incident that you've described smelling
5 alcohol, was that immediately after a court session,
6 or did Mr. Leinster have time to go outside and to a
7 bar and come back?

8 A. No, it was right after.

9 MR. GILLICK: Thank, you ma'am. No
10 further questions.

11 THE COURT: Thank you.

12 MR. GILLICK: Your Honor, we would call
13 Lori Russo.

14 THE CLERK: Good morning, ma'am. Raise
15 your right hand, please

16 LORI RUSSO, PETITIONER'S WITNESS, SWORN

17 THE CLERK: Ma'am, please state your
18 full name for the record, and spell your last
19 name.

20 THE WITNESS: Lori Lynn Russo,
21 R-U-S-S-O.

22 THE CLERK: Thank you, ma'am. Be
23 seated.

24 DIRECT EXAMINATION

25 BY MR. GILLICK:

1 Q. Good morning, Ms. Russo.

2 A. Good morning.

3 Q. Where do you live?

4 A. I live in Palmetto.

5 Q. And the address there?

6 A. Is 7040 60th Avenue East.

7 Q. Are you employed, Ms. Russo?

8 A. No. I'm a homemaker.

9 Q. Okay. And do you have children?

10 A. Yes, two.

11 Q. Okay. And are you involved in any other
12 activities other than your children?

13 A. Well, I volunteer a lot. That's -- my work is
14 volunteering at school and church.

15 Q. And Ms. Russo, are you related to the
16 Petitioner, Kevin Herrick?

17 A. He's my brother.

18 Q. Is he your natural brother?

19 A. Adopted by my father.

20 Q. And are you related to Rita Herrick?

21 A. She's my stepmother.

22 Q. And have you had any involvement with an
23 attorney named Edward Leinster?

24 A. Yes.

25 Q. Did you have any involvement prior to Kevin's

1 trial in October of -- any involvement with
2 Mr. Leinster?

3 A. Not that I can remember, no.

4 Q. Prior to Kevin's trial, did you obtain any
5 reports or records for Kevin?

6 A. I don't remember if it was before the trial or
7 after the trial when we were going through all the
8 process.

9 Q. What type of --

10 A. Or police records, maybe I did. I can't
11 remember what I got beforehand, if I got anything.

12 Q. Did you obtain a police report for Kevin?

13 A. Yes, from the Largo Police Department.

14 Q. Why did you have to obtain a report?

15 A. Well, we were unable to get any information
16 from Mr. Leinster and so we did it on our own.

17 Q. Did Kevin indicate to you that he had never
18 received a police report up to that point?

19 A. Yes.

20 MR. FISHKIN: I'm going to object to
21 what Kevin may or may not have said to her.

22 THE COURT: Sustained.

23 Q. So did you actually go to the Largo Police
24 Department and purchase a police report?

25 A. Yes.

1 Q. Do you know if you got the full report or not?

2 A. I just got what they gave me.

3 Q. Okay. Did you attend Kevin's trial in October
4 of 1990?

5 A. The second day I did.

6 Q. You didn't attend the first day?

7 A. No.

8 Q. And did you observe Mr. Leinster at some point
9 during this second day?

10 A. Yes.

11 Q. And did you observe anything unusual about
12 Mr. Leinster?

13 A. Well, it was after the jury had gone out, we
14 had left the courtroom, and in the hallway he came
15 over to speak with me and my parents; and he was
16 telling us that the case was open and shut, there
17 was nothing to worry about, go get a bite to eat,
18 we'll be taking Kevin home later on that day. Well,
19 during that conversation, I smelled alcohol on his
20 breath.

21 Q. Did you discuss that with anyone?

22 A. My mother and I did.

23 Q. After Kevin's trial, did you obtain any
24 additional discovery items for Kevin?

25 A. A lot.

1 Q. What type of items did you obtain?

2 A. Trial transcripts, I believe. I obtained his
3 file from Mr. Leinster's office.

4 Q. Did you purchase any depositions?

5 A. Yes.

6 Q. Were these witness depositions?

7 A. Yes.

8 Q. These were materials that Kevin did not have --

9 A. Yes.

10 Q. -- at that point?

11 A. (Nods head up and down.)

12 Q. Did you also obtain any lab reports or
13 laboratory results?

14 A. Yes, I helped in that, and I had another sister
15 making some phone calls, as well.

16 Q. Was it your understanding that the lab results
17 were materials that Kevin did not have possession
18 of?

19 A. Yes.

20 Q. This was after his trial that you obtained
21 these?

22 A. Correct, yes.

23 Q. You indicated that you also obtained
24 Mr. Leinster's file; is that correct?

25 A. Yes.

1 Q. Did he voluntarily give that to you or was
2 it --

3 A. Well, we had talked on the phone several times
4 trying to arrange a day that would be convenient for
5 me to go to his office to get it, and we finally
6 picked a day. And when I got to the office, I mean,
7 I had to wait 30 minutes. They were just going back
8 and forth as to whether or not they were getting the
9 file. Where it was or whatever, I don't know. I
10 assumed that the file would be copied there in the
11 office, whether I was doing it or them, but they
12 gave me the file and told me to go down the street
13 to copy it.

14 Q. Did you go down the street and copy it?

15 A. Yeah.

16 Q. Did you copy that file in its entirety?

17 A. Yes.

18 Q. Did you remove anything from Mr. Leinster's
19 file?

20 A. Absolutely not.

21 Q. And when you obtained that file, was that
22 pursuant to an order of a court?

23 A. Yes.

24 Q. I have no further questions. Just stay there.

25 THE COURT: Mr. Gillick, do you intend

1 to offer that file as an exhibit?

2 MR. GILLICK: Yes, I would, Your Honor.
3 Thank you.

4 (Counsel confer)

5 MR. FISHKIN: Your Honor, we're going to
6 object to the admission of the file. We don't
7 know that that's the complete file. We've
8 never -- I mean, we don't agree that that is
9 necessarily the complete file.

10 THE COURT: Well, I'll allow Mr. Gillick
11 to establish a predicate that it is.

12 Q. Ms. Russo, I would hand you an exhibit and
13 ask you to take a look at that.

14 Ms. Russo, do you recognize that?

15 A. I can't say that I recognize the whole thing.
16 I mean, I know that I was given something pretty
17 much this size and I remember the top page looking
18 this way, but to say that, you know -- I would
19 assume that this is the one that I copied. It's
20 about the size as what I copied.

21 MR. GILLICK: Okay. Your Honor, I would
22 offer this as Petitioner's Exhibit, however you
23 want it listed, 1 or A.

24 THE COURT: All right. Mr. McCarthy
25 [sic]?

1 MR. FISHKIN: I'm sorry?

2 THE CLERK: Mr. Fishkin, Judge.

3 MR. FISHKIN: Yeah. We're going to
4 object. There's been no identification of this
5 of the file. She says the front page looks like
6 it; it's the same size. That's not a basis of
7 sufficient predicate for the admission of a
8 document.

9 THE WITNESS: Well, I just didn't
10 read -- you know, I mean --

11 THE COURT: That's all right, ma'am.

12 I'll admit it for purposes of this
13 hearing and give it such weight as I think it
14 deserves.

15 MR. GILLICK: Thank you, Your Honor.

16 THE COURT: It will be Petitioner's
17 No. 1.

18 (Petitioner's Exhibit No. 1 was received in
19 evidence)

20 THE COURT: You can just lay it on the
21 table there, Mr. Watts.

22 MR. FISHKIN: If I could have just a
23 moment, Your Honor.

24 THE COURT: Mr. Fishkin, before you
25 begin, Mr. Gillick, did you say that you were

1 going to need a VCR --

2 MR. GILLICK: No, Your Honor.

3 THE COURT: -- at some point?

4 MR. GILLICK: No.

5 MS. MCCARTHY: Respondent requested use
6 of.

7 THE COURT: All right. Do you have any
8 idea of roughly when you'll need it?

9 MS. MCCARTHY: It will be in the
10 afternoon, Your Honor.

11 THE COURT: All right. That's fine.

12 THE CLERK: Thank you.

13 CROSS-EXAMINATION

14 BY MR. FISHKIN:

15 Q. Ms. Russo, do I understand that in your
16 response to counsel's questions you indicated that
17 prior to trial you had no involvement with
18 Mr. Leinster? Is that correct?

19 A. Not that I can remember, no.

20 Q. You didn't call him; you didn't ask him for
21 anything prior to trial?

22 A. I don't remember doing so, no.

23 Q. Okay.

24 A. My parents had most of the involvement with
25 Mr. Leinster at that time.

1 Q. Okay. You indicated that after the jury went
2 out Mr. Leinster came out and had a conversation
3 with you; is that right?

4 A. Yes.

5 Q. And you smelled alcohol on his breath?

6 A. Yes.

7 Q. Other than smelling alcohol on his breath, did
8 you have any reason prior to that to believe that
9 Mr. Leinster was in any way impaired?

10 A. No.

11 Q. And you were in during the trial on the second
12 day?

13 A. Yes.

14 Q. He acted perfectly normal?

15 A. (Nods head up and down.)

16 Q. He did what defense counsel is supposed to do,
17 as far as you know?

18 A. Well, according to television. I don't know.
19 You know, I've never been in a trial, I've never
20 seen one, so I can't really say that I could answer
21 that correctly, but he assumed to -- I mean, when I
22 looked at him, he appeared to be okay.

23 Q. And he vigorously cross-examined witnesses and
24 he vigorously put on a closing argument; did he not?

25 A. I don't know that I would say vigorously, to be

1 quite honest with you. I mean, if you want me to be
2 honest, I was kind of confused and that's why when
3 he came out, he assured us that this was an open and
4 shut case and we had nothing to be worried about,
5 there was no reason to do this or do that, 'cause we
6 were questioning why was this not done or why was
7 that not done or whatever. My parents were asking
8 questions.

9 Q. What were you questioning that was not done?

10 A. I don't remember the whole particulars, I was
11 not there on the first day, but I remember we were
12 very nervous, you know, that it went so short and
13 was all the evidence that needed to be brought in
14 brought into the trial.

15 Q. Okay. And had you ever been at a trial before?

16 A. No. No.

17 MR. FISHKIN: I have nothing further.

18 MR. GILLICK: No further questions, Your
19 Honor.

20 THE COURT: Thank you, ma'am.

21 MR. GILLICK: The Petitioner would call
22 Kevin Herrick to the stand.

23 THE CLERK: Raise your right hand, sir.

24 KEVIN HERRICK, THE PETITIONER, SWORN

25 THE CLERK: Sir, state your full name

1 for the record, and spell your last name.

2 THE WITNESS: Kevin Richard Herrick,
3 H-E-R-R-I-C-K.

4 THE CLERK: Thank you, sir. You may be
5 seated.

6 DIRECT EXAMINATION

7 BY MR. GILLICK:

8 Q. Good morning, sir.

9 A. Good morning, Mr. Gillick.

10 Q. Mr. Herrick, where are you currently residing?

11 A. Zephyrhills Correctional Institution.

12 Q. And is that part of the Florida prison system?

13 A. Yes, sir.

14 Q. How long have you been in the Florida prison
15 system pursuant to this case that brings us here
16 today?

17 A. In the Department of Corrections, since January
18 15th, 1991, I believe.

19 Q. Were you incarcerated prior to that in the
20 State system?

21 A. Yes, sir.

22 Q. In the County or State system?

23 A. Pinellas County jail from July 15th, 1989,
24 roughly 13 years this next July.

25 Q. How old are you now?

1 A. I'm 35 years old.

2 Q. How old were you in July of 1989?

3 A. 22.

4 THE COURT: Mr. Herrick, if you would
5 scoot up a little bit so that you're speaking
6 close to the microphone.

7 THE WITNESS: Is that better, sir?

8 THE COURT: That's fine.

9 Q. Mr. Herrick, did you grow up in Pinellas
10 County?

11 A. Essentially, yes, sir.

12 Q. As a teenager, or subsequent, prior to this
13 case, did you have any scrapes with the law?

14 A. Yes, sir. I've been in trouble with the law
15 since I was about 13. I ran away from home a few
16 times and got in some trouble there with just being
17 gone, I guess. And when I was 18, I was arrested in
18 Pinellas County. Ultimately, I was put on
19 probation, or community control, and violated that
20 and ended up in prison, Florida Department of
21 Corrections.

22 Q. Okay. And were you convicted of a burglary or
23 burglaries at some point?

24 A. One burglary. It was --

25 Q. Where did that burglary occur?

1 A. To my mother and father's house. I violated my
2 probation, disappeared for a few months. I returned
3 back to Florida, went into my parents' house, and
4 that was cause for a burglary charge.

5 Q. Did you steal anything or take anything when
6 you were in your parents' house?

7 A. Yes, sir. I removed two firearms from there.

8 Q. Did you sell them?

9 A. No, sir.

10 Q. Were you involved in drugs as a teenager?

11 A. Smoking pot, things of that nature, drinking.

12 Q. Have you ever been charged with any type of sex
13 crime other than this --

14 A. No, sir.

15 Q. Mr. Herrick, did you know Patrick and Theresa
16 Porrey?

17 A. Yes, sir.

18 Q. How did you know the Porrey family?

19 A. Well, when my mother met my father, my father
20 Richard Herrick, they were ultimately married. We
21 moved into his triplex there on [REDACTED] where
22 the Porreys were living, also, at the site of where
23 this crime took place in Largo. I met Patrick
24 running around with my brother riding bikes. I was
25 rather young. I imagine eight, nine, 10 years old.

1 Just neighborhood hangout kids.

2 Q. Was Patrick older than you?

3 A. Yeah, I believe Pat's probably three years
4 older than me, two or three years older than me.

5 Q. Was Patrick Porrey your friend or your
6 brother's friend?

7 A. He would be more my brother's friend. They
8 were, you know, the same age. I was like the -- I'd
9 hang out with my brother and we'd all ride bikes
10 together and run around in the woods that was there
11 at the time and build forts and things of that
12 nature. But if I had to say was he my personal
13 friend more than my brother's, no. If my brother
14 wasn't around, Pat really wouldn't have wanted to
15 hang out with me.

16 Q. And did your brother continue to live -- was he
17 living with you in 1989?

18 A. My brother?

19 Q. Yes.

20 A. No. My brother was in the Air Force at that
21 time.

22 Q. And as far as Pat Porrey, did he have any
23 scrapes with the law that you were aware of?

24 A. I'm aware that he had been in trouble with the
25 law, but specifics, I wouldn't have much idea of

1 that at all.

2 Q. Did you and Pat Porrey ever get arrested
3 together for anything?

4 A. No, sir.

5 Q. And Theresa Porrey, how did you know Theresa
6 Porrey?

7 A. As Pat's mother, simply that. You know, come
8 in, she'd -- if we were over there playing a game of
9 Risk or something at the time, she'd, you know, make
10 us something to eat, or just generally being Pat's
11 mom.

12 Q. Okay. Now, you indicated you both lived in
13 triplexes, your family and the Porrey family. Were
14 you in the same triplex or --

15 A. No, sir.

16 Q. -- separate?

17 A. Separate triplexes. [REDACTED] is like a
18 cul-de-sac, simple road. There's maybe 20 triplexes
19 on each side, 10 going down each side. At that time
20 my father and my family lived down on the circular
21 part. The Porreys lived up maybe three triplexes in
22 on [REDACTED] on the other side of the street.

23 Q. Was Pat's mom, Theresa, and your mother, were
24 they close friends?

25 A. No, sir. I'm not even sure if they had even

1 talked before. I'm sure they have, us getting in
2 trouble or something or, you know, screwing around
3 as a kid.

4 Q. In 1989, you came to live with Theresa Porrey
5 for a period, didn't you?

6 A. Yes, sir.

7 Q. And what was her physical state at the time?

8 A. She was on emphysema. Or not on emphysema,
9 excuse me. She had emphysema and was hooked on
10 oxygen to a respirator-type thing. She was kind of
11 old, a little bit frail.

12 Q. Was she able to get around and about outside?

13 A. Yeah, she could move around pretty decent, all
14 things considered.

15 Q. Was she always on oxygen?

16 A. Yes. She always had the oxygen tube. She had
17 maybe a hundred, 150 feet of cord that would allow
18 her to move around the triplex area, get out and
19 water her plants and things of that nature. She was
20 still pretty active. She didn't go anywhere as far
21 as leaving the house, but she would move around the
22 apartment pretty well.

23 Q. Did Theresa Porrey stay up late during that
24 period?

25 A. Yes. As far as I know she'd stay up, you know,

1 to 3 o'clock in the morning. She was pretty much up
2 a lot. Hard for her to sleep, I think.

3 Q. When's the last time you saw or talked to
4 Theresa Porrey?

5 A. The last time that I saw Theresa Porrey was
6 right before my arrest. The last time that I spoke
7 with her would be the night of the crime where I was
8 left alone there with her for about 20 minutes in a
9 particular portion of the sequence of events and
10 spoke with her maybe 20, 30 minutes.

11 Q. That was in July of 1989?

12 A. That would be July 15th, 1989.

13 Q. How did you come to --

14 A. Excuse me, sir. I did actually speak with her
15 on the telephone. It would have been July -- or
16 June/July, I'm thinking 1990, at one point where
17 Mr. Leinster had asked me to make sure -- at the
18 time we were going to trial and he hadn't secured
19 her videotape deposition, and he had told me --
20 explained to me that her doctor said she can't come
21 to court and testify, so he was going to take a
22 videotape deposition. At that particular time, he
23 hadn't done it. He wanted me to make sure that she
24 would be willing to videotape testimony, so at that
25 time I called her from the jail, spoke to her

1 probably 15, 20 minutes, if that much. That's the
2 last time I spoke with her.

3 Q. Did you ask Theresa Porrey to tell any lies for
4 you?

5 A. No, sir.

6 Q. Did you tell her what to say and not to say
7 during her deposition?

8 A. No, sir.

9 Q. And how did you come to live with her in 1989?

10 A. Well, in 1989, about the middle of June, I
11 guess it was, I returned from Chicago here to
12 Florida, to Pinellas County. I was staying in
13 Clearwater. I ended up looking for some old
14 friends. I was looking for phone numbers through
15 the phone book, thought of Pat, looked up Theresa's
16 number, gave her a call, called Pat. He happened to
17 be there that day and ended up coming to get me.

18 We went, had a beer, and I ended up -- he said,
19 "Where are you staying?" And I said, "Well, I'm
20 staying at this hotel." At that particular time,
21 the girl that I was living with in Chicago came back
22 to Florida with me. She went to live with her
23 mother. And he said, "Well, why what are you doing
24 in a hotel? Why don't you come down here? You have
25 a room down here if you ever need one, you know

1 that," and essentially offered me a place to stay.

2 We went and talked with his mother. She didn't
3 have a big problem with it until I could get on my
4 feet, get a job going, and things of that nature. I
5 could stay as long as I like.

6 Q. And did you pay Mrs. Porrey rent?

7 A. I hadn't paid up until that point. She knew
8 essentially that I would give her something.

9 MR. FISHKIN: I object to what
10 Mrs. Porrey knew or didn't know, Your Honor.

11 THE COURT: Sustained.

12 Q. How long did you live with Theresa Porrey prior
13 to the incident of July 14 and 15 of 1989?

14 A. I would think it would be about two-and-a-half
15 to three weeks.

16 Q. And was Patrick Porrey also living there?

17 A. Yes, sir.

18 Q. The full time that you were?

19 A. Yes, sir.

20 Q. Did he live there permanently or was he back
21 and forth?

22 A. I really don't know if he was there back and
23 forth or not. At that particular time, he was
24 there. The whole time that I stayed there he was
25 staying there. I know he had a girlfriend, Felicia,

1 in Tampa that he had stayed with before or lived
2 with before. She had lived in the triplex before.
3 I had met her a number of years before that.

4 Q. Did you stay in the same room with Patrick or
5 have your own room?

6 A. Pardon me?

7 Q. Did you have your own room or stay in the room
8 with Patrick Porrey?

9 A. We had separate bedrooms.


10 Q. And the room you were in, did it have only your
11 possessions or were there --

12 A. It was a well lived-in room. Theresa has two
13 other sons, Mark and Vaughn Porrey. Over the years
14 that I have known them growing up in that area, both
15 Pat and them had lived in that room at a particular
16 time. There was a number of clothes, dressers,
17 toys, stereos, things of that nature, a lot of
18 personal property of theirs in there.

19 Q. Okay. Other than the Porreys, who else lived
20 in that triplex?

21 A. In the triplex itself?

22 Q. Yes.

23 A. From what I now know, David and Barbara Stewart
24 lived in I would imagine it would be the west
25 triplex, west apartment of the triplex; and 

1 [REDACTED] and [REDACTED] in the east triplex.

2 Q. And Kevin, I'd like to show you what is marked
3 as Petitioner's Exhibit 2, and ask you to take look
4 at this.

5 Mr. Herrick, do you recognize that?

6 A. Yes, sir, I do.

7 Q. What is that?

8 A. That would be a diagram of the triplex and
9 parking area that I drew.

10 Q. You drew that?

11 A. Yes, sir.

12 Q. When did you draw that?

13 A. Exact time, huh? I would imagine it was
14 probably in '95.

15 Q. So this is subsequent to your arrest?

16 A. Yes, sir.

17 Q. You were in the Florida prison system at that
18 time?

19 A. I was in Desoto Correctional Institution at
20 that time.

21 Q. And is this to a particular scale?

22 A. No, sir, but it's pretty accurate.

23 Q. And how do you have a recollection of the
24 layout of the triplex?

25 A. Well, the Porreys' triplex is identical to the

1 triplex that my father owned at the other end. I
2 lived in it, I'm familiar with all the apartments,
3 and I'm familiar with the Porreys' triplex at that
4 particular time, a couple of weeks. I have a good
5 memory. It's not too difficult to remember where
6 stuff was at and what was happening.

7 Q. Even though it's not to scale, does it show a
8 reasonable representation of the location of the
9 apartments in that triplex?

10 A. Yes, sir.

11 MR. GILLICK: Judge, I would offer
12 Petitioner's Exhibit No. 2 into evidence.

13 MR. FISHKIN: No objection.

14 THE COURT: Two is admitted.

15 (Petitioner's Exhibit No. 2 was received in
16 evidence)

17 MR. GILLICK: Judge, if it please the
18 Court, I could pass that up so the Court might
19 follow, or I could give the Court another copy.

20 THE COURT: Whichever you prefer,
21 Mr. Gillick.

22 MR. GILLICK: Okay. I will pass the
23 Petitioner's Exhibit 2 and give the witness a
24 copy.

25 Q. Mr. Herrick, in the -- let's start with the

1 left side. You have a room, it looks like. It
2 says "my bedroom;" and then there's a room, Pat's
3 bedroom; and a room in front of that, living
4 room; and above the living room is something that
5 says "master bedroom." There's also a dining
6 area in there. Would that be the Porrey
7 apartment?

8 A. Yes, sir. That's Theresa's apartment there.

9 Q. And then in the upper right section, there's
10 just a square or a box that says "David Stewart's
11 apartment;" is that correct?

12 A. Yes, sir.

13 Q. And in the lower right, a drawing of another
14 apartment. It looks like a living room, something
15 that says "baby's room," and [REDACTED] and [REDACTED] s
16 bedroom above that. Would that be [REDACTED] and
17 [REDACTED] s apartment?

18 A. Yes, sir.

19 Q. And let's look at the room on the left that
20 says "my bedroom." Is there an exit that goes into
21 the apartment from there?

22 A. Into Theresa's apartment?

23 Q. Yes.

24 A. Yes. If you come where the bed is, if you were
25 laying on the bed normal ways and you walked through

1 the little area right there between the bathroom and
2 the closet, that's a hallway that leads out. You
3 would turn left and you would end up facing where it
4 says "couch," kind of elbow-type couch.

5 Q. From your bedroom, is there another exit out of
6 that room?

7 A. Yes. There's a sliding glass door directly
8 across going the same way. If you were going
9 towards the couch into the back porch, there's a
10 couch setting there, there's a dresser there, and a
11 sliding glass door.

12 Q. In July of 1989, could you actually exit
13 through that back door, the sliding door?

14 A. No, sir.

15 Q. Why not?

16 A. Well, in the inside, just alone being the
17 dresser and the couch being there, they also had
18 some accordion closet doors that were stacked up
19 across there; and on the other side outside of the
20 sliding glass door there was a number of building
21 material, weight equipment, plants, such as stuff as
22 that. It wasn't a thruway or anything like that.
23 You weren't going to go in and out through there.

24 Q. And you indicated that David Stewart lived in
25 the apartment on the top of this page. What was

1 your relationship with David Stewart?

2 A. I have never spoke to David Stewart before.

3 Q. Did anyone live with Mr. Stewart?

4 A. As far as I know, his wife Barbara. I've never
5 spoke to either one of them. I don't -- I never met
6 them.

7 Q. Okay. How about the apartment that contained
8 [REDACTED] and [REDACTED], did you come
9 to know them during your two-and-a-half to three
10 weeks stay with Mrs. Porrey?

11 A. Yes, sir, I did.

12 Q. And did you know them prior to moving there?

13 A. No, sir.

14 Q. Did they have any children?

15 A. Yes, sir, they had a small baby.

16 Q. What was the relationship between [REDACTED]
17 and [REDACTED]?

18 A. As far as I know --

19 MR. FISHKIN: I'm going to object to
20 that, Your Honor.

21 THE COURT: Overruled.

22 A. Boyfriend and girlfriend.

23 Q. And how did you come to meet [REDACTED] and
24 [REDACTED]?

25 A. I met [REDACTED] first, if it's all right if I call

1 him [REDACTED]. That's what I referred to him. That's
2 what he was introduced to me as. One day Pat and I
3 were doing some yard work, cutting the grass around
4 the triplex, and -- excuse me -- he was digging a
5 turtle pond on the side of his house. We struck up
6 a conversation, met, and How ya doing, [REDACTED]?
7 Scott, Kevin, you know. Pat knew him apparently
8 from living there and introduced me. We kind of
9 hung out there on the side of the triplex and
10 discussed his turtle pond and things of that nature.

11 Q. Did Mr. [REDACTED] give you anything at that
12 time?

13 A. At that particular time, he offered to smoke
14 some pot with us.

15 Q. Did you have any pot?

16 A. Did I?

17 Q. Yes.

18 A. No, I had no pot. Did I smoke some with him?
19 Yes, to clarify that.

20 Q. Did Mr. [REDACTED] produce the pot?

21 A. Yes, sir.

22 Q. And that would be marijuana?

23 A. Yes, sir. At that time Pat didn't smoke. Pat
24 wasn't smoking.

25 Q. Okay. And how did you meet [REDACTED]?

1 A. I don't recall that I met her at that
2 particular time. I don't think that I did, 'cause I
3 think what we did is we smoked the joint outside
4 there by his turtle pond. Then we went about our
5 business; he went about his. I think a day or two
6 later I'd met [REDACTED] coming out. We smoked
7 cigarettes and we couldn't smoke inside of our
8 triplex because of Theresa's emphysema, so we'd be
9 outside quite often to smoke.

10 At some point, I think it was in the early
11 afternoon, we were out in the courtyard area where
12 you'd come out the front door there, Pat and I. She
13 came out and was going to go get her mail, which is
14 way out pretty much off [REDACTED], would be off
15 the paper, and the mailboxes were out there, and,
16 you know, I'd offered to -- I remember offering to
17 walk out there and check her mail for her since she
18 had her little baby with her and it was, you know,
19 mid-June, July, whatever, pretty hot. I walked out
20 there and checked her mail, and if there was
21 something there, I don't recall, and came back.

22 Q. Okay. Did you have any problems with
23 Ms. [REDACTED]?

24 A. No.

25 Q. Did you have any problems with [REDACTED]?

1 A. No.

2 Q. Did you ever have occasion to go into [REDACTED]
3 and [REDACTED]'s apartment?

4 A. That particular instance that I'm talking about
5 going to check her mail, right after that when I
6 came back, Pat asked me if I had any rolling
7 papers. I said, yeah, I happened to have some. He
8 said, "Well, [REDACTED] would like --" you know, "Why
9 don't you smoke some pot with us if you want to go
10 over and get high?" I said, "Let me go and get my
11 papers." I went into the Porrey's residence, went
12 back to my bedroom, got the papers, wherever they
13 were at in my belongings, and came back. And we
14 went in, [REDACTED] and I and Pat went in their house,
15 and smoked a joint.

16 Q. Was Mr. [REDACTED] home at that time?

17 A. No, sir.

18 Q. Was Pat already in the apartment prior to you?

19 A. No.

20 Q. And were you in [REDACTED] and [REDACTED]'s apartment
21 on other occasions?

22 A. I recall one other occasion, really, is all I
23 can remember is -- no, it would be two other
24 occasions. It would be we went -- Pat and I ended
25 over there the night before this crime took place,

1 and we were over there and ended up watching a movie
2 there, Cocoon II, if you'd like me to explain what
3 happened there.

4 Q. Yeah. What happened that evening?

5 A. That particular evening, Pat and I rented a
6 movie across the street. One of the strip malls had
7 a Blockbuster or something to that effect. We
8 rented a movie. When we came back to the Porreys'
9 house, we went to play the movie, and his particular
10 VCR was not working. It came out all fuzzy. He
11 said, "Well, go next door and ask [REDACTED] and [REDACTED]
12 if they have a VCR head cleaner."

13 So I went over there and knocked on the door.
14 She opened the door. I said, "Have you got VCR head
15 cleaner?" She said, "No, I don't, but if you guys
16 want to come over here, [REDACTED]'s gone for the
17 night --" you know, he went to a bachelor party, or
18 something like that -- "and if you want to come
19 over and watch it here, we can watch it here." So I
20 went and told Pat, and that's what we ended up
21 doing, going over there and watching a movie.

22 Q. Okay. Did you smoke pot that night?

23 A. Yes, sir.

24 Q. With whom?

25 A. [REDACTED] and Pat.

1 Q. Who had the pot?

2 A. [REDACTED].

3 Q. And were you attracted to [REDACTED] [REDACTED]?

4 A. Sexually, no.

5 Q. Were you ever involved in a sexual situation
6 with [REDACTED]?

7 A. No, I wasn't.

8 Q. She had a young baby at the time?

9 A. Yes, sir.

10 Q. And you indicated that you were in the
11 apartment, I believe, those were two. There was
12 another time. When was that?

13 A. The next day about 6 o'clock, I'd went over
14 there to see if [REDACTED] wanted to play a game of
15 chess. Through our prior conversations, we had
16 discussed, you know, a mutual interest in playing
17 chess, and at that particular time I went over there
18 to see if he wanted to play. He wasn't home, and
19 [REDACTED] said, you know, "I'll play," and so I said
20 okay. I went and got a chessboard, came over, set
21 it up, whipped her real quick. [REDACTED] came home a
22 little bit after that, maybe 20 minutes after we had
23 been there playing chess, came home with a couple of
24 friends.

25 Q. Okay. And when [REDACTED] came home, was

1 there any problem between you and he?

2 A. No.

3 Q. What happened at that point when he came home
4 with a couple of friends?

5 A. Well, we kind of talked a little bit. He saw
6 what we were doing. He went to his little stereo
7 cabinet, he's kind of got an entertainment system
8 there, and pulled out an album that had some pot in
9 there, rolled up a couple joints, and all four of
10 us -- five of us smoked.

11 Q. Did you and [REDACTED] have any type of
12 confrontation?

13 A. No. Everything was just casual conversation:
14 Hey, how you doing; how was work; whatever, you
15 know.

16 Q. And did you stay for the evening or did you
17 leave at that time?

18 A. I was probably there maybe another hour,
19 7:30-ish or so. They said they were going out to
20 eat and see ya later, you know. I left and they
21 left.

22 Q. Did they leave with the other couple, as far as
23 you know?

24 A. I have no idea what they did.

25 Q. You left before them?

1 A. I went back into the Porreys' house, made some
2 dinner, and sat down and watched some TV.

3 Q. Okay. The times that you were in [REDACTED] and
4 [REDACTED]'s apartment, how did you enter, the front
5 door, back door?

6 A. The front door. When I initially met them, the
7 first day that I met them, we were by the sliding
8 glass door in the back. I don't recall ever going
9 into their apartment at that particular time. I
10 know from things that I've read they said they were
11 having a barbecue one time --

12 MR. FISHKIN: I'm going to object --

13 A. -- and we were in and out.

14 MR. FISHKIN: Your Honor, I'm going to
15 object to his interjecting things that he read.

16 THE COURT: I'll sustain the objection.

17 Q. But when you visited their apartment, you went
18 through the front door as a rule?

19 A. Yes.

20 Q. Is that correct?

21 A. Whenever arriving, going over there, asking
22 them something, I'd knock on the front door.

23 Q. The night before your arrest when you and Pat
24 Porrey were there to watch a movie with [REDACTED]
25 [REDACTED], did anything unusual happen between [REDACTED]

1 and Patrick Porrey?

2 A. Another strange thing as far as --

3 THE COURT: Repeat the question again,
4 please, Mr. Gillick.

5 MR. GILLICK: Yes. This would be the
6 night before, Mr. Herrick has indicated that
7 he -- that Mr. Herrick and Patrick Porrey went to
8 [REDACTED]s apartment and watched a movie,
9 Cocoon II, and I'm asking --

10 THE COURT: You can just repeat the
11 question.

12 MR. GILLICK: Oh, that would be easier.
13 Okay.

14 Q. Mr. Herrick, the night that we described
15 when you and Patrick went to watch the movie
16 Cocoon II with [REDACTED], did anything unusual
17 occur?

18 A. Yeah. When we were watching the movie --
19 another weird thing about [REDACTED] and [REDACTED] is that
20 they would smoke pot inside their house but they
21 wouldn't smoke cigarettes in their house, so similar
22 to the situation with Theresa, we would all go
23 outside to smoke cigarettes, put it on pause, put
24 the movie on pause, and went outside to smoke. I
25 finished essentially first, came back in, sat back

1 down. [REDACTED] came in, sat down.

2 At that particular time, Pat was coming
3 back through the sliding glass door. He was
4 wearing, I guess, spandex-type bicycle rider's pants
5 and he had a little belt pouch around his waist.
6 And at that time when he started coming through the
7 door, [REDACTED] started giggling and laughing and like,
8 you know, What are you doing, you know, What's up,
9 and she's laughing saying she thought that he was
10 exposing himself to her.

11 Q. Did anything happen between Pat and [REDACTED] that
12 you're aware of that night?

13 A. No, sir.

14 Q. You were arrested, sir, on July 14th, or early
15 in the morning of July 15th; is that correct?

16 A. Yes, sir.

17 Q. Earlier in the day, do you recall what you had
18 done during that day of July 14?

19 A. Yeah. Pat and I had -- I had woke up, I don't
20 remember what time, but ultimately in the
21 midafternoon time, 12 o'clock, 1 o'clock. Pat had
22 his girlfriend Felicia's Z-28, it needed a new
23 thermostat in it, and we took it down to a
24 self-service car wash down on Ulmerton, right off
25 Belcher and Ulmerton, and basically spent the

1 afternoon there putting that in.

2 Q. Did you wash the car?

3 A. Yes.

4 Q. Did you get dirty or wet when you were doing
5 the work on the car?

6 A. Yeah, greasy and everything else. Used part of
7 the wash cycle to wash the car and get the stuff off
8 us, also, you know.

9 Q. Do you recall when you arrived back at the
10 Porrey residence after washing and repairing the
11 car?

12 A. I'm thinking that it was about 5 o'clock.

13 Q. In the evening?

14 A. Yes, sir.

15 Q. Did you shower or bathe at that time?

16 A. Yeah. Pat did first, and then I did. There's
17 only one shower there in the bathroom there.

18 Q. And that evening, did Patrick Porrey go out?

19 A. Yeah. Pat left, it would have been before I
20 went over to [REDACTED] and [REDACTED]'s to play chess, maybe
21 6 o'clock or so.

22 Q. Did you go out with him?

23 A. No. He was returning to Tampa to return the
24 car to his girlfriend's house.

25 Q. And did you stay at home --

1 A. Yes.

2 Q. -- thereafter?

3 A. Yeah, up until the point where I went over to
4 [REDACTED] and [REDACTED]'s to play some chess.

5 Q. You said you went over to play chess. Did you
6 intend to play with [REDACTED] or with
7 Mr. [REDACTED]?

8 A. With [REDACTED]. That was -- that
9 was -- my original thought was, when I was standing
10 around outside having a cigarette, I'll go see if
11 [REDACTED] wants to play some chess, nothing to do,
12 Friday night, you know.

13 Q. And when you got there, was [REDACTED] home?

14 A. No, he was not.

15 Q. What did you do then?

16 A. I told [REDACTED], I said, "When he gets home,
17 holler at him, see if he --" you know, "Tell him to
18 come over to see if he wants to play some chess or
19 something." And she said, "Well, if you want to,
20 I'll play with you." And, All right, you can play?
21 She said yeah, and so I went and got the chessboard
22 and brought it over.

23 Q. Okay. Who won the game?

24 A. I did.

25 Q. And you indicated that Mr. [REDACTED] came home

1 while you were playing chess?

2 A. Yes, sir.

3 Q. No problems with him?

4 A. No, sir.

5 Q. Was he upset that you were there with [REDACTED]?

6 A. I didn't notice anything like that taking
7 place.

8 Q. Who were the other people who came home with
9 Mr. [REDACTED]?

10 A. A young gentleman named Darryl, and I believe
11 his girlfriend Tammy.

12 Q. And you indicated you stayed around for a while
13 after everybody arrived home?

14 A. Yes.

15 Q. And they were going out for the evening to
16 dinner, you indicated?

17 A. That's what they had told me, yes, sir.

18 Q. Did you go out to dinner with them?

19 A. No, sir.

20 Q. What did you do?

21 A. Went back to the Porreys' residence, made some
22 Hamburger Helper, and watched television, watched
23 the "A-Team," and a movie with Rodney Dangerfield,
24 Easy Money.

25 Q. Was Mrs. Porrey home at that time?

1 A. Yes, sir.

2 Q. About what time was it that you went home?

3 A. It would be before 8 o'clock because that's
4 when the "A-Team" started, so I would say 7:30-ish
5 'cause I had enough time to -- like I say, I
6 cooked -- remember specifically cooking a Hamburger
7 Helper meal and getting that ready and sitting down
8 in front of the TV on the floor there and watching
9 it.

10 Q. Where was Theresa Porrey when you were home
11 that evening?

12 A. She would be in the kitchen area. When I was
13 watching TV, I know she was in the kitchen area.
14 When I was cooking it, I know she was in the kitchen
15 area 'cause she was, you know, just talking, hanging
16 out, and that's where her main, I guess, little
17 compressor-type air thing was.

18 Q. Was she awake?

19 A. Oh, yes.

20 Q. Alert?

21 A. Yes.

22 Q. You indicated you then watched a movie. What
23 did you do after watching the movie?

24 A. I went to bed, went to my bedroom and laid
25 down, read a book for about 20 minutes before dozing

1 off.

2 Q. About what time was that?

3 A. The movie ended at 11:00, so I know I went to
4 bed at 11:00. I'm guessing after 20 minutes of
5 reading. That's usually about the average time that
6 I'll last reading at that particular time at night.

7 Q. When you went to bed around 11:00-ish, where
8 was Theresa Porrey?

9 A. Theresa was in her kitchen.

10 Q. And from the kitchen, can you see the living
11 room area?

12 A. No, sir. When I went to bed, I walked in there
13 and I said, "I'm going to bed, Theresa," you know,
14 "I'll see you tomorrow," check on her, things of
15 that nature. She'd be sitting at her kitchen table,
16 or little table that's setting there. If you know
17 where the kitchen is there, she's sitting at her
18 table. And then you come out, and then once you
19 step out of the kitchen itself into the dining room
20 area, then you can see the entire apartment going
21 back, to those big sliding glass doors in the living
22 room.

23 Q. Did you actually see Mr. [REDACTED] and Ms. [REDACTED]
24 and their friends leave to go to dinner?

25 A. No, sir.

1 Q. Did you see them return?

2 A. No, sir.

3 Q. Do you know what time they returned from
4 dinner?

5 A. I wouldn't know if they went to dinner or came
6 back or anything like that.

7 Q. Did you ever see Mr. [REDACTED] leave again?

8 A. No, sir.

9 Q. After you went to bed, you indicated you read
10 for about 20 minutes and went to sleep. Right?

11 A. Yes, sir.

12 Q. Did you ever get up and leave your room again
13 that night?

14 A. Yeah, when Theresa woke me up.

15 Q. What happened when Theresa woke you up?

16 A. Theresa woke me up screaming that the girl next
17 door is being raped.

18 Q. That would be Theresa Porrey who woke you?

19 A. Yes, sir.

20 Q. And prior to Theresa coming in and waking you
21 up, had you left your room for any reason --

22 A. No, sir.

23 Q. -- whatsoever?

24 Were you asleep when Theresa Porrey woke you
25 up?

1 A. Yes, sir.

2 Q. Do you know about what time it was that Theresa
3 Porrey woke you up?

4 A. No, sir. I guess from things that I've read --
5 he's going to object, but --

6 MR. FISHKIN: Your Honor, I would object
7 again.

8 THE COURT: Well, let's put it this
9 way. Ask your question, Mr. Gillick, as to what
10 time and as best he can tell, and if he needs to
11 supplement his answer, he can supplement his
12 answer, provided that the basis for his
13 information is set out in the record.

14 Q. Mr. Herrick, do you recall approximately what
15 time that Theresa Porrey awoke you?

16 A. It would be close to 1 o'clock.

17 Q. In the morning?

18 A. Yes, sir.

19 Q. This would be --

20 A. 12:45, something like that, if I recall. I
21 didn't look over and see a clock or anything like
22 that when she woke me up. I ran out of the
23 apartment to get out there and see what was going
24 on.

25 Q. Okay. And what did Theresa Porrey -- what was

1 she yelling to you when she woke you up?

2 A. "The girl next door is being raped."

3 Q. What did you do?

4 A. I immediately jumped up, asked her, "What?
5 What's going on," you know. She said, "The girl --"
6 she's steadily screaming, "The girl next door is
7 being raped. The girl next door is being raped." I
8 pulled on a pair of shorts, ran out, down the
9 hallway around, came out into the courtyard, out the
10 front door.

11 Q. When you run out the front door, was there
12 anybody else outside?

13 A. Yes.

14 Q. Who?

15 A. When I came out the front door, if you -- on
16 there, I seen David coming out of his front door
17 this way. [REDACTED] was standing at her door in or out
18 right about a few feet from the door.

19 Q. Let me clarify. You said David. Is that David
20 Stewart?

21 A. David Stewart, yes, sir.

22 Q. And his front door -- as you walk out of your
23 front door, would Mr. Stewart's door be to your
24 left?

25 A. Yes, sir.

1 Q. And would [REDACTED] and [REDACTED]'s door be to your
2 right?

3 A. Yes, sir.

4 Q. Okay. I'm sorry to interrupt, but you
5 indicated that David Stewart was coming out of his
6 apartment?

7 A. Yes, sir.

8 Q. And who else was present or becoming present at
9 that time?

10 A. [REDACTED] was standing off to my right,
11 Mrs. Porrey was essentially behind me about the
12 time -- when I got out of the front door, she was
13 there really quick with me. [REDACTED] was -- [REDACTED],
14 [REDACTED] was coming down the walkway towards
15 me.

16 Q. When you walked outside, what was [REDACTED]
17 doing or saying?

18 A. She was screaming.

19 Q. What was she saying; do you recall?

20 A. She was saying, "Don't leave me, don't leave
21 me," over and over, crying, essentially pretty
22 hysterical it looked like to me.

23 Q. Did you leave her?

24 A. No, I didn't leave her.

25 Q. Did she indicate what happened to her?

1 A. At that particular time, no.

2 Q. Did she give a description of how she was
3 attacked?

4 A. At that particular time, no. She did later,
5 later that evening.

6 Q. To you?

7 A. Yes, sir.

8 Q. What did [REDACTED] [REDACTED] tell you about her
9 attacker?

10 MR. FISHKIN: I'm going to object, Your
11 Honor.

12 THE COURT: Overruled.

13 A. At that particular time, it wasn't directly
14 to me. Theresa --

15 THE COURT: Just a moment. So the
16 record is clear, I do not take the testimony as
17 being offered for the truth of the matter
18 asserted, simply that it was said and that it
19 might be consistent with something later said by
20 Ms. [REDACTED]. I presume that's what you're offering
21 it for, Mr. Gillick.

22 Q. You indicated that [REDACTED] talked with you
23 or in front of you about what had happened to her.

24 A. Yes, sir. We were all standing mostly towards
25 her door, Theresa Porrey, me, and David. I don't

1 believe Barbara Stewart was there, David's wife. I
2 know that David, me, and Theresa were there. [REDACTED]
3 may have been there, but I don't think so. I think
4 he was still sitting inside, inside his apartment.
5 She indicated that a guy had put a knife to her
6 throat and --

7 Q. Did she say it was a knife?

8 A. I believe at that time scalpel, and I
9 believe -- she stated that he tried to rape her.

10 Q. Did she point a finger at you and accuse you?

11 A. No, sir.

12 Q. There were other people present?

13 A. Yeah. You know, like I say, David, Theresa,
14 and me. By that time, Barbara might have been
15 there. You know, so many people were moving around
16 at that particular time, but I remember those two
17 being there specifically. She was standing there
18 holding her baby and everything.

19 THE COURT: Which two?

20 THE WITNESS: David Stewart and Theresa
21 Porrey.

22 Q. Do you recall if [REDACTED] gave a
23 description of her attacker at that time?

24 A. Not to me.

25 Q. She did not accuse you in front of Theresa

1 Porrey or David Stewart and possibly his wife; is
2 that correct?

3 A. No, sir.

4 Q. And was that specific incident when she was
5 describing what happened, was that prior to the
6 arrival of the police?

7 A. Yes, sir. That was before the police got
8 there.

9 Q. I believe you testified when you first came out
10 and [REDACTED] was screaming whatever she was screaming
11 that [REDACTED] was --

12 A. Could I come back?

13 Q. Yes.

14 A. That last question, was that conversation where
15 she described that and told us what happened? No,
16 that was after the police got there. That was not
17 before.

18 Q. Okay. And you also indicated that, you know,
19 when [REDACTED] was screaming, when you came outside,
20 [REDACTED] was there, David Stewart was coming out, and
21 that Mr. [REDACTED] was coming up the walkway?

22 A. Yes, sir.

23 Q. Was he walking or running or --

24 A. He was moving pretty quick. I wouldn't say he
25 was running, but he was coming back. He was

1 screaming for David to write down a tag number of a
2 vehicle that he had seen leaving.

3 Q. And do you recall anything else that
4 Mr. [REDACTED] said at that time?

5 THE COURT: Let me stop you for a
6 moment. You just said that Mr. [REDACTED] came up
7 screaming for Mr. Stewart to write a tag number?

8 THE WITNESS: Yes, sir.

9 THE COURT: Is that what you said?
10 All right.

11 Q. Did Mr. [REDACTED] give any indication of why
12 he wanted a tag number written down?

13 A. He said he chased the guy to a car, and the guy
14 got in the car and drove away.

15 MR. FISHKIN: I'm going to object to
16 that and move that it be stricken. He can't know
17 why Mr. [REDACTED] was asking someone to write down
18 a tag number, unless Mr. [REDACTED] told him that.

19 THE COURT: I'll overrule it.

20 Q. That was a statement that Mr. [REDACTED] made?

21 A. Yes, sir.

22 Q. You were there?

23 A. Yes, sir.

24 Q. Mr. [REDACTED] indicated that he chased the
25 suspect who got in a car with this tag number?

1 A. Yes, sir. If I can explain what happened.

2 Q. Yes.

3 A. When he came out and I came out the front door,
4 David's writing down the number. Like I say,
5 [REDACTED]s screaming. He comes here; he's telling him
6 to write down the tag number. He says, "[REDACTED], are
7 you all right? What happened?" I'm looking at
8 him. I can see that he's bleeding. And, you know,
9 like I said, Theresa's just screaming, "The girl's
10 getting raped next door." I'm wanting to know
11 what's going on, how can I help the situation. I
12 came out here to help.

13 I see that he's bleeding. I got him to
14 stop. He told him -- he got the number to David. I
15 said, "David, call the police. Make sure they get
16 the tag number." "[REDACTED], what happened?" And he
17 explained to me then. He says, "Man, I came in,
18 this guy stabbed me." He said, "I chased him down
19 the street. He got into a car." He said, "I don't
20 know what kind of car it was. I believe that it was
21 a white car. This is the tag number."

22 Q. At that point did [REDACTED] accuse
23 you of being his attacker?

24 A. No, sir.

25 Q. Did he indicate to anyone at that point that

1 you were his attacker?

2 A. No, sir.

3 Q. This was prior to the police arriving?

4 A. Prior to the police.

5 Q. Did anyone say to call the police at that
6 point?

7 A. Me.

8 Q. Who did you tell that to?

9 A. I told it to David, telling him when he got the
10 tag number written down, call the police, make sure
11 they get that tag number.

12 Q. As far as David Stewart, do you have any idea
13 where he is today?

14 A. No idea. I didn't know him then; I don't know
15 him now. I wish I did.

16 Q. Have you talked to him since that night?

17 A. I've never talked to David Stewart other than
18 that night a few questions, conversation. Other
19 than that, I've never spoke to David before or after
20 this incident.

21 Q. And did the police come?

22 A. Yes, sir.

23 Q. How long after you came outside and were
24 talking to these people did the police arrive?

25 A. I would say within three to four minutes.

1 Q. Did the police come directly to that triplex?

2 A. No, sir. When [REDACTED] and I had this
3 conversation where I had asked him if he was all
4 right and he told me about the tag number and things
5 of that nature, everybody was pretty hysterical.
6 Theresa was behind me, you know, Oh, my God, oh, my
7 God, steadily, you know. You have to see her to
8 understand how she could be. She could be pretty
9 hysterical. I got her. I said, "Theresa go sit
10 down in the kitchen," 'cause she's hyperventilating,
11 breathing really hard and steadily screaming while
12 I'm trying to figure out what's going on.

13 Dave had went in and called the police. I told
14 [REDACTED], I said, "Look, [REDACTED], you're okay." He's
15 looking at me pretty, you know, competently. He's
16 breathing hard, but he looks okay. He's bleeding.
17 I said, you know, "Calm down. Get [REDACTED], step
18 inside, relax." I said, "Make sure that you put --"
19 one of the things that came to my mind was that you
20 need to make sure that pot that you had -- because
21 when he came home earlier that evening, he had his
22 pot in the record album. I said, "You need to make
23 sure that kind of stuff's put away. Go in your
24 house, get your stuff squared away. The police will
25 be here in a minute." At that point he went in with

1 [REDACTED].

2 David came back out. And I walked to the end
3 of the walkway there out to the parking lot area and
4 waited for the police. The police officer pulled
5 up, came to the second triplex. I waived them over
6 to the Porreys' triplex area. He came in. I told
7 him where to go in and go into [REDACTED] and [REDACTED]'s
8 apartment.

9 Q. Did you try to flee before the police got
10 there?

11 A. There was no reason to flee.

12 Q. Did you try to leave after the police got
13 there?

14 A. No.

15 Q. Had you done anything wrong that night?

16 A. No, sir.

17 Q. Did you break into [REDACTED] and [REDACTED] s
18 apartment --

19 A. No, I did not.

20 Q. -- on July 14th --

21 A. No, I did not.

22 Q. -- 1989?

23 A. No.

24 Q. Did you attempt or have sex with [REDACTED]
25 on July 14th or 15th of 1989?

1 A. No, I did not.

2 Q. Did you stab or otherwise cause bodily injury
3 to [REDACTED] on July 14 or 15, 1989?

4 A. No, I did not.

5 Q. Did you run out of the apartment being pursued
6 by [REDACTED] on the night of July 14th
7 or early morning July 15th of 1989?

8 A. No, I did not.

9 Q. Well, would it have been possible for you to
10 have exited the apartment without Theresa Porrey
11 seeing you?

12 A. No.

13 Q. Why?

14 A. There's no way to get out of the sliding glass
15 door. The only way out of the apartment is to walk
16 out that hallway into the living room area. You'd
17 have to walk that far to either go out the living
18 room sliding glass door or go out the front door.
19 She would see you or hear you one way or the other.

20 Q. You indicated that you did not run from [REDACTED]
21 [REDACTED], being pursued by [REDACTED]. Did you
22 run from the apartment and down a street at all that
23 night?

24 A. No.

25 Q. Would it have been possible for you to -- for

1 anyone to have run from the apartment several houses
2 down being pursued, get back into your apartment
3 without being observed, and come out of the
4 apartment to immediately thereafter not be sweating,
5 not having blood all over you?

6 MR. FISHKIN: I'm going to object to the
7 question, Your Honor. It's compound.

8 THE COURT: Overruled.

9 Q. Would that be possible for you to do?

10 A. No. There's no way you could do that.

11 Q. You indicated you took a shower after working
12 on the car around 5 o'clock or so that day. Did you
13 take another shower that night?

14 A. No, sir.

15 Q. Did you hide any bloody clothes or any other
16 clothes that night?

17 A. I didn't hide anything.

18 Q. Did you own a scalpel?

19 A. No, sir.

20 Q. Did you have a knife of any kind?

21 A. No, sir.

22 Q. I believe evidence came out that a knife was
23 found in the room that you were staying. Was that
24 your knife?

25 A. No, sir.

1 Q. Do you know whose knife it was?

2 A. No idea. I would imagine it was one of the
3 Porreys, one of their brothers, one of -- Pat's or
4 Pat's brothers, Mark or Vaughn.

5 Q. Did you have a knife or any weapon with blood
6 on it that night?

7 A. No, sir.

8 Q. Did you have clothes with blood on it that
9 night?

10 A. No, sir.

11 Q. Patrick Porrey. You indicated that Patrick
12 Porrey had left to go somewhere earlier that
13 evening. Was Patrick Porrey home, to the best of
14 your recollection, when his mother woke you?

15 A. The original time? No, sir.

16 THE COURT: Are you saying that you
17 didn't know he was there or what?

18 THE WITNESS: After she woke me up, I
19 never seen Patrick until 3 o'clock that morning,
20 so I don't believe that he was there.

21 Q. You said you saw him at 3 o'clock. Where was
22 that?

23 A. He woke me up at that time. I had gone back to
24 bed.

25 Q. Did Pat appear to be sober or intoxicated?

1 A. No. He seemed to be regular Pat. He wasn't
2 drunk or anything like that, just a little bit
3 pissed off.

4 Q. When you say upset, what do you mean by that?

5 A. Basically what happened is: I was back in bed;
6 I was sleeping. Pat came in the room and literally
7 jumped on top of me, said, "What's going on," you
8 know, "How did you do this? Why did you do this?
9 We let you stay here." And I got him off of me,
10 pushed him off me, pushed him off the bed, got him
11 standing up. [REDACTED] -- or not [REDACTED]. Theresa and
12 David are standing in the room also with me. I
13 pulled on a pair of pants to where I wasn't indecent
14 and said, "What are you talking about? What's going
15 on?" He says, you know, "They think you did this."
16 You know, I was, Think I did what? And he was, That
17 you attacked [REDACTED] and [REDACTED]. And I said, "Well,
18 man, you're nuts. I didn't do anything like this."

19 Q. Let me back up a little bit. After the police
20 initially came, did you talk to them?

21 A. Yes, sir.

22 Q. Did they take your name and birth date and
23 personal information?

24 A. Yes, sir.

25 Q. And you stayed then. Did you go back to bed?

1 A. Yes, sir.

2 Q. And then as far as you know, did the police
3 talk to [REDACTED] and [REDACTED]?

4 A. Yeah, while I was -- everybody was there. They
5 were in their apartment. They talked to them.

6 [REDACTED] was wheeled out on a stretcher and taken to a
7 hospital and everybody essentially left.

8 Q. Okay. And had Scott Barfield and [REDACTED]
9 pointed a finger at you or accused you of anything
10 at that point?

11 A. No, sir.

12 Q. Then you indicated that Pat Porrey came home.
13 Had you gone back to bed?

14 A. Yes, sir.

15 Q. Didn't flee or leave the apartment?

16 A. No.

17 Q. You indicated that Pat came in, was initially
18 upset, and what happened then? Could you
19 describe --

20 A. Well, like I said, he came in. I woke up with
21 Pat on top of me basically saying, "How did you
22 do -- Why did you do this," or such and such like
23 that. We got off the bed and we were talking. I
24 said, "I didn't do anything, Pat. I don't
25 understand why you're saying that, but your mother

1 woke me up." She's standing in the doorway, and she
2 says to him, "Hey, I woke him up," you know. And
3 through the conversation, he's saying, "Well, [REDACTED]
4 says you did it," or "[REDACTED] says you did this." I
5 said, "It's impossible. The guy said he left in a
6 car. You know, how could I have done this? Your
7 mother woke me up, and he says he left in a car. He
8 gave the police the tag number."

9 At that time David said the same thing. He
10 said, "It couldn't be, Pat." He's saying, you know,
11 "The guy left in a car," this and that. I said, "I
12 want to go -- let's go talk to [REDACTED]" you know, "I
13 want to straighten this out," 'cause, you know, I
14 didn't -- I was pretty upset about being told that I
15 just tried to rape a girl. I wanted to go talk to
16 them. They noticed that I was pretty agitated, and
17 basically said, "No, we'll go talk to him."

18 Q. Who is "we"?

19 A. Pat and David.

20 Q. David Stewart?

21 A. Yes, sir.

22 Q. Okay. Did they go talk to [REDACTED] and [REDACTED]

23 A. Yeah. They left the triplex, left me there,
24 and then I sat --

25 THE COURT: When you say "they," who is

1 they?

2 THE WITNESS: That would be Pat Porrey
3 and David Stewart.

4 Q. Okay. What happened then?

5 A. I stayed there with Theresa, probably got a cup
6 of coffee or something, and tried to calm down and
7 relax and waited for them to come back.

8 Q. And did Pat Porrey and David Stewart come back?

9 A. Yes.

10 Q. What happened then?

11 A. About 30 minutes later they returned. Pat
12 says, "Come on," tells me to come with. We go back
13 into my bedroom, and he says, "What's happening,
14 man? Did you screw around with [REDACTED] and get
15 caught?" I said, "Look, I don't know what happened
16 over there. I have no idea." I said, "I wasn't
17 messing around with her," this, that, and the
18 other. And he says, "Well, are you sure?" And I
19 said, "Yeah, Pat, I'm sure. I don't have anything
20 to do with this." And he says, "Well --" he's
21 looking at me really hard, and he says, "Well, [REDACTED]
22 says that it was you." And I said, "Well, [REDACTED] s
23 crazy. I didn't --" you know, "Your mom woke me
24 up. The dude left in a car. I don't know why
25 [REDACTED] s saying this, but we need to go straighten

1 this out now before things get out of control."

2 He's just looking at me really hard, kind of
3 like staring me down or something. You know, I
4 said, "Let's go. Let's go take care of this now."
5 And he says, "Well, [REDACTED] says that he thinks that
6 it's you, but he's not sure that it's you." And I
7 said, "Well, we still need -- let's call the police
8 and let's do whatever it takes to get this
9 straightened out." And, you know, I might have even
10 been a little verbally threatening [REDACTED] at that
11 particular time because I was upset about it. Like
12 I said, to me, to be accused of that, was pretty
13 devastating and I wasn't happy.

14 Q. But at that point Patrick Porrey told you that
15 [REDACTED] really wasn't sure it was you?

16 A. Yes, sir. The words that I remember Pat using
17 were that "he thinks it's you, but he is not sure."

18 Q. And have you talked to Pat Porrey since that
19 night?

20 A. No.

21 Q. Have you seen Pat Porrey since that night?

22 A. No.

23 Q. Were you arrested that night or that early
24 morning?

25 A. Yeah, I was arrested that evening, that -- I

1 guess 4 o'clock in the morning, 5 o'clock in the
2 morning, somewhere around then.

3 Q. It would have been July 15th?

4 A. Yes, sir.

5 Q. What day of the week was that?

6 A. Friday. The 15th would be the Saturday,
7 Saturday morning; Friday night on the 14th.

8 Q. Tell us about your arrest. What happened?

9 A. Well, after that conversation with Pat, we had
10 went out. David was still there. He was standing
11 there with Theresa. We went out -- we all went out
12 front to have a cigarette. Theresa stayed inside.

13 We were standing out in the parking lot area
14 discussing basically what happened, what we thought
15 was happening, and, you know, thought maybe she was
16 screwing around on her boyfriend and got caught,
17 didn't understand everything that took place, and
18 they had -- at that point I still wanted to go talk
19 to talk to [REDACTED], I wanted to straighten this out,
20 and essentially they talked me out of it saying,
21 "Look --" apparently David Stewart was with Pat
22 when they talked to [REDACTED] and [REDACTED] where he said
23 "I think it's Kevin, but I'm not positive," this
24 and that. You know, the whole thing, that they got
25 me calmed down, it seemed like nothing was going to

1 take place. They said nothing's going to happen.

2 We finished our cigarettes. We came back
3 inside. We were inside maybe five, six minutes,
4 couldn't have been more than 10. There was a knock
5 at the door. I remember thinking that it was David
6 Stewart at that point maybe come over to say
7 something else or whatever. He had went home when
8 we came in from finishing our cigarette.

9 I went to the door. I was closest to the
10 door. We were all in the kitchen area. I went to
11 open the door. There was about seven, eight Largo
12 police officers there, and they said, "Kevin, can we
13 talk to you a minute?" I said, "Sure." And I took
14 one step outside the door and I was grabbed and
15 handcuffed. And the officer told me, said, "We
16 found your fingerprints," pointing to [REDACTED]'s door,
17 "on that door. You've been convicted of burglary
18 before and we know you're the one who did this." At
19 that point I was surrounded, like I said. They
20 pretty much bent me over and took me to a squad car.

21 Q. Did you deny doing it?

22 A. Yes, sir.

23 Q. And the evidence at trial indicated the police
24 found a knife in your bedroom. Was that yours?

25 A. No, sir.

1 MR. FISHKIN: Asked and answered, Your
2 Honor.

3 THE COURT: Sustained.

4 Q. Did that knife have any blood on it?

5 A. As far as I know, FDLE tested it, and no blood.

6 Q. When you were arrested, sir, did the police --
7 where did they take you?

8 A. They took me to the Largo police station there
9 on East Bay, and I don't know where the crossroad
10 is. I think it's Missouri.

11 Q. Did you deny that you were involved in the
12 wrongdoing that night?

13 A. Yes, sir.

14 Q. Did the police give you your Miranda warnings?

15 A. Yes, sir.

16 Q. Did they tell you you have a right to an
17 attorney?

18 A. Yes, sir.

19 Q. Did you ask for an attorney?

20 A. Yes, sir.

21 Q. What happened then?

22 A. Well, they told me I would -- I explained to
23 them that --

24 MR. FISHKIN: Excuse me, Your Honor. I
25 don't think there's a claim here that there was a

1 Miranda violation or a Sixth Amendment violation,
2 deprivation of counsel.

3 THE COURT: Where are we going,
4 Mr. Gillick?

5 MR. GILLICK: Judge, I'm saying that he
6 was fully cooperative with the police subsequent
7 to his arrest.

8 THE COURT: All right. Continue.

9 A. When they brought me to a little holding cell
10 there, they asked me if I'd -- first they explained
11 that I was being charged with kidnapping, attempted
12 homicide, sexual battery, armed burglary, and a
13 convicted felon in possession of a firearm. They
14 asked me if I wanted to talk about this, and I
15 explained that this was -- I said, "You guys just
16 rattled off some serious stuff, and obviously I'm
17 sitting here in handcuffs. We have a problem." I
18 said, "I would like an attorney. Is there an
19 attorney here that I can --" I said, "I'd be happy
20 to answer any questions if there's an attorney
21 present."

22 I've been arrested before, represented by Ky
23 Koch, and he had advised me that if I'm ever
24 arrested or in any type of situation being
25 questioned to ask for an attorney, so that's what I

1 did. I explained that to them.

2 THE COURT: Let me stop you here,
3 Mr. Gillick, and take a morning recess. Why
4 don't we come back at 11 o'clock?

5 (Recess at 10:43 a.m., until 11:04 a.m.)

6 THE COURT: Please continue,
7 Mr. Gillick.

8 MR. GILLICK: Thank you, Your Honor.

9 Q. Mr. Herrick, what was the attitude of the Largo
10 police officers when you informed them that you
11 would talk to them but you wanted a lawyer first?

12 A. He didn't understand that. He questioned me as
13 far as, "What do you mean you'll cooperate --" what
14 I had told them is, "I'll cooperate with you any way
15 that I can, but I won't answer any questions until
16 an attorney's present," and he said, well --

17 THE COURT: Let me say, Mr. Gillick,
18 there's no Edwards violation alleged in this
19 case, and to the extent that we're going to go
20 into whether there is or there is not, I'm
21 certainly not going to consider the conduct of
22 the Largo Police Department in connection with
23 this matter.

24 MR. GILLICK: I understand, Your Honor.
25 And I am --

1 THE COURT: At least in connection with
2 the interrogation of the Petitioner.

3 MR. GILLICK: Okay.

4 Q. Mr. Herrick, did you volunteer to give any
5 evidence to the Largo police officers?

6 A. Yeah. About 30 minutes after our initial
7 conversation, they came to the holding cell that I
8 was in, Officer Joyner and Officer Crosby, I believe
9 that it was, and asked me if I would consent to
10 giving hair samples.

11 Q. Did you?

12 A. Yes, sir.

13 Q. Voluntarily?

14 A. Yes, sir. And I told them that it may help
15 prove my innocence. Take whatever you need.

16 Q. Mr. Herrick, were you taken to the Pinellas
17 County jail that day, July 15th of 1989?

18 A. Yes, sir.

19 Q. Have you been incarcerated since?

20 A. Yes, sir.

21 Q. And did you go to trial right away?

22 A. No, not right away.

23 Q. How long was it before you got to trial?

24 A. The trial was October 2nd and 3rd of 1990.

25 Q. About 15 months later?

1 A. Yes, sir.

2 Q. Were you able to hire an attorney initially?

3 A. No, sir, initially, no.

4 Q. Were you appointed an attorney?

5 A. Yes. I was appointed a public defender,
6 Mrs. Jane Brown.

7 Q. And did Ms. Brown come to see you right away?

8 A. It seemed like about two weeks after I'd been
9 there.

10 Q. Did you tell attorney Jane Brown of your
11 version of events?

12 A. Yes, sir.

13 Q. Did Ms. Brown discuss the evidence with you?

14 A. She discussed a bloody palm print.

15 Q. What were you told about that?

16 A. That apparently a bloody palm print was found
17 at the scene on a sliding glass door; that if it was
18 mine, I would be convicted.

19 Q. What did you tell her?

20 A. I told her it wasn't mine. It couldn't be
21 mine. I wasn't there.

22 Q. Did Ms. Brown tell you about an alleged bloody
23 knife or clothes?

24 A. At our initial meeting, no, I don't believe
25 that she mentioned anything like that in our initial

1 meeting. That came later on. She had said that the
2 police had found a bloody knife and bloody clothes
3 in my room, which I was completely blown away with.
4 I didn't understand that at all. I never knew where
5 that came from.

6 Q. Well, was there a bloody knife or bloody
7 clothes in your room?

8 A. No, sir.

9 Q. Did Ms. Brown take notes while she talked with
10 you?

11 A. A little bit, yeah. I would say yeah. It
12 wasn't a very long conversation. Most of her
13 dealing with me when she first came in was that she
14 wanted to add up my prior record to determine what
15 my guideline score sheet would be -- score would be
16 to where we could negotiate a deal, at which point I
17 told her, "I'm not interested and I didn't do
18 anything," was my -- you know, I was very adamant
19 about it, that I wouldn't be taking a deal. I would
20 be going to trial if this even went that far. I
21 didn't have any idea it would go that far. I
22 figured ten days they'd figure out I didn't do
23 this. At that point in time, I still had no idea
24 that it was [REDACTED] or [REDACTED] making an identification
25 of me as being the person who did this.

1 Q. Okay. And was your matter set for trial by
2 Ms. Brown?

3 A. Yes, sir.

4 Q. When was it initially set?

5 A. I think the initial -- there was a pretrial
6 hearing on October 9th of 1989, and then she had
7 scheduled trial for January 23rd, 1990.

8 Q. Were you looking forward to trying this in
9 January?

10 A. Was I looking forward to doing it?

11 Q. Yes.

12 A. Going to trial?

13 I wasn't looking forward to going to trial on
14 it, but I wanted to get the matter resolved.

15 Q. And did you advise your public defender to
16 waive or not waive your speedy trial right?

17 A. To not waive. It was unequivocal on October
18 9th that I wanted to go to trial within that 180-day
19 period of time. I did not want to sit in the county
20 jail forever and basically wait a year, two years to
21 go to trial.

22 Q. Was your right to a speedy trial waived by
23 someone?

24 A. Yes, by Jane Brown.

25 Q. Were you present when that occurred?

1 A. No, sir.

2 Q. How did you come to find out about that?

3 A. Well, when -- in that particular -- Pinellas
4 County jail, when you're leaving the -- when you go
5 to court for a pretrial, you're essentially kept in
6 a holding cell. I never seen the courtroom until
7 the day I went to trial. When the bailiff comes and
8 gets you, he hands you what they call a trip
9 ticket. They walk you to an elevator with a trip
10 ticket, and when they put you on the elevator, they
11 hand you the trip ticket to give to the bailiff when
12 you get down to the floor.

13 I looked at that and noticed the trial date had
14 been set for January 23rd. By my rough
15 calculations, it was like 11 days over the 180-day
16 period. At that point in time, I knew that she had
17 waived my speedy trial rights and then became upset
18 with her.

19 Q. You were arrested in July and set for trial the
20 following January. Had Ms. Brown provided you with
21 any police reports, depositions, or laboratory
22 reports, or any type of discovery materials?

23 A. No, sir.

24 Q. Had you at that point seen a police report, lab
25 results --

1 A. No, sir.

2 Q. -- depositions?

3 A. No, sir. After that October hearing, I asked
4 my sister Lori, who testified earlier, to at least
5 go get me a police report from the Largo Police
6 Department 'cause I didn't know what was being
7 said. Up until that time in October, no depositions
8 or anything had been taken. None of the laboratory
9 testings that we now know were done had not been
10 completed at that point in time.

11 Q. After you discovered that your trial had been
12 set for January 23rd, did it go on January 23rd?

13 A. No, sir.

14 Q. Why not?

15 A. About the 17th of that January, Ms. Brown came
16 to me in the jail there, regular attorney visit-type
17 situation. At that point she informed me that David
18 and Pat had not yet shown up for their -- they were
19 scheduled for deposition testimony like December 5th
20 and they hadn't shown up, she had to reschedule it,
21 and essentially said she wasn't going to be ready by
22 the 23rd and she was going to have to postpone it.

23 Q. Did that upset you?

24 A. I wasn't very happy about it, no.

25 Q. What did you do? Did you continue with the

1 public defender's office?

2 A. Well, at that point, no. When I returned to
3 the jail cell, I ultimately talked to my parents and
4 talked to Ed Leinster, and they ultimately retained
5 him.

6 Q. How did you come to hear of Ed Leinster?

7 A. Through an inmate, William Pettit, who was in
8 the jail in the particular quad that I was in. He'd
9 been in there since I was in there. He was there
10 before me.

11 Q. Did he refer you to Mr. Leinster?

12 A. Yes. Throughout the time that we were in the
13 jail, at that particular time, he, you know, talked
14 about how good his attorney was, essentially he was
15 getting some DNA evidence thrown out of his case,
16 and this is the guy to have, and this, that, and the
17 other.

18 Q. Do you know where Mr. Leinster was officed?

19 A. I knew he was in the Orlando area. I don't
20 know where his office is, but --

21 Q. Did this Mr. Pettit call Mr. Leinster for you?

22 A. Yes, he did.

23 Q. And put you on the phone with Leinster?

24 A. Yes, he did.

25 Q. Did you talk to Leinster?

1 A. Yes, I did.

2 Q. Did you explain your case to him?

3 A. Explained it as well as I could at the time.
4 The knowledge that I had was essentially very
5 limited. By that time, I had acquired the police
6 report from my sister. The depositions that Jane
7 Brown had taken in that earlier part of December she
8 didn't provide me a copy with and she wouldn't let
9 me read them when we had our visit on the 17th, so I
10 still knew next to nothing about what was being
11 said, who was saying what, and this, that, and the
12 other.

13 I explained essentially what had happened to me
14 from arriving at the Porreys to my arrest, and to
15 this date why I was not going to trial on the 23rd
16 as was expected, 'cause he asked me, "When's your
17 trial date?" I said, "The 23rd." I said, "But it's
18 going to be postponed now because Ms. Brown's not
19 ready to go. She hasn't got these depositions from
20 Pat and David yet," this, that, and the other.

21 Q. Okay. The police report that your sister got
22 from the Largo Police Department, was that the
23 complete police file?

24 A. No, sir. That was simply Officer Brian
25 LaVigne's report.

1 Q. It didn't have the supplemental reports or any
2 laboratory results?

3 A. No, sir.

4 Q. And did Mr. Leinster ask you to write anything
5 down for him?

6 A. Yeah. In our initial conversation, our initial
7 phone conversation, at that particular time he said,
8 "Well, look, you need to --" I explained that I
9 need my parents -- you know, to talk to my parents
10 because I didn't have any money at that particular
11 time. I'd been in jail, and prior to that I
12 wouldn't have had enough money to hire an attorney
13 anyway. So our initial conversation was about
14 that.

15 My parents had spoke with him. I called them,
16 I talked to them, told them, "At least talk to the
17 guy. His price is reasonable, \$7,500. He'll take
18 payments, whatever the case may be," and explained
19 to my mom that basically I wasn't very excited about
20 Jane Brown. I didn't think that I would be
21 represented very well simply because her whole thing
22 was to take a deal.

23 Ultimately, through another conversation, once
24 they decided to hire Ed, I talked to him again. He
25 says, "Look, write everything down, write to me what

1 happened," and such and such. I wrote a letter
2 explaining essentially what had taken place up until
3 that point in time. I had also sent him -- he
4 wanted the particular police report that I had
5 'cause I told him -- he said, "Well, what do you
6 have?" I said, "I got this police report my sister
7 got me." He said, "Well, send that with it too so I
8 know what's going on." So I wrote everything down
9 and sent that to him.

10 Q. And we heard testimony that a Charles Tiffany
11 came to visit you first. Is that correct?

12 A. Yes, sir.

13 Q. Did you see Mr. Leinster in January or February
14 of 1990?

15 A. No, sir.

16 Q. Who was Charles Tiffany?

17 A. I'm guessing that in about --

18 MR. FISHKIN: I object to his guessing,
19 Your Honor.

20 THE WITNESS: Figure of speech.

21 Q. Do you know who Mr. Tiffany is?

22 A. Yes, sir, I do.

23 Q. Who is he?

24 A. Mr. Tiffany is an associate of Mr. Leinster's,
25 an attorney out of, I believe, Kissimmee, Florida.

1 Q. Did he visit you in the Pinellas County jail?

2 A. Yes, sir.

3 Q. And did you explain to him what you knew about
4 your case and your situation?

5 A. Yes, sir. I went through from the time that I
6 came to the Porreys' residence to the day that he
7 came in and talked to me.

8 Q. Did Mr. Tiffany take notes?

9 A. Yes, sir, he did.

10 Q. Have you ever seen those notes again?

11 A. No, sir.

12 Q. Are those notes included in the file that your
13 sister got from Mr. Leinster's office?

14 A. No, sir, they were not.

15 Q. Is the letter and notes that you sent to
16 Mr. Leinster included in Mr. Leinster's file that
17 your sister obtained?

18 A. No, sir. I don't believe there was any letters
19 from me that I had wrote to Mr. Leinster in those
20 files -- in that particular file.

21 Q. Do you have any idea of how many times you
22 wrote to Mr. Leinster?

23 A. I couldn't even venture to guess. Maybe six
24 times, if that. The initial letter was quite long
25 explaining things, 15-, 20-page typed letter trying

1 to explain what had happened to me.

2 Q. In your --

3 A. Nothing else was there.

4 Q. -- letters to Mr. Leinster or in the
5 information you gave to Charles Tiffany to provide
6 to Mr. Leinster, did you indicate that Patrick
7 Porrey, David Stewart, and Theresa Porrey could back
8 up your version of events?

9 A. Yes, sir.

10 Q. Did you indicate that the alleged victims,
11 Ms. [REDACTED] and Mr. [REDACTED], had both indicated --
12 that neither one of them had identified you
13 initially?

14 A. Yes.

15 Q. Did you indicate in your correspondence and
16 discussions with Mr. Leinster or Mr. Tiffany that
17 the alleged victims admitted to these people that
18 they were not sure of their identification of you?

19 A. Yes, sir.

20 Q. Did you indicate that Patrick Porrey and David
21 Stewart would be important witnesses for you?

22 A. Yes.

23 THE COURT: Mr. Gillick, I am not
24 certain that you have laid a sufficient
25 foundation as to what information the defendant

1 possessed relayed by Mr. Patrick Porrey or
2 Mr. David Stewart about the victim's
3 identification of the assailant.

4 MR. GILLICK: Okay.

5 Q. Mr. Herrick, you previously discussed that when
6 you initially came out, David Stewart was out, and
7 [REDACTED] was outside screaming when Theresa
8 Porrey came and got you initially --

9 A. Uh-huh.

10 Q. -- that night of the incident.

11 Was David Stewart present?

12 A. Yes, he was.

13 Q. Theresa Porrey present at that time?

14 A. Yes, she was.

15 Q. And did you indicate to your attorneys that
16 both of them would be witnesses that [REDACTED]
17 did not identify you as the perpetrator at that
18 time?

19 A. Yes, sir. There was only -- I mean, that's
20 what happened. I explained to him what had happened
21 to me. David must have -- had to have been there.
22 He was there, so he would have to be a witness.

23 Q. And very shortly after the people that were
24 just described were there, you indicated that [REDACTED]
25 [REDACTED] came up the sidewalk from allegedly

1 chasing someone; is that correct?

2 A. Yes, sir.

3 Q. Was Theresa Porrey, Mr. Stewart, were they both
4 present when --

5 A. Yes, sir.

6 Q. -- David came up?

7 A. Yes, sir, when [REDACTED] came up.

8 Q. [REDACTED]. And were they present when [REDACTED]
9 [REDACTED] indicated that he had chased the
10 perpetrator who got in a car?

11 THE COURT: Let me go back a moment and
12 tell you what I'm interested in, Mr. Gillick.
13 The witness has testified that Mr. Patrick Porrey
14 was not present initially when [REDACTED]
15 reported that she'd been attacked but that he
16 came later and eventually woke up Mr. Herrick a
17 second time.

18 It's that series of events when
19 Mr. Herrick was awakened the second time that I'm
20 speaking about, and it's my understanding from
21 his testimony that Patrick Porrey and David
22 Stewart were present at that time and went to go
23 see the victims. If you are saying that either
24 Patrick Porrey or David Stewart have some
25 information about the identifications made by the

1 victims of the assailant, you have not presented
2 much detail regarding that aspect.

3 MR. GILLICK: I'll get to that right
4 now.

5 Q. After Patrick Porrey came home that night, you
6 indicated that you had some conversation with him
7 and that he and David Stewart came to talk to you.
8 Is that right?

9 A. Yes. The first time they spoke to me, Pat,
10 David, and Theresa Porrey were present in the
11 bedroom when Pat woke me up and told me that --

12 Q. And then after you denied any involvement in
13 the wrongdoing, who went over to talk to Ms. [REDACTED]
14 and Mr. [REDACTED]?

15 A. Pat Porrey and David Stewart. Theresa and I
16 stayed at the triplex.

17 Q. And Pat Porrey and David Stewart subsequently
18 came back together?

19 A. Yes, sir.

20 Q. Indicated they had talked to [REDACTED] and
21 [REDACTED]; is that correct?

22 A. Yes, sir.

23 Q. And then you and Pat Porrey went into a
24 bedroom; is that correct?

25 A. Yeah, my bedroom.

1 Q. Did Mr. Stewart stay outside?

2 A. Yes. He stayed, as far as I know of, with
3 Theresa in the kitchen.

4 Q. Is my recollection correct that Patrick Porrey
5 indicated to you that Mr. [REDACTED] acknowledged that
6 he was not sure of your being a suspect?

7 A. That is correct.

8 Q. This was after he and David Stewart had gone to
9 talk to [REDACTED] and [REDACTED]; is that correct?

10 A. Apparently, they had spoke to [REDACTED] and [REDACTED]
11 twice. When Pat originally came home from wherever
12 he was at, found out that something happened, went
13 and spoke to [REDACTED] and [REDACTED], came and woke me up,
14 spoke to me, went and spoke to [REDACTED] and [REDACTED]
15 again, came back and talked to me in the bedroom
16 privately. Then we went out front and had a
17 cigarette and discussed things, came back in, and
18 the police came and arrested me. That's the
19 sequence.

20 Q. Did you provide that information to
21 Mr. Leinster in writing?

22 A. Yes, sir. Yeah. I provided it to Jane Brown,
23 to her investigator, to Mr. Tiffany, to
24 Mr. Leinster. Anybody who would ask me any
25 questions about this, they knew that that's what I

1 said took place.

2 Q. Did you indicate to Mr. Leinster at that time
3 in writing or through Mr. Tiffany the importance of
4 these witnesses as to your defense?

5 A. I think it was self-explanatory. If I
6 specifically said, "This is a crucial key witness to
7 me," I don't know what a key witness is. I don't
8 think I would say that. I think I'd just describe
9 it as, "This is what happened. These people are
10 going to have to testify on my behalf if this goes
11 to trial."

12 Q. Did you tell Mr. Leinster through
13 correspondence or through Mr. Tiffany that you had
14 voluntarily given hair samples to the police?

15 A. Yes. Yeah. Yes, you know.

16 Q. Did you think that was important?

17 A. Yeah. I put the same weight on that. I told
18 them what happened. I said, "When they came and
19 asked me, I gave them hair. They plucked hair from
20 the pubic region and the head." You know, I said,
21 "Obviously, some type of evidence was left on the
22 scene." And like I told them there when they took
23 it, it may prove my innocence, you know, it's like
24 everything else, like Theresa waking me up.
25 Everybody needs to testify to this.

1 Q. Did you indicate to Mr. Leinster in writing or
2 through Mr. Tiffany, his associate, that you left no
3 bloody prints in that apartment?

4 A. I indicated to Mr. Leinster and Mr. Tiffany and
5 everybody else, Jane Brown, that my fingerprints
6 were not in that apartment because I was not in that
7 apartment. There could not be a bloody print of
8 mine, that -- you know, Jane Brown was, "Well, if it
9 comes back, you're going to get life." And I said,
10 "You don't need to worry about it because I know
11 that they're not my prints. I was not there."

12 Q. Did you indicate to Mr. Leinster personally or
13 in writing and through Mr. Tiffany that there would
14 be no blood found on any clothes or a knife taken
15 from your room?

16 A. As far as the knife, I didn't understand where
17 a knife had come from. I knew that my personal
18 clothes particularly, my clothes would not have
19 blood on them because I didn't stab [REDACTED]. I wasn't
20 involved in this. There was no way for my stuff to
21 have blood on them. When I was informed that there
22 was bloody clothes, it blew me away; just as when I
23 was informed that [REDACTED] and [REDACTED] identified me as
24 the person attacking them, I was totally perplexed.

25 When I was arrested, the police officer, Well,

1 we have two eyewitness identifications of you. I
2 didn't know it was [REDACTED] and [REDACTED]. I never
3 dreamed it could be [REDACTED] and [REDACTED] because they
4 didn't say anything or do anything. I said, "How
5 could two people identify me? How could there be
6 bloody clothes in my room? How could a bloody palm
7 print be on there when it's not mine? I know it's
8 not mine. I was in bed sleeping when Theresa Porrey
9 woke me up."

10 Q. Now, you indicated Mr. Leinster didn't come to
11 the initial meeting. He sent someone named Charles
12 Tiffany. Would that have been in January or
13 February of 1990?

14 A. That's what I was saying. I was guessing it
15 was early February, March -- or February, 1990 when
16 he came there.

17 Q. When did you first see Ed Leinster?

18 A. I believe it was May 2nd, 1990.

19 Q. What was that occasion?

20 A. The trial that was scheduled for January 23rd,
21 I'm not sure if Ed had postponed that one or Jane
22 Brown had, but it ultimately came out to be
23 rescheduled for May 2nd, 1990.

24 Q. And that date when you were scheduled to go to
25 trial is the first time you saw Mr. Leinster?

1 A. Yes, sir.

2 Q. Had you talked to Mr. Leinster over the phone
3 prior to that?

4 A. Yes, we had spoke over the phone.

5 Q. How many times, roughly?

6 A. I would say three to four times, maybe more
7 than that. The initial time that I spoke to him was
8 a long conversation. The second time where he had
9 told me, "Go ahead write down -- write me a letter
10 telling me what happened." The times after that
11 were simply I would call his office. Some of the
12 times he would be there; most of the time, he
13 wouldn't be. His secretary, Gina Blinkey, I think
14 was her last name, or Binkley, would answer and say,
15 "He's not here," or she wouldn't accept the call.

16 I spoke to him a couple of times throughout
17 that time. I essentially was -- up till that time
18 he was like trying to find out information. He'd
19 say, "I don't -- you know, I'm still waiting. I'm
20 getting the case file from the PD's office," and
21 stuff like that, and essentially didn't know
22 anything. He knew as much as me, which he was able
23 to glean from the police report that I'd sent him.

24 Q. Did Ed Leinster ever provide you with a full
25 set of police reports?

1 A. No.

2 Q. Did you ever discuss the police reports in any
3 detail with him?

4 A. No, sir. I didn't discuss anything with him.

5 Q. Did Mr. Leinster ever provide you with
6 deposition copies?

7 A. No, sir.

8 Q. Did you ever specifically request copies of
9 depositions from Mr. Leinster?

10 A. Yes.

11 Q. What did he tell you?

12 A. Told me that they were 45, 50 pages apiece, and
13 he really wasn't going to copy them and send them to
14 me. He didn't have time to do that.

15 Q. Did Mr. Leinster provide you with any
16 laboratory reports or fingerprint analysis?

17 A. No, sir.

18 Q. None at all?

19 A. None.

20 Q. Did you receive anything from Ed Leinster?

21 A. The only thing I received from Ed Leinster was
22 little like memo messages that I'd be going to court
23 on a particular day. Any documentation, I never
24 received any documentation from Ed. I don't think
25 he ever wrote me a letter or anything like that.

1 Q. You indicated that your case was scheduled for
2 trial on May 2nd of 1990. Did you expect to go to
3 trial at that time?

4 A. I expected to have problems because William
5 Pettit, the inmate who initially introduced me to Ed
6 Leinster, was scheduled to go to trial on May 2nd,
7 also.

8 Q. Did Mr. Leinster ever tell you you would or
9 would not be going to trial on May 2nd?

10 A. No. Up until -- prior to that, we had a hard
11 time getting ahold of him, and essentially that day
12 he came and told me we weren't going to trial on
13 that date.

14 Q. On May 2nd, when you were set for trial, you
15 indicated Mr. Leinster came and told you that the
16 trial was not going to go that day.

17 A. Yes.

18 Q. Did he explain why?

19 A. I believe he stated that he had another trial
20 with William Pettit.

21 Q. At that time, did you ask him --

22 A. We were in conflict.

23 Q. At that time, did you ask Mr. Leinster, on May
24 2nd, for any discovery or reports?

25 A. After being told that he wasn't going to

1 provide me with the depositions, I didn't know what
2 to ask him for anymore. I'd ask him about -- you
3 know, "What about the hair analysis?" He said, "It
4 isn't done yet," or what have you. You know, "What
5 about the fingerprints?" "They aren't complete.
6 They haven't tested them yet."

7 THE COURT: Let me interrupt you for a
8 moment. On the May 2nd meeting with
9 Mr. Leinster, even though you say he did not
10 provide you with any copies of any depositions,
11 did you discuss any depositions with him, or the
12 results of the depositions, or what the deponents
13 said about the events the night the crime
14 occurred?

15 THE WITNESS: No, Your Honor. He showed
16 up. At that time, he asked me to sign a piece of
17 paper acknowledging that my trial would be
18 postponed at that point. We didn't -- it was
19 maybe a 15-minute conversation, if that. The
20 facts of my case weren't discussed at all at that
21 time.

22 THE COURT: During your phone
23 conversations up to May 2nd, do you recall
24 speaking to him about what the deponents said
25 about your case or what the State's evidence was

1 about your case?

2 THE WITNESS: No, sir. Up until -- in
3 that area of time when I could get ahold of him
4 on the telephone, he was telling me that he was
5 still waiting to get the public defender's file
6 that Mrs. Brown had made and maintained in my
7 case. Until he got that, there was nothing he
8 could do.

9 THE COURT: Well, when you saw him on
10 May 2nd, he was in Pinellas County, of course;
11 was he not?

12 THE WITNESS: Yes, he was.

13 THE COURT: Did he say to you that he
14 had the file or that he was going to get the
15 file?

16 THE WITNESS: I don't believe that it
17 was discussed at that time. Like I say, he just
18 came with a piece of yellow -- yellow piece of
19 legal paper to get me to acknowledge that my
20 trial would be postponed at that point in time.

21 THE COURT: All right.

22 Q. As far as depositions, did Ed Leinster himself
23 take any depositions in your case?

24 A. No, sir, excluding a videotape deposition of
25 Theresa Porrey.

1 Q. And that was taken the day before your trial in
2 October, wasn't it?

3 A. Yes, sir, October 1st, 1990.

4 Q. Who took the depositions of any witnesses in
5 this case?

6 A. Jane Brown.

7 Q. The public defender?

8 A. Yes, sir.

9 Q. And did she ever provide you with copies?

10 A. No, sir.

11 Q. Did she ever discuss what had occurred at the
12 depositions?

13 A. No. When she came on the 17th, January 17th,
14 before the January 23rd, 1990 trial date, she had
15 [REDACTED] and [REDACTED]'s depositions with her. I
16 attempted to ask her questions at that point in
17 time. She would begin looking through the --
18 actually, I had asked her, "Can I read the
19 depositions? Can I have them? Can you give me a
20 copy of these so I can see what's going on?" She
21 said, "I can't copy them to you." And I said,
22 "Well, can I read them now?" And she said, "No. I
23 don't have time to sit here with you while you read
24 them. They're pretty thick." You know, I said,
25 "Well, let me take them back to my cell so I can

1 read them." She said, "No, I'm not going to let
2 these out -- you can't take them back to your cell.
3 Somebody might take them from you." She said, "Just
4 ask me some questions."

5 At that point in time, I don't know enough
6 about the facts of the case to ask anything
7 intelligent. I asked her questions: Well, you
8 know, what about the tag number? The guy's saying
9 he left him the -- [REDACTED]s saying he left him the
10 tag number, the guy left him the tag number. She'd
11 start looking through the depositions and couldn't
12 find it.

13 I said, "Well, what about the palm print?
14 Did you guys get this stuff back? Who's describing
15 what?" And that's where she's telling me, "Well,
16 this particular description, [REDACTED] says that he
17 looks one way, his hair's slicked back, and [REDACTED]
18 says that the guy's got long, curly hair; and one
19 says he's wearing a shirt, the other says he's not
20 wearing a shirt," this, that, and the other.

21 At the time I didn't know what to ask her, I
22 had no idea, and she didn't know what to tell me.
23 And she wouldn't let me have the depositions to
24 where I could go ahead and look at them.

25 THE COURT: Mr. Gillick, are you

1 planning on calling Mr. Doherty as a witness in
2 this case?

3 MR. GILLICK: Yes, Your Honor.

4 THE COURT: Well, he's in the back of
5 the courtroom.

6 MR. GILLICK: Oh, he is?

7 THE COURT: If you want to go ahead and
8 talk to him, you're more than welcome to.

9 MR. GILLICK: Wait outside. Thank you

10 (Mr. Doherty retires from the courtroom)

11 Q. And was your May 2nd trial date continued?

12 A. Yes, sir, it was.

13 Q. When was it set then?

14 A. I'm not positive if there was another one set
15 for June something or another. I may have had one
16 set for June. The next one that I positively
17 remember being was set for July 3rd and July 5th. I
18 remember that specifically, because they would start
19 on July 3rd, take off for July 4th, and come back on
20 the 5th.

21 Q. Okay. Did Mr. Leinster come and see you or
22 talk to you again between May 2nd and this July
23 trial date?

24 A. On July 3rd, he came up to the jail, you know,
25 ready to go to trial, except he wasn't ready to go

1 to trial.

2 Q. He said that who wasn't ready?

3 A. He'd asked me -- basically, what he said was
4 that Theresa Porrey hadn't shown -- or not hadn't
5 shown up, but she [sic] hadn't gotten the videotape
6 deposition yet, and that it was my choice to go to
7 trial without that videotape or postpone.

8 Q. Did you ask him about a deposition of Patrick
9 Porrey or David Stewart?

10 A. No.

11 Q. And did Mr. Leinster provide you with any
12 discovery materials at your July meeting?

13 A. No.

14 Q. How long did you talk to Mr. Leinster at the
15 July meeting?

16 A. Probably 15, 20 minutes, long enough for him to
17 come in and tell me -- give me my choice of whether
18 or not I wanted to proceed at trial at that point or
19 not.

20 Q. What was Ed Leinster's appearance, physical
21 appearance at that time?

22 A. Well, longish hair, parted in the middle,
23 combed back, mustache, beard.

24 Q. And at some point did you talk to Ms. -- did
25 Mr. Leinster ever discuss with you whether you

1 should or should not testify at your trial?

2 A. That was discussed in our first conversation,
3 first telephone conversation. He asked me if I had
4 a prior record. I explained somewhat of my criminal
5 history, as far as burglary with my parents' house
6 and stuff of that nature. He said, "Well, you can't
7 testify then, 'cause once they find out you're a
8 convicted felon, they'll convict you."

9 Q. Did he go into detail about the nature of your
10 prior convictions?

11 A. I didn't ask that much questions about it. It
12 was just, you know, You're a convicted felon. You
13 can't testify.

14 Q. Did he ask you your opinion or impression about
15 testifying?

16 A. No.

17 Q. Did he explain to you why he felt you could not
18 testify?

19 A. No, sir, other than, "You'll be convicted
20 because you're a convicted felon."

21 Q. And when did you actually go to trial?

22 A. On October 2nd and October 3rd of 1990.

23 Q. About 15 months after your arrest?

24 A. Yes, sir.

25 Q. And did you talk to Mr. Leinster the day

1 before?

2 A. The day before? No, sir.

3 Q. Yes.

4 A. The day of the trial.

5 Q. The week before?

6 A. No, sir.

7 Q. Did you meet with Mr. Leinster at all after
8 this brief July conference with him?

9 A. No, sir.

10 Q. Did you talk to him by phone?

11 A. I'm sure we spoke roughly by phone.

12 Q. Did Mr. --

13 A. I don't know the number of times. It was
14 difficult to get ahold of Mr. Leinster on the
15 telephone by that point. At one point I asked my
16 mother to call him because I wouldn't get ahold of
17 him for so long. He decided to call my mother back
18 collect.

19 Q. At that point, prior to your trial in October
20 of 1990, had you ever been through a trial?

21 A. No, sir.

22 Q. Had you ever seen a trial?

23 A. Television.

24 Q. How old were you?

25 A. When I was going to trial? Well, I was

1 convicted on my 24th birthday, October 3rd.

2 Q. Prior to trial, did Mr. Leinster ever sit down
3 with you and discuss the procedure of the trial?

4 A. No, sir.

5 Q. Did you ever discuss the evidence that might be
6 presented at trial by either side?

7 A. No, sir. As far as the discussions on
8 evidence, he had -- through our phone conversations,
9 I knew that the fingerprints did not match me, and
10 we had asked him about the hair analysis, the hair
11 comparisons. At that particular time, I'm sure I
12 didn't use the words "hair analysis." I said, "What
13 about the hair that I submitted, that I voluntarily
14 gave you? You know, what's happening with that?"
15 He said, "It's inconclusive." He said, "It ain't
16 going to help."

17 Q. He told you that the hair analysis was
18 inconclusive?

19 A. Inconclusive.

20 Q. It would not help?

21 A. Yeah.

22 Q. Did he ever show you a report on the hair
23 analysis?

24 A. I had never seen a report until later acquiring
25 them through one of my sisters.

1 Q. This would be after you were convicted?

2 A. This was in -- I believe I acquired them in
3 1995.

4 Q. And did Mr. Leinster ever discuss with you a
5 trial strategy for your defense?

6 A. No, sir. He didn't discuss anything with me.

7 Q. Did he tell you what witnesses he intended to
8 present?

9 A. No.

10 Q. Did you expect that he would present Patrick
11 Porrey and David Stewart, as you had requested?

12 A. It seemed logical, being that they went through
13 this series of events with me. I believed that
14 everybody who was involved in this situation would
15 have testified.

16 Q. Did he ever tell you he was not going to
17 present them?

18 A. No. If he had told me that, I would have never
19 went to trial without them, and Mr. Leinster would
20 have been fired.

21 Q. Did you expect and anticipate that Mr. Patrick
22 Porrey and David Stewart would testify?

23 A. Yes.

24 Q. When the trial started, did you anticipate
25 that?

1 A. Yes.

2 Q. What made you anticipate it at the start of the
3 trial?

4 A. In the initial -- picking the -- going through
5 the panel of jurors, they read everybody's name who
6 was involved in this case, including Pat and
7 David's, mine, I believe they may have even read my
8 parents, Theresa Porrey, police officers, the whole
9 witness list of people, different, who I now know
10 are FDLE technicians, analysis people. I assumed
11 that this was the witness list, and they were asking
12 the jury, Do you know any of these people because
13 they're witnesses in this case? They're going to
14 testify.

15 Q. Do you know when Ed Leinster took Theresa
16 Porrey's deposition?

17 A. October 1st, the day before the trial.

18 Q. Was that a video deposition?

19 A. Yes, sir.

20 Q. Due to her ill health?

21 A. Yes.

22 Q. Did Mr. Leinster show you a copy of her
23 deposition?

24 A. No, sir. I've never seen the video. When they
25 showed it at trial was the first I heard it, and it

1 was positioned in such a way that I couldn't see it
2 being played to the jury.

3 Q. Could you see who was on the video or in the
4 background of the video?

5 A. No, sir.

6 Q. And at the time of trial, the start of your
7 trial, had you ever seen the depositions of [REDACTED]

8 [REDACTED] or [REDACTED]

9 A. No, sir.

10 Q. Any witness at all?

11 A. None.

12 Q. As far as the trial itself, there would have
13 been a jury selection, correct?

14 A. Yes, sir.

15 Q. Did Mr. Leinster explain to you what that was?

16 A. No.

17 Q. Did he explain the importance of it?

18 A. No, sir.

19 Q. Did Mr. Leinster ask your opinion about any of
20 the potential jurors?

21 A. No, sir.

22 Q. Did he talk to you at all while he was
23 selecting a jury on your behalf?

24 A. No, sir.

25 Q. Did he give you a pen and some paper to write

1 notes to him?

2 A. No, sir.

3 Q. In the trial itself, after the jury was
4 selected, did -- obviously, Mr. Leinster
5 cross-examined witnesses. Is that correct?

6 A. Yes, he did.

7 Q. Did he discuss their testimony with you prior
8 to cross-examining them?

9 A. No, sir.

10 Q. Mr. Leinster ask you any questions about the
11 witnesses' testimony?

12 A. No, sir.

13 Q. Did Mr. Leinster ask you if the witnesses had
14 left anything out or said anything that wasn't true
15 during their testimony?

16 A. No, sir. We didn't have any discussion while
17 he was doing that. When they would take a break, I
18 was taken to the holding cell, just like here, and
19 he was gone. He didn't come talk to me, didn't ask
20 me nothing when we were sitting at the table or any
21 other time.

22 Q. When they actually selected jurors and kicked
23 off potential jurors to exercise challenges, were
24 you present for that?

25 A. Yes, sir. At the judge's bench? No, sir.

1 When they exercised cause challenge, stuff like
2 that, no. I was left at the defense table.

3 Q. Mr. Leinster went up without you?

4 A. Yes, sir.

5 Q. Did he ask your opinion or impression about
6 anyone in that jury panel?

7 A. No, sir.

8 Q. And did Mr. Leinster present any physical
9 evidence of laboratory or fingerprint analysis
10 during your trial?

11 A. No, sir.

12 Q. Did he discuss fingerprint or laboratory
13 analysis with you prior to your trial?

14 A. Prior to my trial?

15 Q. Yes.

16 A. The discussion that we had was -- like I say,
17 he told me the results of the hair analysis were
18 inconclusive, the fingerprints didn't match me,
19 which I had told him that to begin with, that
20 they're not going to match me. I told everybody
21 that.

22 Q. Did Mr. Leinster even have copies of any
23 laboratory reports?

24 A. I wouldn't know. I know now from -- through
25 the civil suit that -- I acquired his case file,

1 that the hair analysis reports were not in there.
2 Whether or not the fingerprints, fingerprints from
3 Largo Police Department were in there, I'm not
4 positive. I'd have to look at the index that I had
5 made when I -- as soon as I acquired his case file,
6 I made a index of every document that was contained
7 therein and sent him a copy and asked him to verify
8 that this was what it was. And without looking at
9 that, I don't recall what was exactly in there.

10 Q. Did Mr. Leinster ever show you any photographs
11 of the crime scene?

12 A. No.

13 Q. Did Mr. Leinster even have photographs of the
14 crime scene?

15 A. No. And when Mr. Bulone went to introduce them
16 at trial, Ed got up and essentially said, "I've
17 never seen them," meaning him, that he's never seen
18 them prior to trial. I'd never seen them. I'd
19 never seen them until my sister went down to the
20 courthouse and purchased them for me.

21 Q. That was after your trial?

22 A. Long after my trial.

23 Q. The hair analysis report, you indicated
24 Mr. Leinster told you it was inconclusive?

25 A. Yes, sir.

1 Q. Was it inconclusive as to your hair?

2 A. No, sir, it was certainly not.

3 Q. What did the hair analysis --

4 THE COURT: Let me say, Mr. Gillick, the
5 lab report will speak for itself. If you intend
6 to offer it as evidence, you may do so.

7 MR. GILLICK: Okay.

8 Q. And did Mr. Leinster ever tell you what the
9 fingerprint results were?

10 A. Other than they did not match me, no.

11 Q. Mr. Leinster ever tell you what the blood
12 analysis results were?

13 A. I don't believe Mr. Leinster ever told me that
14 there was really an analysis conducted on them. I
15 don't recall any conversation specifically as far
16 as -- I know that the knife was -- a knife was found
17 and that bloody clothes were supposedly found, but
18 as far as any discussion as to what the results
19 were, I don't recall him ever telling me what they
20 were one way or the other.

21 Q. How long did your trial in state court last?

22 A. Two days.

23 Q. Two full days?

24 A. I don't know the hours of it, what time, you
25 know, 3 o'clock, or what have you, when it was

1 finished.

2 Q. Was the first day a full day?

3 A. It seemed like it. It seemed like it went till
4 like 5:00, 5:00 or so.

5 Q. What happened at the end of the first day of
6 trial? Did you confer with Mr. Leinster?

7 A. No. He left. They took me back to the jail.

8 Q. Did Mr. Leinster come to the jail to talk to
9 you?

10 A. No.

11 THE COURT: Let me interrupt you for a
12 moment, Mr. Gillick. If you would look to -- if
13 you have the Respondent's exhibit list in front
14 of you.

15 MR. GILLICK: Yes.

16 THE COURT: So that there's not a need
17 to duplicate exhibits, if you would look to
18 Exhibit No. 30, the FDLE crime laboratory
19 reports.

20 MR. GILLICK: Yes, Your Honor.

21 THE COURT: Do these include all the
22 crime laboratory reports that are at issue in
23 this case that you say pertain to evidence that
24 should have been admitted or submitted by
25 Mr. Leinster on Mr. Herrick's behalf?

1 MR. GILLICK: Give me just one moment,
2 Your Honor.

3 THE COURT: Unless you intend to
4 introduce everything separately.

5 MR. GILLICK: Can I have just a moment
6 with my client, Your Honor?

7 THE COURT: Sure. I didn't mean to --
8 I'll tell you what, why don't we do this? Why
9 don't you just continue with your examination,
10 and then at the lunch break take your time in
11 reviewing it with him to make certain that --

12 MR. GILLICK: Thank you.

13 THE COURT: -- what I've asked is
14 correct.

15 Q. And at the end of day one, you were taken back
16 to jail, correct?

17 A. Yes, sir.

18 Q. Mr. Leinster did not confer with you that day
19 about what had happened and what you might expect?

20 A. No, sir. I saw him the next morning.

21 Q. The next morning. Did he come to jail, or when
22 did you see him on the second day --

23 A. I'm not positive if he came in that morning
24 into the holding cell to speak with me. I know that
25 he did come in the first morning to speak with me to

1 tell me about the prosecutor's plea bargain offer.

2 Q. Okay. What did Mr. Leinster tell you on day
3 one about the plea bargain offer?

4 A. He said that the State had been offering him
5 plea deals all that morning, starting out around 30
6 years and coming down to five. He said he felt he
7 ought to tell me about that. And at that point I
8 told him, "I can't plead guilty to something I
9 didn't do." He said, "Well, let's go pick a jury."

10 Q. On day two, did Mr. Leinster talk to you before
11 the trial started?

12 A. I'm not sure if he did or not. I don't
13 recall. If it was, it was very short. It wouldn't
14 have been very long, and it wasn't anything of
15 substance because I don't remember it.

16 Q. Did he ever tell you what he intended to
17 present for the defense?

18 A. No, sir.

19 Q. Did he ever tell you that Patrick Porrey and
20 David Stewart were not present and were not going to
21 be witnesses?

22 A. No, sir.

23 Q. At that time, did you still expect they would
24 be --

25 A. Yes.

1 Q. -- witnesses to exculpate you?

2 A. Yes, sir.

3 THE COURT: Did you have any discussion
4 with Mr. Leinster about what the likely sentence
5 would be if you were convicted, namely discussing
6 with him the application of Florida's sentencing
7 guidelines?

8 THE WITNESS: She [sic] told me I'd get
9 life.

10 Q. And then you went on and continued the trial on
11 day two, correct?

12 A. Yes, sir.

13 Q. How long was your conversation with
14 Mr. Leinster prior to commencing the trial on day
15 two?

16 A. I don't know. I'm not sure that we had a
17 conversation that day.

18 Q. Did Mr. Leinster put on any evidence on your
19 behalf?

20 A. He presented the videotaped deposition of
21 Theresa Porrey and then asked me to sign a piece of
22 paper, sign my name on a piece of paper.

23 Q. And you indicated you could not actually view
24 Theresa Porrey's video?

25 A. No, sir.

1 Q. Could you hear it?

2 A. Yes, sir.

3 Q. Did Mr. Leinster ask you any questions about
4 what had been said on the video?

5 A. No, sir.

6 Q. Did you hear any reference to Patrick Porrey on
7 the video?

8 A. I believe at the time I heard Pat's voice on it
9 asking his mother if he's okay -- she's okay.

10 Q. And --

11 A. I remember her asking [sic] a question to, You
12 can ask my son, to a particular question, one that
13 either Mr. Leinster or Mr. Bulone had asked,
14 referred him to ask her son about it. I think it
15 was referring to the kind of stuff that was blocking
16 the sliding glass doors and things of that nature.

17 Q. And then after Mrs. Porrey's testimony and
18 Mr. Leinster had you sign a piece of paper in front
19 of the jury, did you expect Patrick Porrey would
20 testify?

21 A. Yeah. I expected everybody to testify, to
22 continue the trial, continue or what have you. I
23 wasn't sure what was going to happen.

24 Q. What happened then?

25 A. I guess he rested my case.

1 Q. Were you shocked?

2 A. I wouldn't say that I was shocked in that I
3 really didn't understand too much about what was
4 going on, so it was hard to be, you know, shocked as
5 far as, you know, What do you mean, what does that
6 mean? It was more like he rested and they went in
7 to talk about jury instructions and things of that
8 nature, and trying to follow and understand what was
9 taking place was more my concern, as opposed to
10 who's testifying or what's going to happen now.

11 Actually, no, what happened was, the prosecutor
12 had put on [REDACTED] and [REDACTED] for rebuttal testimony,
13 went right into more testimony. Then after they
14 testified, they go into jury instructions, things of
15 that nature, you know.

16 Q. Did --

17 A. It was more like sitting there watching things
18 take place on TV, watching a bunch of people go
19 about their business and not being included in
20 anything, just sit there and be quiet.

21 Q. Did Mr. Leinster then discuss his closing
22 argument with you?

23 A. No.

24 Q. After closing arguments, I assume the jury went
25 out?

1 A. Yes.

2 Q. And did you and Mr. Leinster talk at that time?

3 A. No, sir.

4 Q. What happened?

5 A. They put me in the holding cell, and we waited.

6 Q. Did Mr. Leinster come in and talk to you in the
7 holding cell?

8 A. No.

9 Q. And did the jury come back with any questions?

10 A. The jury came back. They had requested to see
11 Theresa's video again, at which point they brought
12 back into the courtroom -- brought me back into the
13 courtroom. It basically took place. And Judge
14 Downey let them know that there was a jury question,
15 that they wanted to see the video. Nobody had
16 objections. They said okay, brought me back into
17 the holding cell, and that was it. I assume the
18 video was taken into the jury room.

19 Q. Let me back up. Did Mr. Leinster object to the
20 video being taken back to the jury room?

21 A. No, sir.

22 Q. After Mr. -- let me back up. After
23 Mr. Leinster had shown Theresa Porrey's video
24 deposition and had you sign something, did he
25 discuss with you the potential for your testifying

1 on your own behalf?

2 A. No, sir. Since our first conversation where he
3 said, "You can't testify," my testifying never came
4 up again in any of conversations.

5 Q. After the jury took the video into the jury
6 room, how long was it before they came back with a
7 verdict?

8 A. I have no idea. I didn't have a watch. They
9 don't have -- let you have a watch in the county
10 jail, and it wasn't very long, you know. The next
11 thing I knew, the bailiff came and said, "We have a
12 verdict. Come on."

13 Q. What was the verdict?

14 A. They found me guilty.

15 Q. Were you guilty of the crimes?

16 A. No, sir.

17 Q. After you were found guilty, what happened
18 immediately thereafter?

19 A. I was fingerprinted and taken back to the
20 holding cell. Mr. Bulone wanted to have sentencing
21 at that point in time. Mr. Leinster essentially
22 stood up and said he has no idea what my prior
23 record was and hasn't discussed it with me and why
24 not set a presentence investigation. And I was
25 taken back to the holding cell and given a bologna

1 sandwich and a pint of milk and taken back to jail.

2 Q. Did Mr. Leinster come to see you?

3 A. No.

4 Q. Did Mr. Leinster ever come see you --

5 A. No.

6 Q. -- after that?

7 A. No.

8 Q. When was your case set for sentencing?

9 A. It was originally set for sentencing in 30
10 days. Judge Downey had set it off 30 days to, I'm
11 thinking, November 4th. Something like that sounds
12 familiar. It was postponed at that point until like
13 December 6th, December 5th, something around there.
14 We appeared in the courtroom for sentencing on
15 December 5th, at which point Mr. Leinster had filed
16 a motion to vacate some of my prior felonies, at
17 which point he asked for more time.

18 Mr. Bulone responded essentially what
19 Mr. Leinster was trying to do was not going to be
20 successful to begin with, no reason to give any more
21 time. Judge Downey was considerate enough to go
22 ahead -- I remember him telling both Mr. Leinster
23 and Mr. Bulone that he would give me every
24 opportunity to show him why a life sentence
25 shouldn't be imposed and went ahead and scheduled

1 things for January 4th, 1991.

2 Q. Had Mr. Leinster been paid additional monies to
3 file this motion to vacate?

4 A. Yes, sir.

5 Q. By whom?

6 A. My parents.

7 Q. And you eventually were sentenced on January
8 4th of 1991?

9 A. Yes, sir.

10 Q. And was the motion to vacate heard at that
11 time?

12 A. Yes, sir, it was.

13 Q. And had Mr. Leinster, prior to your sentencing
14 on January 4th of '91, discussed the sentencing
15 procedure, what you would do, what your rights were,
16 or anything of that nature?

17 A. Not that I recall.

18 Q. Had he ever come to meet with you prior to --

19 A. No. I had never seen him again until the day
20 of sentencing, on that December, then -- in the
21 courtroom on December, and then in Judge Downey's
22 office on January 4th.

23 Q. At the January 4th sentencing, what were you
24 eventually sentenced to?

25 A. I was sentenced to two life sentences and 15

1 years concurrent.

2 Q. And at the sentencing, did Mr. Leinster have
3 anyone with him?

4 A. Yeah, his daughter, child.

5 Q. How old was she?

6 A. Three or four years old.

7 Q. What was she doing during your sentencing?

8 A. She was literally just hanging around him,
9 crawling on him, and I don't know how to describe it
10 other than playing around him and crawling over his
11 lap, climbing up his arm, holding onto his head. He
12 would hold her, pick her up.

13 MR. FISHKIN: Your Honor, I'm going to
14 object to the relevance of all this.

15 THE COURT: Let's move on, Mr. Gillick.

16 MR. GILLICK: Okay.

17 Q. And at your sentencing, did you attempt to talk
18 to the judge?

19 A. Yes, I did.

20 Q. Well, first, did Mr. Leinster call you as a
21 witness?

22 A. Yes, he did.

23 Q. Were you aware he was going to call you as a
24 witness?

25 A. No. I had no idea.

1 Q. What did he call you -- for what purpose did he
2 call you?

3 A. Well, you would have to understand the nature
4 of the motion to vacate the prior felonies. I can
5 explain briefly.

6 Q. Could you briefly?

7 A. Some of the prior felony convictions that I
8 have is ones of burglary, and there's two grand
9 theft of firearms as a result of me going into my
10 parents' house and removing the firearms. It was
11 Mr. Leinster's initial theory, I guess, from what I
12 can gather from the discussion that we had about it
13 and my parents and everybody else involved, is that
14 if you remove the burglary and the grand theft
15 charge convictions from my score sheet, that would
16 bring me below the sentencing guidelines category
17 for life, the score for life.

18 It was his belief that because they were my
19 parents, my parents had pressed the charges against
20 me in an effort to address a behavior problem they
21 felt that I was having at that particular time when
22 I was 18 years old.

23 And as it turned out, the way things work in
24 Florida, having not known about the way that the
25 scoring matrix works as far as prior records

1 being -- different degree of felonies being scored
2 against you and so and so, it turns out that as a
3 result of those particular charges I scored into a
4 life category. He was essentially asking Judge
5 Downey to remove them and --

6 Q. In fact, would that have made any difference in
7 your scoring?

8 A. At that particular time, no. I still scored
9 into life because of victim injury points. What
10 Mr. Leinster attempted to do was to score the
11 guideline score sheet as only using one victim
12 injury, which would assess 40 points for the
13 stabbing of Mr. [REDACTED]. And he neglected to
14 consider or total in there 40 points for penetration
15 to [REDACTED]. And Mr. Bulone pointed that out to
16 Mr. Leinster and Judge Downey, and at that point
17 Judge Downey essentially went ahead and denied the
18 motion. He said it's not because it doesn't have
19 merit but because he feels that it was moot.

20 To get to the question as far as him -- what he
21 wanted me to testify to, I'm not sure because he
22 didn't discuss it with me. And the next thing I
23 know they were arguing the motion. He said, "I
24 would ask Mr. Herrick be sworn." At that point I
25 found out that I would be testifying. He asked me

1 essentially what was going on; did I feel that I had
2 permission to take the guns. He had proffered
3 testimony that my father would have said that I had
4 permission or that I was okay to go into the house
5 and that I could take the guns. He asked me that,
6 and I can't sit there and lie. I'm under oath. I
7 told him, you know, "Nobody ever told me that I
8 couldn't use the guns," attempting to mitigate it
9 the best that I could from not knowing what was
10 going on. And that was essentially my testimony.
11 Mr. Bulone crossed.

12 Q. And you were, in fact, sentenced, as you
13 discussed?

14 A. Yes, sir.

15 Q. After your sentence, did you request that the
16 judge take some action?

17 A. It was actually prior to the sentencing. When
18 he denied the motion to vacate the judgments and
19 convictions, he asked if there was anything else
20 that anybody wanted to say. He asked me if I had
21 anything to say. I told him, "Yeah, I didn't do
22 this." He said, "I understand." He was about to
23 sentence me, and I asked him, I said, "What I'd like
24 to know, Your Honor, is your opinion of the evidence
25 that came in against me here because I don't

1 understand this."

2 Q. What did the judge say?

3 A. He told me that it would be inappropriate at
4 that time for him to do that. He said that he
5 hadn't been -- his job -- that's not his job in a
6 jury trial situation, that his job is to determine
7 whether or not I get a fair trial, and he hasn't
8 been -- based on the evidence that came in. He
9 said, "I haven't been asked to do that yet, to make
10 that ruling. That comes after sentencing if and
11 when your attorney files a motion for new trial."
12 He says, "If and when your attorney does, in fact,
13 file one, then my opinions and judgments will come
14 into play."

15 He told me I needed distinctions there.
16 And he said the jury's made a decision, and that's
17 what he has to live by at that time.

18 Q. Okay. Did you then ask Ed Leinster to file a
19 motion for a new trial?

20 A. After I was sentenced and he took us out of
21 chambers, while going back, the bailiff stopped and
22 Ed was standing there with me in the hallway, and I
23 said, "I want this to happen. I want to know the
24 opinions I want." And he said, "I've already filed
25 one. The judge will rule on it."

1 Q. Have you seen Ed Leinster since that day?

2 A. No, other than the news.

3 MR. GILLICK: Judge, this might be a
4 good time to take a lunch break, if you'd like,
5 and then we can get into the procedural aspects
6 after lunch.

7 THE COURT: All right. How are we
8 making out on time?

9 MR. GILLICK: I would expect a half an
10 hour to an hour regarding the procedural aspects
11 now that we're done with the trial and
12 convictions regarding Mr. Herrick's
13 postconviction problems of procedures.

14 THE COURT: How long do you think it's
15 going to take for the Respondent's side of the
16 case, Mr. Fishkin?

17 MR. FISHKIN: On cross, Your Honor?

18 THE COURT: Altogether. And the reason
19 I ask that, when I had scheduled this some time
20 ago, I had informed you that I had a proceeding
21 at 1:30 tomorrow, and I just need to know how to
22 arrange my day.

23 MR. FISHKIN: We have, I think, a total
24 of nine witnesses. Most of them will be very,
25 very brief. We'll have two long or substantive

1 witnesses, not the Respondent. Obviously,
2 Mr. Moore's not going to testify, but
3 Mr. Leinster and an expert. And the length of
4 time of the expert will, of course, depend upon
5 the length of time of their expert.

6 THE COURT: All right. Well, if we need
7 to go into tomorrow afternoon, we'll just have to
8 work around my schedule a little bit. All
9 right. And don't take my comments as saying that
10 either one of you should shortcut any of your
11 presentation. You do what you need to do.

12 We'll take a lunch break. Let's be back
13 here at 1:15. I'm going to remain on the bench
14 for a while.

15 (A luncheon recess is had from 12:10 p.m.
16 to 1:18 p.m.)
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