

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

**FILED**

KEVIN RICHARD HERRICK, )  
 )  
 Petitioner, )  
 )  
 Vs. )  
 )  
 MICHAEL W. MOORE, )  
 )  
 Respondent. )  
 )  
 )

Date 10/8/02  
COPY  
CLERK, U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

CASE NO: TAMPA, FLORIDA  
8:97-cv-2205-T-23MAP

Tampa, Florida

May 20, 2002

1:18 p.m.

VOLUME II (144 - 319)  
TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE MARK A. PIZZO

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Proceedings recorded by computer-aided transcription

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1                                    AFTERNOON SESSION

2                    MR. GILLICK:    Could I have Petitioner's  
3    Exhibit No. 1?    That's Mr. Leinster's file.

4                    MR. GILLICK:    May I approach, Your  
5    Honor?

6                    THE COURT:    You may.

7                                    DIRECT EXAMINATION (Cont.)

8    BY MR. GILLICK:

9    Q.    Mr. Herrick, I'd like to show you what's been  
10    marked as Petitioner's Exhibit No. 1 and ask you to  
11    take a look at that.    And that's been identified  
12    previously as Mr. Leinster's file.

13                    Is that familiar with you?

14    A.    It appears that it would be the same documents  
15    that I received a copy of, and yes.

16    Q.    And Mr. Herrick, at the very front of that file  
17    there is an index.    Is that something that came with  
18    the file or was prepared by you?

19    A.    No, sir.    I created this when I obtained a copy  
20    of it.    When my sisters mailed it to me, I  
21    inventoried it and documented what was there.

22    Q.    And how many pages is in the index that you  
23    created?

24    A.    Five.

25    Q.    Okay.    Thank you.

1       A.     The first top five pages.

2               THE COURT:   Mr. Gillick, is Petitioner's  
3     No. 1 the document that you obtained from the  
4     Petitioner himself?

5               MR. GILLICK:   To my understanding, it  
6     is, Your Honor.   I believe that was the  
7     testimony.   The first five pages are not -- the  
8     first five pages are an index that was prepared  
9     by Mr. Herrick.

10              THE COURT:   No, I understand that, but  
11     Ms. Russo's testimony was that appeared to be the  
12     exhibit -- that exhibit appeared to be what she  
13     had obtained originally from Mr. Leinster,  
14     although she was not certain of that.   And this  
15     witness had said that it appears to be what he  
16     had indexed and obtained from Ms. Russo.   And I'm  
17     just asking you, as an officer of the court,  
18     whether you obtained that from the Petitioner.

19              MR. GILLICK:   I obtained that from  
20     Mr. Herrick.

21              THE COURT:   Okay.

22     Q.     Mr. Herrick, before we broke for lunch, you  
23     indicated that you had asked Mr. Leinster -- after  
24     receiving some information from the Court, you asked  
25     Mr. Leinster to file a motion for new trial.

1 A. Yes, sir.

2 Q. Did he do so?

3 A. He had already filed one, he told me, at that  
4 point when we were standing in the hallway. And I  
5 said, "I want to file it. I want to do that." And  
6 he says, "We've already done that." He said that  
7 the judge will rule on that particular motion.

8 Q. Had he given you a copy of that motion?

9 A. No, sir.

10 Q. And the motion that he did file, was that  
11 timely filed?

12 A. I ultimately learned that it was not.

13 Q. And what do you mean that it was not?

14 A. The certificate of service date, after  
15 acquiring a copy of it through the court system,  
16 they may have got it. When I got his particular  
17 file, I actually seen the motion that he drafted and  
18 sent to the court, and the certificate of service  
19 date was marked the 18th, I believe, of October of  
20 1990. I was convicted on October 3rd.

21 Q. So it was actually filed before you were  
22 sentenced?

23 A. Yes, sir.

24 Q. And did Mr. Leinster ever file a proper motion  
25 for a new trial?

1 A. It appears that he attempted to file another  
2 one after my sentencing. There was another document  
3 created called Motion for New Trial. It has no  
4 record of being filed with the court, but he  
5 believes that it was sometime in, I think, July of  
6 '95, around there sometime. One of his secretaries  
7 or paralegals, Ms. Samuels, wrote Bernie McCabe, the  
8 State Attorney of the Sixth Judicial Circuit, and  
9 asked if they had a copy of it. She felt that it  
10 might possibly have been filed with them by  
11 mistake. It turned out that it was apparently  
12 Ms. C. Marie King provided her with a copy of the  
13 particular motion and it was dated somewhere around  
14 January 8th, but Ms. King pointed out that it wasn't  
15 a correct certificate of service date.

16 MR. FISHKIN: Objection to what Ms. King  
17 pointed out, Your Honor.

18 THE COURT: Sustained.

19 Q. And was that second motion for new trial timely  
20 filed?

21 A. No, sir, it was not.

22 Q. Did you ever get a motion for new trial ruled  
23 upon?

24 A. No, sir.

25 Q. Did you ever have an opportunity to go before

1 the court and present your evidence for a motion for  
2 new trial?

3 A. No, sir.

4 Q. Did Mr. Leinster file a notice of appeal in  
5 your case?

6 A. Yeah, but it was apparently lost or filed with  
7 the State Attorney's office. They ultimately got a  
8 belated appeal about six, seven months later, after  
9 my conviction.

10 Q. Okay. When you say a belated appeal, was that  
11 one that was not timely filed?

12 A. Apparently, Mr. Leinster had to file what I  
13 know has been documented or called or entitled a  
14 Motion for Belated Appeal to the clerk of court. Me  
15 and my family -- I was sent to prison in January of  
16 '91 -- we attempted to call Mr. Leinster as far as  
17 finding out what's going on with the motion for new  
18 trial, what's going on with the appeal, what issues  
19 would be raised, this, that, and the other, you  
20 know, basically what is going to happen. I've been  
21 sentenced to life; we're trying to figure out what's  
22 happening, when I can get out.

23 MR. FISHKIN: Your Honor, I'm going to  
24 object. The witness is testifying to what other  
25 people were doing and his own personal beliefs.

1           THE COURT: Well, as to his own personal  
2 beliefs, to that extent this objection is  
3 overruled, as to his comments regarding others  
4 and what others may have done, the objection is  
5 sustained.

6           MR. FISHKIN: Just to clarify, Your  
7 Honor, when I say his own personal beliefs, his  
8 own personal beliefs as to why it's important to  
9 him because he was sentenced to life in prison  
10 and all that.

11           THE COURT: The ruling's the same as to  
12 that.

13 Q. Mr. Herrick, when did you say that the notice  
14 of appeal was, in fact, filed?

15 A. As far as I know, none was ever filed with the  
16 clerk of court until six, seven months later, Judge  
17 Downey granted a belated appeal and Alynnggee  
18 Amboffel (ph) filed a notice of appeal.

19 Q. Did Mr. Leinster send you a copy of the notice  
20 of appeal?

21 A. No, sir.

22 Q. Did he ever discuss an appeal with you?

23 A. No, sir.

24 Q. Did you ever talk to Mr. Leinster after your  
25 sentencing in January of 1990?

1 A. No, sir.

2 Q. Did he ever send you anything?

3 A. No, sir.

4 Q. Did your appeal come to be heard at some point,  
5 or did someone do an appeal on your behalf?

6 A. Alynnggee Amboffel of the public defender's  
7 office here in Bartow, I believe it is.

8 Q. Did she file a brief?

9 A. She filed what's called an Anders brief, sent  
10 me a letter, a copy of her brief, said no reversible  
11 error, essentially nothing she could do.

12 Q. And did you file your own brief at that time?

13 A. No, sir. I didn't know how. I didn't have any  
14 idea what to do.

15 Q. What was your education level when you were  
16 convicted?

17 A. I'd completed a GED while I was in prison  
18 before at River Junction Correctional Institution.  
19 Prior to that, I dropped out of school in the tenth  
20 grade.

21 Q. Mr. Herrick, did you have any formal legal  
22 training of any kind?

23 A. No, sir.

24 Q. Did you have any legal writing or research  
25 experience?

1 A. No, sir.

2 Q. And what happened with the Anders brief that  
3 was filed?

4 A. I guess the court agreed. They just sent what  
5 I now know is a blanket opinion, no written opinion,  
6 per curiam affirmed.

7 Q. Did you receive a copy of that?

8 A. Yes, I did.

9 Q. And did you file anything thereafter --

10 A. Did I file anything as far as postconviction?

11 Q. -- in your case?

12 A. Related to the direct appeal?

13 Q. Yes.

14 A. No, sir.

15 Q. Okay. At some point did you file any pleadings  
16 in your case?

17 A. Yes, sir.

18 Q. Pro se, or on your own?

19 A. All pro se, yeah. From that point on, it was  
20 on my own.

21 Q. Did you have an attorney assist you?

22 A. No. I asked the court -- that was the first  
23 thing that I filed was a motion for appointment of  
24 counsel to the circuit court in Pinellas County.

25 Q. And what happened to that motion?

1 A. They never responded.

2 Q. Did you ever get a ruling on that?

3 A. Yeah. When Judge Downey ruled on my original  
4 postconviction, I believe he denied that, also.

5 Q. You indicated at some point you filed an  
6 original motion for postconviction relief.

7 A. Yes, I did.

8 Q. Do you recall how that was titled?

9 A. Defendant's Motion for Postconviction Relief, I  
10 believe.

11 Q. Did you have any legal assistance?

12 A. I had befriended another inmate who was hanging  
13 out in the law library working there, and Chris  
14 Helton was assisting me or trying to similarly --  
15 you know, we were both in the same boat, sitting in  
16 prison and trying to figure out what to do.

17 Q. And did you understand what that motion for  
18 postconviction relief was?

19 A. I'm not sure I know how to answer that question  
20 or can answer that question. Did I understand what  
21 it was in the sense that it was something to let the  
22 judge know what was wrong with my conviction? Yes.  
23 Did I understand the procedural requirements of it  
24 and everything that could be raised in it? No; or  
25 what couldn't be or what could be, no.

1 Q. Do you recall a date that you filed that?

2 A. It was about May 20th, '93, something like  
3 that.

4 Q. And what was the outcome of that?

5 A. Summarily denied.

6 Q. Did you have a hearing?

7 A. No, sir.

8 Q. Did the State Attorney or anyone respond to  
9 your motion?

10 A. No, sir.

11 Q. And were you given any reason why that was  
12 denied?

13 A. It addressed the merits of the issues raised.  
14 I don't think that I was very accurate. For  
15 instance, one issue was -- the first issue is, I'd  
16 raised something similar to that I was denied  
17 effective assistance of counsel for Mr. Leinster's  
18 failure to object to questions and answers posed to  
19 Theresa Porrey during her videotaped deposition.  
20 From memory of what took place, I felt that there  
21 was some things, after reading some law books, that  
22 he shouldn't have -- Mr. Bulone shouldn't have been  
23 able to ask her, particularly about being threatened  
24 to be sued and some things of that nature.

25 The judge responded to that by saying that

1 I'm not allowed to object to a discovery deposition;  
2 and this wasn't a discovery deposition in that it  
3 was perpetuated testimony being brought in in lieu  
4 of live testimony where any objections that would  
5 have normally been able to have been made in the  
6 courtroom to that particular witness testifying  
7 should be able to make. I just felt that it wasn't  
8 addressed properly.

9 Q. Did you appeal the judge's denial of your  
10 motion?

11 A. Yes, sir.

12 Q. To whom?

13 A. The Second District Court of Appeal.

14 Q. What happened with that?

15 A. The same thing, no written opinion, per curiam  
16 affirmed.

17 Q. Did you subsequently file another motion for  
18 postconviction relief?

19 A. Yes. I filed a second -- could I back up to  
20 the first motion? I did file a motion for rehearing  
21 at the same time I filed a notice of appeal on that.

22 Q. And what happened with your motion for  
23 rehearing?

24 A. Well, because I filed a notice of appeal at the  
25 same time, the motion for rehearing was dismissed.

1 Q. Were you familiar with the procedures at the  
2 time you filed that?

3 A. No, sir. I was led to believe that if I file  
4 both at the same time in the same envelope, they  
5 both went at the same time; that in the event that  
6 they denied the motion for rehearing, the notice of  
7 appeal would mature and things would take place, the  
8 events would take place to secure the appeal.

9 Q. And now to a second motion for postconviction  
10 relief. Did you file one?

11 A. Yes, I did.

12 Q. When?

13 A. I'm thinking August of 1994.

14 Q. And in August of 1994, were there any  
15 additional grounds that you hadn't raised in your  
16 first motion?

17 A. Yes, there were.

18 Q. What grounds?

19 A. Well, to explain, I guess, just to try to go  
20 through each one, the most important ground would be  
21 the failure to timely file a motion for new trial.  
22 And the reason why that is in the second motion and  
23 was not in the first motion is because at the time  
24 when I filed my first motion, I didn't know it was  
25 untimely. I'd raised it in my first motion as

1 saying that the court denied me due process in  
2 failing to rule on the motion.

3 I was led to believe by Mr. Leinster that  
4 the motion was timely filed; that when we were  
5 standing in the hallway and I asked him about it,  
6 that it would be filed. Therefore, when Judge  
7 Downey denied my first motion, he informed me that,  
8 Hey, your motion for new trial was not timely filed;  
9 therefore, you weren't denied due process. That  
10 happened on December 1st, 1993. August, I think it  
11 was August 4th that I filed the second motion for  
12 postconviction relief. I filed the issue raising  
13 for the first time ineffective assistance based upon  
14 Mr. Leinster's failure to timely file the motion for  
15 new trial.

16 Q. Any other additional issues?

17 A. There was quite a few. All of the other issues  
18 had not been presented in -- other than, I think, I  
19 again raised the videotape motion, the issue  
20 regarding Theresa Porrey's -- Mr. Leinster's failure  
21 to object to the questions and answers simply  
22 because I felt that I was given a very insufficient  
23 response and ruling by the court in the first time.  
24 I couldn't -- without seeing a list of them, I  
25 couldn't recite each issue. There were some

1 regarding Pat Porrey, David Stewart, failure to  
2 investigate the tag number, things of that nature.

3 By that time that I'd filed that motion, I'd  
4 also filed the legal malpractice suit against  
5 Mr. Leinster on January 4th, 1994, and was  
6 essentially attempting to litigate any way that I  
7 could to prove my innocence. The same issues -- by  
8 that time, I knew there were problems procedurally,  
9 not so much procedurally in 3.850 but in the  
10 criminal judicial system. From what I was seeing in  
11 other people's cases taking place, I was concerned  
12 with how things were going to come out.

13 And in that endeavor to seek any possible  
14 way of showing my innocence, I decided that a legal  
15 malpractice claim would be appropriate. At that  
16 time, I'd been learning more about the law, and by  
17 the time I filed the legal malpractice, had a better  
18 idea of understanding of collateral relief and  
19 various aspects of what to do.

20 Q. Did you file that action against Mr. Leinster  
21 on your own?

22 A. Yes, I did.

23 Q. And what was the outcome of your second motion  
24 for postconviction relief?

25 A. On June 5th, just about a year later, Judge

1 Susan Schaeffer denied the motion.

2 MR. FISHKIN: Excuse me, Your Honor.

3 I'd just like to inquire of counsel, are we just  
4 going to go through the entire procedural  
5 history, which is part of the record?

6 MR. GILLICK: No. I'm going to have him  
7 explain his postconviction motions.

8 MR. FISHKIN: That's all a part of the  
9 record in this.

10 MR. GILLICK: It is, but there are  
11 explanations that I believe I have a right to  
12 talk about.

13 THE COURT: Well, I'm assuming,  
14 Mr. Gillick, that you are trying to establish  
15 cause and prejudice.

16 MR. GILLICK: Yes, Your Honor.

17 THE COURT: Well, let's confine it to  
18 that and whatever information is necessary to  
19 understand the cause and prejudice argument.

20 MR. GILLICK: Okay. Thank you.

21 Q. And did Judge Schaeffer deny that with or  
22 without prejudice?

23 A. At that time she had denied it saying that I  
24 had already filed a motion for postconviction relief  
25 and failed to explain why these particular issues

1 were not raised in the first motion. At that time I  
2 filed a motion for rehearing.

3 Q. Did you receive a response in that regard from  
4 Judge Schaeffer?

5 A. For the denial?

6 Q. Yeah.

7 A. I'm not sure what your question is.

8 Q. You said you filed a motion for rehearing. Did  
9 Judge Schaeffer respond to that?

10 A. Yes, she did.

11 Q. In what manner?

12 A. She denied the motion for rehearing without  
13 prejudice to me filing an amended 3.850.

14 Q. And did you subsequently file an amended 3.850?

15 A. Ultimately, I did, yes.

16 Q. And amended your prior motion?

17 A. Yes, I did.

18 Q. Was it a new motion or simply an amendment?

19 A. Simply an amendment of the second motion.

20 Q. When did you file that?

21 A. I believe that it was filed January 8th, 1996.

22 Q. And what was the outcome of that?

23 A. Judge Peters, another judge, apparently took  
24 over the case. He denied it in the same form that  
25 Susan Schaeffer did, saying that I had already filed

1 a motion for postconviction relief and I didn't  
2 explain why these issues weren't raised in there.  
3 In addition, he addressed that the motion for new  
4 trial issue, I discovered it by Judge Downey's  
5 December 1st, 1993 order denying my first motion for  
6 postconviction relief, that I had not filed within  
7 two years of discovering that.

8 Q. Okay. In your amended motion, was there  
9 information in there that you could not have  
10 discovered prior to filing your first postconviction  
11 motion?

12 A. Yes, sir.

13 Q. What information?

14 A. The hair analysis report by FDLE that  
15 Mr. Leinster had, like I testified to before, that  
16 led me to believe that that was inconclusive, that  
17 the testing results were inconclusive. After filing  
18 a legal malpractice suit against him, I asked for a  
19 production of his case file. I had received the  
20 copy of that case file that you've introduced there,  
21 went through it, and discovered that there were no  
22 FDLE reports regarding hair analysis. At that point  
23 in time, using my sisters, I asked them to contact  
24 FDLE and determine whether or not I could acquire a  
25 copy of these reports that detailed examination

1 results.

2           Ultimately, after going back to -- being  
3 directed to go back to Largo Police Department, get  
4 the evidence numbers, and various things that they  
5 require, one of my sisters, Vicki, had contacted  
6 FDLE, acquired the reports and sent them to me. I  
7 discovered for the first time that these hair  
8 analysis results were not inconclusive, as  
9 Mr. Leinster says; that they exculpate me as far as  
10 being my hair is not found in that bed where the  
11 evidence was found, where hair was found.

12           At that point in time, I drafted a  
13 supplemental issue to my second motion for  
14 postconviction relief and sent it -- I'm thinking  
15 that it was right when Judge Schaeffer originally --  
16 her June 5th denial came to me, I believe they  
17 crossed in the mail. It was right at that same time  
18 I had sent it between the 4th and maybe the 8th of  
19 June, 1995.

20           At that point, I received Judge Schaeffer's  
21 denial, went through the process of rehearing where  
22 she granted -- or essentially said without prejudice  
23 file an amended motion. I didn't receive that order  
24 immediately. I received it in December of '95. I  
25 amended -- once receiving it, found out that I could

1 amend my motion, I amended it, and included in my  
2 explanations of why these particular issues were not  
3 raised in my original postconviction motion, why the  
4 hair analysis issue was not raised in either of the  
5 first or second but presented by the supplemental  
6 issue, and immediately sent it to the court.

7 Q. When was your state postconviction process  
8 exhausted, if you know?

9 A. It would be, I believe, at the conclusion of  
10 the -- when the mandate was issued from the Second  
11 District Court of Appeal on appealing the denial of  
12 my amended motion, which would be October 7th, 1996.

13 Q. And you've previously discussed that  
14 Mr. Leinster failed to properly file a motion for --  
15 basically a motion for new trial for the judge to  
16 review. What is the importance of that?

17 A. From my understanding of the concepts in the  
18 motion for new trial, the motion for new trial  
19 allows the trial judge to sit as an additional juror  
20 as a safety valve in cases where the evidence is  
21 technically sufficient to withstand the motion for  
22 judgment of acquittal. However, the weight of the  
23 evidence goes against the jury's verdict. It gives  
24 them an opportunity to determine the credibility of  
25 the witnesses and the weight of the evidence. In my

1 case, there was no evidence. There was nothing.  
2 Scott and Cheryl's testimony, two people giving  
3 different descriptions.

4 MR. FISHKIN: Your Honor, I'm going to  
5 object to --

6 THE COURT: Sustained.

7 Q. And Mr. Herrick, during our break, did you have  
8 the opportunity to look over the FDLE report,  
9 laboratory reports, and so forth?

10 A. Yes, sir.

11 Q. And did you notice anything missing therefrom?

12 A. No, sir. I didn't notice anything missing.

13 Q. Were there any reports regarding fingerprint  
14 identification?

15 A. Fingerprints?

16 Q. Yes.

17 A. The ones that you had shown me? I don't  
18 believe those are FDLE. The fingerprints aren't. I  
19 believe they're done by Largo Police Department.

20 Q. I'd like to show you what is being marked as  
21 Petitioner's Exhibit 3 and 4 and ask you to look at  
22 Exhibit No. 3 and see if you can recognize that.

23 And do you recognize Petitioner's Exhibit 3,  
24 sir?

25 A. Yes, sir.

1 Q. And take a look at No. 4.

2 (Counsel confer)

3 MR. GILLICK: Judge, I'm advised they're  
4 in apparently another exhibit, No. 33, so I will  
5 not need to introduce these.

6 THE COURT: All right. Well, let's make  
7 sure that by the end of this particular hearing,  
8 that is, after Mr. Herrick's hearing is about to  
9 close, I want to make certain that any lab report  
10 or fingerprint report or any type of scientific  
11 or expert report that Mr. Herrick contends his  
12 lawyer should have introduced but didn't is part  
13 of the record so that there is no longer any  
14 claim that we've missed something.

15 MR. GILLICK: Okay. I understand.

16 Q. Well, let me clarify this, then. Exhibit  
17 No. 3, sir --

18 THE COURT: Perhaps the easier way to go  
19 about it or the more appropriate way to go about  
20 it would be to ask Mr. Herrick when he filed his  
21 third Rule 3.850 motion, in which one of his  
22 claims was that counsel failed to investigate or  
23 present results of microanalysis testing on hair  
24 fibers recovered from the scene and hair samples  
25 submitted by Mr. Herrick. What is he talking

1 about? And let me ask -- just a moment. Just a  
2 moment, please.

3 Counsel, I'm looking at the  
4 preevidentiary hearing stipulation which purports  
5 to summarize each postconviction motion, and I  
6 note that the third postconviction motion is  
7 referenced on Page 6, 7, 8, and 9, which includes  
8 the history of that particular motion from its  
9 filing until its ultimate appellate conclusion;  
10 and scanning those paragraphs, I do not see  
11 anything about fingerprints. I see it about hair  
12 analysis and microanalysis. Was the fingerprint  
13 examination or testing a part of that particular  
14 Rule 3.850; do you know, Mr. Gillick?

15 MR. GILLICK: Without looking at that  
16 particular motion, I don't know offhand, Your  
17 Honor.

18 THE COURT: Okay.

19 MR. GILLICK: I can find out quickly.

20 Q. Mr. Herrick, do you know --

21 A. I don't believe that it was, no, sir.

22 Q. Okay.

23 A. The fingerprints weren't -- I don't recall ever  
24 raising anything on fingerprints, simply because as  
25 far as I knew at trial, they told me that the

1 fingerprints weren't mine; they all matched Scott.

2 Q. Did Mr. Leinster ever show you a fingerprint  
3 report?

4 A. No, sir.

5 Q. Do you know when you obtained copies of  
6 fingerprint analysis reports, if you did?

7 A. These particular reports, I believe, I acquired  
8 from the State Attorney's office by access to public  
9 records.

10 Q. Do you recall when that was?

11 A. It would have been in -- after '96, possibly  
12 after May of '96, 'cause I was at Hardy Correctional  
13 Institution at that time. Maybe October of '96,  
14 about then.

15 Q. How does that relate to -- would that be  
16 subsequent to or prior to your filing --

17 A. It would be after.

18 Q. -- the amended motion?

19 A. After.

20 MR. GILLICK: May I have just a  
21 moment --

22 THE COURT: Sure.

23 MR. GILLICK: -- with my client?

24 (Counsel for Petitioner and his client  
25 confer)

1 MS. McCARTHY: Your Honor, while he's  
2 speaking with his client, can I just do some  
3 witness control outside to --

4 THE COURT: Sure.

5 MS. McCARTHY: -- coordination, because  
6 it looks like we're running quite a bit behind  
7 our own --

8 THE COURT: All right.

9 MS. McCARTHY: -- preplanned schedule.

10 Q. Mr. Herrick, we've previously discussed that  
11 you filed a second motion for postconviction relief  
12 that Judge Susan Schaeffer denied. You requested a  
13 rehearing and that was denied, correct?

14 A. Yes, sir.

15 Q. Did you receive a copy of that denial?

16 A. No, sir.

17 Q. When did you finally get a copy of the judge's  
18 denial?

19 A. On about December 8th, '96. That's when I  
20 learned that it was without prejudice to amending  
21 that motion.

22 Q. And when did you then amend after receiving the  
23 denial in December?

24 A. January 8th, within 30 days or so. It took a  
25 little bit to put everything together and finally

1 got it filed about 30 days later, January 8th, '96.

2 MR. GILLICK: Okay. I've got nothing  
3 further, Your Honor.

4 THE COURT: Okay. Mr. Fishkin.

5 Mr. Fishkin, before you begin, it might  
6 be wise for us to stop a moment and let me ask  
7 Mr. Herrick a couple of questions -- and  
8 Mr. Gillick, you can follow-up -- because I want  
9 to make certain that I understand what  
10 Mr. Herrick's claims of ineffective assistance of  
11 counsel are.

12 You are saying, Mr. Herrick, that your  
13 lawyer should have done certain things. In  
14 particular, what is it that he should have done  
15 that he didn't do?

16 THE WITNESS: I believe that  
17 Mr. Leinster should have used the FDLE hair  
18 analysis reports, or Marilyn Hildreth [sic], who  
19 had committed or had done those analysis, to  
20 demonstrate to the jury that the hair fibers that  
21 were found on the scene of the crime did not  
22 belong to me.

23 THE COURT: Okay.

24 THE WITNESS: I believe that  
25 Mr. Leinster should have timely filed a motion

1     for new trial, in that it would have given me the  
2     opportunity to have the trial court address the  
3     police telling Scott and Cheryl that bloody  
4     clothes and a bloody knife was found in my room,  
5     that my fingerprints were found in their house,  
6     when that was, in fact, not true. It would have  
7     given me the opportunity to have him, like I  
8     spoke before, weigh the credibility of the  
9     witnesses of their testimony. It would have  
10    given me the opportunity to raise any other  
11    issues that an attorney could come up with at  
12    that time.

13                 I feel that at that time  
14    constitutionally -- at a time motion for new  
15    trial is filed, I'm constitutionally entitled to  
16    representation. I wasn't given that opportunity  
17    at all. Even when I raised in the 3.850 motions  
18    that he failed to timely file the motion for new  
19    trial, the State Attorney responded that  
20    everything is harmless, and I don't understand  
21    how you can say that it's harmless if you've  
22    never given me an opportunity to raise the issues  
23    themselves and have them supplemented with  
24    evidence and argument from counsel.

25                 THE COURT: All right. So as I

1 understand it, the failure of Mr. Leinster to  
2 file a timely motion for new trial prejudiced you  
3 because the trial court judge did not get an  
4 opportunity to weigh the credibility of the  
5 witnesses; and had he done so, he would have  
6 ruled in your favor.

7 THE WITNESS: I believe that's  
8 reasonably probable.

9 THE COURT: Okay. Anything else about  
10 the motion for new trial?

11 THE WITNESS: Just the police  
12 misconduct. Are you familiar with that?

13 THE COURT: What are you speaking  
14 about?

15 THE WITNESS: Throughout the  
16 investigation, the police, when they arrested me,  
17 they went into my bedroom and took a pair of  
18 pants of mine and a shirt, a red shirt and a pair  
19 of blue jeans. They recovered a firearm, a  
20 knife, and they had apparently, through  
21 deposition and trial testimony of Scott and  
22 Cheryl, told them that there was blood on those  
23 pants and that there was blood on the knife and  
24 that my fingerprints were found in their  
25 apartment.

1           When Scott and Cheryl after 15 months  
2   came to testify at trial, they still believed  
3   this to be true when, in fact, FDLE shows that --  
4   the serologist analysis shows that there were no  
5   blood on the knife, there was no blood on any  
6   pants and that my fingerprints from Largo Police  
7   Department analysis, my fingerprints are not in  
8   their house. In my opinion, that changes  
9   their -- it contaminates their entire testimony.  
10   For 15 months, they believed that these things  
11   are true. It contaminates their testimony, and I  
12   can never test that, the reliability of that in a  
13   courtroom setting, 'cause no matter what you say  
14   to them, they're convinced that I had to have  
15   done it when, in fact --

16           THE COURT: And as I take it, you have  
17   never challenged in any of your Rule 3.850's that  
18   your lawyer should have filed a motion before the  
19   trial saying that the out-of-court identification  
20   was wrong, was impermissible, was  
21   unconstitutional.

22           THE WITNESS: No, sir, I did not.

23           THE COURT: You've only raised it in  
24   connection with your motion for new trial?

25           THE WITNESS: Yes, sir.

1 THE COURT: What else?

2 THE WITNESS: The videotape going into  
3 the jury room. At that particular time, they  
4 came in and asked to see the videotape again. I  
5 don't know how much of it they watched. I  
6 believe Mr. Leinster should have required them to  
7 have it in the courtroom. I think the judge  
8 should have done it in the courtroom. That way,  
9 at least we'd all know that they watched the  
10 entire video and all the testimony. Rather, I  
11 don't know if they started from the beginning or  
12 started from the prosecutor's side.

13 THE COURT: And do you recall, and if  
14 you don't, that's fine, I'll find it, but in what  
15 Rule 3.850 you addressed that particular issue?

16 THE WITNESS: In my first motion for  
17 postconviction relief, it's incorporated in the  
18 first issue there, like the example that I gave  
19 before was that I had raised Mr. Leinster's  
20 failure to object to questions. And in addition  
21 to it, I stated he failed to object to the video  
22 being taken into the jury room.

23 THE COURT: Okay. Anything else?

24 THE WITNESS: Thinking off the top of my  
25 head, I think that's --

1           THE COURT: Mr. Gillick, if you wish  
2 to --

3           MR. GILLICK: If I may, Your Honor,  
4 there was another issue regarding failure to  
5 investigate the exculpatory testimony of Patrick  
6 Porrey and David Stewart.

7 Q. Is that important to you, sir?

8 A. It's important. I think that it -- you know,  
9 honestly, I don't know that it's exhausted properly  
10 in the second motion. I believe that the second and  
11 amended motion are one and the same, a continuation  
12 of each. I couldn't raise it in my first one simply  
13 because I didn't know how. I didn't know what to  
14 raise. I did the best that I could. And under the  
15 circumstances, the only thing I could do is  
16 continue.

17           It's things like that -- if I was allowed  
18 to consult with an attorney to represent me in a  
19 motion for new trial, I could have said -- thinking  
20 clearly say, you know, "Look, I also have these  
21 witnesses, Patrick and David, that could have  
22 testified to this that Mr. Leinster didn't call;" or  
23 if Mr. Leinster is still representing me at that  
24 time, tell the judge, "Hey, when it's going on in  
25 the trial, I didn't know what to say to who or what

1 to do or who to complain to, or if I can complain."  
2 The only thing I know is they convicted me of  
3 something I didn't do and then start screaming that  
4 they want to give me life.

5 MR. GILLICK: Thank you, Your Honor.

6 THE COURT: All right, Mr. Fishkin.  
7 Thank you for giving me a moment.

8 CROSS-EXAMINATION

9 BY MR. FISHKIN:

10 Q. During the course of the trial, there was no  
11 evidence presented, no forensic evidence presented,  
12 linking you to the crime scene; is that correct?

13 A. That's correct, sir.

14 Q. And that fact was brought out to the jury; was  
15 it not?

16 A. Yes, sir.

17 Q. In fact, Mr. Leinster, in his opening  
18 statement, made reference to the fact that there was  
19 absolutely no physical evidence connecting you to  
20 the scene of the crime; isn't that correct?

21 A. Yes, but I don't think what Mr. Leinster said  
22 was evidence that the jury could consider.

23 Q. Did Mr. Leinster say that in his opening  
24 statement?

25 A. I think the judge did.

1 Q. Did Mr. Leinster say in his opening statement  
2 that there was no physical evidence connecting you  
3 to the scene of the crime?

4 A. I would think he did, yes.

5 Q. He told that to the jury, didn't he?

6 A. Yes, I would think that he did.

7 Q. And through the course of the trial, no  
8 physical evidence was presented to that jury linking  
9 you in any way to that crime; is that correct?

10 A. That is correct.

11 Q. And in summation, Mr. Leinster hammered the  
12 fact to the jury that no physical evidence was  
13 presented connecting you to the crime; is that  
14 correct?

15 A. That is correct.

16 Q. Okay. Now, you've made a claim that the  
17 failure to call the hair expert prejudiced you.

18 A. Uh-huh.

19 Q. How?

20 A. How?

21 Q. Tell us how it prejudiced you.

22 A. Well, I believe it prejudiced me in that it was  
23 the only physical evidence available that  
24 demonstrates that I didn't commit this crime and  
25 that there's somebody else out there that did.

1     There's hair fibers left in the bedsheets that this  
2     person was on top of. Those hair fibers are not  
3     mine.

4     Q.     How do you know there were hair fibers? Does  
5     the lab report say there were hair fibers found on  
6     the bedsheet that were not --

7     A.     I believe that the Largo police report requests  
8     that -- requesting hair analysis to be done, it says  
9     that there was hair.

10    Q.     I'm not talking about the request. I'm talking  
11    about the actual report. Did the actual report find  
12    anything connecting --

13    A.     Can I see the report? I believe the report  
14    says that it was my hair, Cheryl's hair, and Scott's  
15    hair was tested against hair fibers or debris in the  
16    sheets.

17    Q.     And none were found?

18    A.     None matched.

19    Q.     None were found matching you anyway; is that  
20    correct?

21    A.     Correct.

22    Q.     Now, in fact, let me refer you --

23                 MR. FISHKIN: Unfortunately, Your Honor,  
24    Exhibit 33 is not paginated, but in there on  
25    Page 2 of the lab report, it shows the results of

1 the hair analysis.

2 (Counsel confer)

3 Q. Let me show it to you. I'd like you to take a  
4 look at this paragraph.

5 Do you recall that? Do you recall seeing that?

6 A. Yes.

7 Q. All right. Now, that paragraph basically talks  
8 about hair debris removed or debris removed from  
9 your pants; is that correct? Now, by the way --

10 A. I would say removed from a pair of pants, yeah.

11 Q. Well, it says from your pants, whether they --  
12 that's what it says, doesn't it? Is that what it  
13 says?

14 A. That's what it says.

15 Q. Okay. Now, by the way, Cheryl died her hair,  
16 didn't she?

17 A. I wouldn't know.

18 Q. You don't know?

19 A. No, I do not know.

20 Q. But a hair was found that had been chemically  
21 lightened that was both consistent and inconsistent  
22 with Cheryl Hagan's hair. Isn't that what it says?

23 A. That's what that report says, yes, sir.

24 Q. Okay. So, theoretically, if a hair expert had  
25 gotten up on the stand, that expert would have

1 testified that there was a hair that was similar to  
2 in some respects and dissimilar to in some respects  
3 Cheryl Hagan's hair. Right?

4 A. Taken out of the pair of pants that they found,  
5 correct.

6 Q. That's correct.

7 A. That's what they could have testified to.

8 Q. And Mr. Leinster, by not calling a hair expert,  
9 kept that out; did he not?

10 A. I don't know.

11 Q. Well, did that information ever go to the jury?

12 A. No. That stuff was not brought before the  
13 jury. I personally don't believe that that  
14 particular analysis for those pants would have been  
15 allowed before the jury.

16 Q. Why wouldn't they have been allowed?

17 A. Well, sir, if you're familiar with the sequence  
18 of events of what Scott testified to -- you've read  
19 the transcripts, I take it -- in the room where  
20 he's stabbed, he's stabbed by a naked man.

21 Q. What difference does it make?

22 A. I'll show you. He's stabbed by a naked man.  
23 The man has blood all over him. At that point the  
24 man pulls on his pants. These particular pants, if  
25 you try to make the relevance of that particular

1 paragraph and that hair found in those pants  
2 admissible, there would be blood on these pants. We  
3 know that there's blood left on the sliding glass  
4 doors and the door handle to the bedroom at that  
5 particular time. If there's blood after he pulls on  
6 his pants left on those items, there would have been  
7 blood on those pants. There's no blood on those  
8 pants that they tested right there for that hair.

9 Q. Mr. Herrick, have you ever listened to a  
10 forensic expert testify?

11 A. No, sir.

12 Q. Do you have any idea about what hair transfer  
13 is, transference?

14 A. No, sir.

15 Q. So you don't know the significance of this  
16 paragraph, is that fair, in the hands of an expert?

17 A. I know the significance of no blood being on  
18 those pants. It means that those pants weren't the  
19 pants worn by the person in that room who stabbed  
20 Scott.

21 Q. Do you know the significance --

22 THE COURT: Mr. Fishkin, your questions  
23 are argumentative in form. It seems to me that  
24 the significance is for me to determine and not  
25 for Mr. Herrick to determine.

1 MR. FISHKIN: All right.

2 THE COURT: So if you have evidence that  
3 you intend to present showing the lack of  
4 significance or the significance, that's  
5 something different.

6 MR. FISHKIN: We'll do that, Your Honor.

7 Q. Now, you claim as one of your grounds that  
8 Mr. Bulone should not have been allowed to ask  
9 Theresa Porrey about her fear of a lawsuit during  
10 the videotaped deposition. Did you say that?

11 A. That was an example of what I remembered of  
12 hearing on the video that I felt was inappropriate.

13 Q. Okay. And you think that would not be  
14 allowable testimony?

15 A. I'm not sure if she answered it in the sense  
16 that, no, she wasn't. And then he kept it a point  
17 where she got to saying she's scared now of being  
18 sued because he keeps bringing it up.

19 Q. Well, would that be legitimate testimony,  
20 though?

21 A. I have no idea, sir. I raised the issue simply  
22 because I didn't think it was right.

23 Q. So you don't know the answer, okay.

24 A. I don't know the law to that, no.

25 Q. Ms. Porrey was the only witness who testified

1 on your behalf; is that correct?

2 A. That's the only witness Mr. Leinster called.

3 Q. All right. And she testified as to alibi?

4 A. Essentially, yes, that she came and woke me up.

5 Q. Okay. Mr. Leinster, again, in summation was  
6 very strong with the jury about how you couldn't  
7 have done it because she woke you up at the time  
8 that it was happening; is that correct?

9 A. I believe so. I would have to reread the  
10 transcripts.

11 Q. And do you think that it prejudiced you that  
12 your only witness was allowed to repeat her  
13 testimony more than once to the jury?

14 A. I believe that it very well could prejudice me  
15 if all's they watched was the State Attorney's  
16 cross-examination.

17 Q. And you don't know what they watched?

18 A. We have no idea.

19 Q. For all you know, they were watching her direct  
20 testimony about her waking you up?

21 A. That's very possible.

22 Q. And that would have benefited you and not  
23 prejudiced you; is that correct?

24 A. I think that in order to be fair, you'd need to  
25 have the whole thing played. Whether it benefits me

1 or prejudices me to give only portions of testimony  
2 is not fair for either me or the State, but I think  
3 I'm the one that has it all to lose.

4 Q. You weren't worried about prejudice to the  
5 State, were you?

6 A. I want the truth to come out. If that means  
7 giving everybody the opportunity to be fair, that's  
8 fine with me.

9 Q. And the only other ones you wanted to be heard  
10 were David Stewart and Patrick Porrey; is that  
11 correct?

12 A. And the hair analysis people.

13 Q. Now, if I remember correctly from your  
14 testimony, you never spoke to David Stewart again  
15 after that night?

16 A. No, sir.

17 Q. And you haven't spoken to Patrick Porrey since  
18 that night?

19 A. No, sir.

20 Q. By the way, do you have Patrick's deposition?  
21 Do you have a copy of that?

22 A. I have a copy of it, yes.

23 Q. Do you have a copy of the other witness  
24 depositions in this case?

25 A. Yes.

1 Q. How long have you had them?

2 A. After I was convicted in '91, my sister Lori  
3 purchased them for me. I was at Okaloosa  
4 Correctional Institution. So I would say since the  
5 middle of '91, '92, beginning of '92, in that area.

6 Q. So you had them before you filed your first  
7 3.850?

8 A. Yes, I did.

9 Q. Now, you were aware on the second day of trial  
10 when the jury went out that Patrick Porrey and David  
11 Stewart had not testified; were you not?

12 A. Excuse me. Yes, I was.

13 Q. Now, also, do you know whether Patrick Stewart  
14 was ever found by anybody?

15 A. Patrick Stewart?

16 Q. I mean David Stewart. I'm sorry.

17 A. No, sir. I don't know if anybody's talked to  
18 him or where he is or where he could be.

19 Q. And you don't know if anyone could find him?

20 A. No, sir.

21 Q. You don't know if he --

22 A. I know my family has done a lot of looking.  
23 I'm sure Mr. Gillick has done a lot of looking. I  
24 don't know where he is, don't know where to look  
25 anymore.

1 Q. So you don't know if David Stewart wanted to be  
2 found?

3 A. I couldn't venture a guess, sir. I have no  
4 idea.

5 Q. Would it be fair to say that you don't know  
6 what David Stewart might have said had he been  
7 found?

8 A. No, sir. Given the fact that he's under oath  
9 and he's supposed to testify truthfully, the events  
10 as I had testified to them are what he would testify  
11 to in that that's what's happened.

12 Q. I believe you said that he went with Patrick  
13 Porrey twice to talk to Darren Barfield, or Scott  
14 Barfield -- Darren's his first name, isn't it?

15 A. Yes, sir.

16 Q. -- prior to your being arrested?

17 A. That is my understanding, yes.

18 Q. And you also, by the way, don't know whether  
19 Patrick wanted to be found, do you, at that time?

20 A. I don't know. I haven't spoke to him.

21 Q. And you don't know what Patrick might have said  
22 to either the State or to Mr. Leinster if, in fact,  
23 he had been found and did talk to them?

24 A. Again, it would be consistent to what I've  
25 testified to in that they would be testifying

1 truthfully. Those are the events that took place.

2 Q. And that's your supposition, that they would  
3 testify consistently with what you've said?

4 A. At that particular time, I believe they would  
5 have.

6 Q. But you don't know that? Is that fair?

7 A. I know it as much as you would know it. I  
8 mean, how do I know what they would testify to other  
9 than the events that I know them to be? They were  
10 present for a particular series of events. It would  
11 be consistent with what I've said. I don't know  
12 what else to tell you.

13 Q. In your first 3.850 filed, what was it, May  
14 19th, 1993?

15 A. May 19th, May 20th, something like that.

16 Q. You raise no issue about Patrick Porrey or  
17 David Stewart being available as alibi witnesses and  
18 not being called, did you?

19 A. No, I did not.

20 Q. Yet you knew about it?

21 A. Yes, I knew about it.

22 Q. Nothing prevented you from raising it?

23 A. A lack of knowledge.

24 Q. A lack of knowledge that you had alibi  
25 witnesses who the defense lawyer didn't call?

1 A. No, sir, lack of knowledge of what exactly I  
2 could, should, or am supposed to put in my motion  
3 for 3.850.

4 Q. Well, you put in he failed to make appropriate  
5 motions as to admissibility of questions and answers  
6 posed to the witness Theresa Porrey.

7 A. Yes.

8 Q. How is that different than ineffectiveness by  
9 not calling essential witness?

10 A. I'm not positive of what could be raised in a  
11 3.850 and what couldn't be raised. You yourself, as  
12 a practicing attorney, know that some things you can  
13 raise in collateral relief. At that time I don't  
14 understand collateral relief. The only thing I  
15 understand is I've been convicted of something I  
16 didn't do.

17 Q. Let's get down to what this trial was really  
18 about. Without Patrick Porrey, who was basically  
19 not an alibi witness but a witness who would attack  
20 the credibility of Darren Barfield; is that correct?

21 A. Yeah. He would testify that when he spoke to  
22 him before he called the police, he told him he  
23 wasn't sure it was me.

24 Q. Now --

25 A. That's what it comes down to.

1 Q. But without that, this is basically a case of  
2 your word or Mrs. Porrey's word in this case against  
3 that of Darren Barfield?

4 A. No, sir. I believe that it more could be  
5 better characterized as a three-way swearing contest  
6 between what Darren testifies to, what Cheryl  
7 testifies to, and what Theresa testifies to, because  
8 Darren and Cheryl's testimony is in just as much  
9 conflict as Theresa's is.

10 Q. Well, Cheryl never identified you.

11 A. I would agree with you there, sir.

12 Q. Cheryl said she thought it was her neighbor but  
13 she couldn't be sure; isn't that right?

14 A. That is correct, sir.

15 THE COURT: Are you saying this is in  
16 the trial testimony, Mr. --

17 MR. FISHKIN: That's correct, Your  
18 Honor.

19 THE COURT: Well, you may want to read  
20 the trial testimony again 'cause that's not what  
21 she says.

22 MR. FISHKIN: Okay.

23 THE COURT: One of the questions  
24 asked --

25 MS. MCCARTHY: She thought it was him

1 from the get-go.

2 MR. FISHKIN: Yeah.

3 THE COURT: One of the questions  
4 asked -- just a moment.

5 MR. FISHKIN: Page 28, Your Honor,  
6 starting at Line --

7 THE COURT: I know. I'm not referring  
8 to that.

9 MR. FISHKIN: I'm sorry?

10 THE COURT: I said I'm not referring --  
11 I'm referring to my notes. Just a moment.

12 Page 116 of the record, or Page 30 of  
13 the trial transcript, question by the  
14 prosecutor: Now, was there anything that you  
15 observed or heard or anything like that would  
16 indicate to you that it was not Kevin Herrick  
17 that did this to you?

18 Answer: No.

19 MR. FISHKIN: Yes, I'm referring to  
20 qualifying questions.

21 Let me ask you this: Before you even  
22 spoke to Scott about who this was, did you have  
23 an idea about who the attacker was?

24 Yes.

25 Who was that?

1 Kevin Richard Herrick.

2 Why did you feel that, what  
3 observation?

4 Just everything. It was just like in  
5 the dark shirt, he always wore the same shirts  
6 when he was walking around the apartment. It was  
7 like the dark shirt. And his build, the outline  
8 of his hair, just everything. Not only that, but  
9 it was just everything that led up to it. I just  
10 thought it was him. It just looked like him in  
11 the dark. I couldn't see him, but I just had a  
12 feeling.

13 Q. In any event, the main testimony was Darren,  
14 was Scott, correct?

15 A. (Nods head up and down.)

16 Q. Who said from the get-go, he knew it was you,  
17 but he didn't initially tell the police. Is that  
18 correct?

19 A. I believe that would be correct.

20 Q. And then when he was released from the hospital  
21 after he was taken to the hospital, he called the  
22 police and told them it was you. Is that what he  
23 testified to?

24 A. That's what he testified to.

25 Q. Now, in Mr. Porrey's deposition, did he not

1 indicate that his conversation with Mr. Barfield was  
2 after you were arrested, not before?

3 A. I don't know if he indicated that in his  
4 deposition or not. I know that the conversation he  
5 had with Mr. Barfield would have been before my  
6 arrest.

7 I would also point out that Pat's  
8 deposition was taken 12-and-a-half years after these  
9 events took place. I don't expect his memory to be  
10 a lot. I think as a result of Mr. Leinster's  
11 failure to secure his testimony and put it in the  
12 record, I've lost a lot already in that testimony.

13 MR. FISHKIN: Page 24 of the deposition,  
14 Your Honor.

15 Q. I believe it was in the courtyard, and even  
16 I -- I can remember even to this day that after they  
17 took Kevin away, Darren said something, he wasn't  
18 for sure if Kevin was the one.

19 He told you that?

20 Yeah. I remember him saying that he wasn't  
21 too sure 'cause it was dark, he said.

22 A. That sounds to me like he's talking about  
23 talking in the courtyard and not the conversation  
24 that he had with him over at Cheryl's mother's  
25 house.

1 Q. You'd indicated that Mr. Porrey was not there  
2 when this incident occurred and that you saw him for  
3 the first time about three hours later. Is that  
4 correct?

5 A. You're speaking of Patrick?

6 Q. Patrick.

7 A. Yes. Yeah, he woke me up.

8 Q. Three hours later?

9 A. Essentially three hours. I don't recall the  
10 exact time that he woke me up.

11 Q. But it was substantially after this event had  
12 occurred?

13 A. Yes, sir.

14 Q. It was after Mrs. Porrey woke you up, you went  
15 outside, and then you went back inside and went to  
16 sleep?

17 A. Yes, sir. Theresa woke me up, the police came,  
18 investigated, Scott was taken to the hospital, and  
19 everybody left. Theresa's sister, who lived down  
20 the triplex down the way, had came and was  
21 comforting her, relaxing her. I went to bed. Pat  
22 came in and woke me up. Excuse me.

23 Q. And yet in his deposition, Patrick said that he  
24 woke you up initially.

25 A. Yes, he did. What Patrick is speaking of there

1 is waking me up.

2 Q. Page 17. All I remember doing is waking him up  
3 out of his sleep, out of the room. That's all I can  
4 remember. I don't know, he might have went outside  
5 when we all were standing out trying to figure out  
6 what was happening while people were outside,  
7 Cheryl, Darren, David, and you.

8 Did Cheryl Hagan at that point accuse him of  
9 anything?

10 No.

11 That was before the police came, wasn't it?

12 A. No. That would have -- before the police came  
13 and arrested me. I don't --

14 Q. The police came --

15 A. I was never in the presence of Scott and Cheryl  
16 with Patrick Porrey. That's what I'm talking about  
17 as far as 12-and-a-half years later of Pat's  
18 testimony, because Mr. Leinster didn't secure it,  
19 Pat's testimony is in some respects good and some  
20 things I don't think he remembers clearly.

21 You know, what were you doing 12-and-a-half  
22 years ago? I remember things very clearly simply  
23 because this has been my life for the last 13 years  
24 of battling this conviction. I know what I did that  
25 night. I know what was going on. I know where

1 things were. Pat has no reason to really think  
2 about it. When you get Scott and Cheryl in here and  
3 they testify, they aren't going to remember things  
4 very well either.

5 Q. They remembered things pretty well during the  
6 trial, didn't they?

7 A. No. I think there's a couple of spots in there  
8 where they're, I don't remember, I can't remember  
9 details, little details; but I can tell you  
10 important things such as that. You know, like I  
11 say, if you never talk to him and then bring it up  
12 12-and-a-half years later, 13 years later, they're  
13 not going to remember.

14 THE COURT: Let me stop here. We're  
15 getting argumentative in nature. I mean, this  
16 dialog here is not assisting me any in deciding  
17 what I'm supposed to decide.

18 Q. Now, were you sharing a room with Patrick?

19 A. No, sir.

20 Q. You had your own room?

21 A. Yes, sir.

22 Q. Patrick had his own room?

23 A. Yes, sir.

24 Q. You were not paying rent. You were a guest in  
25 the house; is that right?

1 A. Essentially a guest, and when I could get a job  
2 and get things going, then I would, you know, pitch  
3 in and show my appreciation for their letting me  
4 stay there.

5 Q. And when you last saw Mrs. Porrey, did you  
6 indicate she was in the kitchen?

7 A. No, when I was --

8 Q. Prior to waking you up.

9 A. Prior to waking me up? Yeah, she was in the  
10 kitchen area.

11 Q. Okay. And that kitchen area had a wall so you  
12 couldn't see -- I think you indicated you couldn't  
13 see the living room from the kitchen --

14 A. No, you couldn't.

15 Q. -- from the table.

16 A. No, you could not, unless you were at the  
17 doorway looking through. It has little pillars and  
18 stuff in there. But other than that -- if you were  
19 just looking over, you would not see the living  
20 room.

21 Q. And is it your testimony that she woke you up  
22 when she heard screaming, or is that what she told  
23 you?

24 A. It's my testimony that she woke me up screaming  
25 that the girl next door was being raped. I know

1     that her testimony is she heard screaming and went  
2     up and came back and woke me up.

3     Q.     Now, that was from the videotape?

4     A.     Yeah.

5     Q.     When is the last time you saw the videotape?

6     A.     I've never seen the video. I heard it during  
7     my trial.

8     Q.     And did you take notes during your trial?

9     A.     No, I did not.

10    Q.     So is this your memory today based on what you  
11    heard 13 years ago?

12    A.     My family has also purchased a copy of the  
13    videotape. I know what's being said on it.

14    Q.     So did they tell you what was being said on it?

15    A.     Yes, they did.

16    Q.     So is part of your testimony based upon what  
17    they told you?

18    A.     Part of my testimony as opposed to what, which  
19    part?

20    Q.     I don't know.

21    A.     Neither do I.

22    Q.     Your testimony about the videotape, is that  
23    what someone else told you?

24    A.     I would say it's probably a little bit of both,  
25    remembering what was done and what they've told me,

1    what they've written down for me, as far as what's  
2    on the video. As far as my testimony of her waking  
3    me up screaming, "The girl next door is being  
4    raped," that's my personal knowledge of what  
5    happened to me.

6    Q.    And how long was it from the time that you got  
7    outside until the police actually arrived?

8    A.    I don't think it was more than five, six  
9    minutes, simply because when he came back telling  
10   David to write down the tag number, Dave went in, I  
11   believe, and was on the telephone calling the  
12   police. I got everybody calmed down, got Theresa  
13   inside her kitchen, got her back inside to relax,  
14   sit down and quit hyperventilating. I instructed  
15   him to go inside and take care of his pot. I  
16   stepped out front, and it couldn't have been two,  
17   three minutes after that that the first squad car  
18   pulled up.

19   Q.    And when did Cheryl and Darren confide in you  
20   about what had happened?

21   A.    When did Cheryl and Darren?

22   Q.    Yeah.

23   A.    Darren, Scott, told me that -- when I came out  
24   the front door and he was coming back at that  
25   particular time, he told me he chased the guy to the

1 car, he got in the car, and he left the tag number  
2 to David, blah, blah, blah. Later on that evening,  
3 once the police had come, the EMT's had come, fire  
4 rescue had come, Scott was inside. I don't recall  
5 if he ever came out again until he was on the  
6 stretcher being wheeled away.

7 During that period of time, Cheryl came out  
8 her door, stood there with me, Theresa, and David,  
9 and possibly David's wife, and told us that the guy  
10 put a scalpel to her neck and tried to rape her.

11 Q. Now, knowing that Mrs. Porrey is dead, that  
12 David has never been found and Barbara has never  
13 been found, essentially, there's nobody to  
14 corroborate, except for Darren and Cheryl, this  
15 story about what they're telling you; is that  
16 correct?

17 A. I don't understand your question. Corroborate  
18 the story who's telling what?

19 Q. I'll withdraw the question.

20 THE COURT: Anything else, Mr. Fishkin?

21 MR. FISHKIN: If I can have a moment,  
22 Your Honor.

23 (Counsel for Respondent confer)

24 MR. FISHKIN: Nothing else, Your Honor.

25 MR. GILLICK: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. GILLICK.

Q. Mr. Herrick, Mr. Fishkin discussed a laboratory report regarding debris and hair fibers with you.

Do you remember that?

A. Yes, sir.

Q. And he read part of it, correct?

A. Yes, sir.

Q. Isn't it true that report specifically says:

No hairs microscopically like those contained in

Herrick's known hair samples were found in the

debris recovered from the bedsheets?

A. Yes, sir. That's my main point.

Q. And that report was never presented to the jury, was it?

A. No, sir.

Q. And as to the trial testimony of Cheryl Hagan and Darren Scott Barfield, did both of them positively identify you at trial as the assailant?

A. I don't believe so. You know, you read the trial. Cheryl say that she believes it's me because the individual characteristics of the person she saw, the description, which contradicts what Scott says, and because Scott told her and Scott won't lie to her. That's what she says in trial. And she

1 says she believes that because the police found the  
2 knife and bloody clothes in my room. That is not  
3 true. So do I believe that she herself identified  
4 from her personal knowledge of what she's seen that  
5 it's me? No, I do not believe that that is what  
6 took place in trial.

7 Q. Okay. Thank you.

8 MR. GILLICK: Nothing further.

9 THE WITNESS: Could I -- Mr. Gillick.

10 Q. Yes.

11 A. I have one -- when you discussed that report  
12 there, the significance of those pants, when you  
13 look at those pants -- they also recovered a  
14 T-shirt. They took a T-shirt. Cheryl describes  
15 these particular clothes. Apparently, by seizing  
16 them and taking them into evidence, they believe  
17 that these clothes were used. These are the pants  
18 that they say had blood on them. Did not. Cheryl  
19 describes the person as wearing a dark black or blue  
20 T-shirt. What they recovered there and took and  
21 sent to FDLE was a red T-shirt.

22 That's what I was trying to point out to  
23 Mr. Fishkin, that those clothes are not the clothes  
24 that could possibly have been used in that attack.  
25 One, there's no blood on them; the shirt is

1 different; the pants are different; there's no large  
2 belt buckle on these pants, as Cheryl says that this  
3 attacker has on his pants. There's no nothing.

4 This little hair that he makes significance  
5 that the hair analysis would come out and say, well,  
6 it looks like it could be Cheryl's and it might not  
7 be Cheryl's, the bottom line is that these pants  
8 can't be shown to have been placed in there. The  
9 only relevant evidence coming from there is the  
10 stuff that is found in the bedsheets, and the stuff  
11 that is found in the bedsheets does not match my  
12 hair that I voluntarily gave them.

13 Q. Did Cheryl have hair when she testified at  
14 trial?

15 A. Did she have what?

16 Q. Did she have hair, or was she bald?

17 A. She had hair, sir.

18 Q. There was plenty of other hair they could have  
19 taken from her to test, right?

20 A. Yes, sir.

21 Q. Okay. Thanks.

22 MR. GILLICK: No further questions.

23 THE COURT: All right. Thank you, sir.

24 MS. MCCARTHY: Your Honor, just as a --  
25 I know this would be taking out of order, but we

1 thought we'd have gotten on a little bit  
2 further. We've sent some witnesses home to come  
3 back tomorrow morning, but there's one FDLE  
4 analyst I hadn't approached Mr. Gillick about  
5 taking out of order. I don't anticipate her  
6 taking terribly long, but she's from Orlando  
7 and --

8 THE COURT: Is that all right,  
9 Mr. Gillick?

10 MR. GILLICK: Do you have any idea how  
11 long? My problem is, I've got Mr. Doherty, who  
12 is employed elsewhere, and --

13 MS. MCCARTHY: I would say 15 to 20  
14 minutes.

15 MR. GILLICK: I've got no objection to  
16 that.

17 THE COURT: All right.

18 MR. GILLICK: Can I explain to  
19 Mr. Doherty, Your Honor?

20 THE COURT: Sure.

21 THE CLERK: Hi, ma'am. Raise your right  
22 hand, please.

23 MARIANNE HILDRETH, RESPONDENT'S WITNESS,  
24 SWORN

25 THE CLERK: Ma'am, please state your

1 full name for the record, and spell your last  
2 name.

3 THE WITNESS: My name is Marianne M.  
4 Hildreth, H-I-L-D-R-E-T-H.

5 THE CLERK: Thank you. Be seated,  
6 please.

7 DIRECT EXAMINATION

8 BY MS. MCCARTHY:

9 Q. Would you state your current occupation?

10 A. Yes. I'm employed by the Florida Department of  
11 Law Enforcement at the Orlando Regional Crime  
12 Laboratory as a microanalyst.

13 Q. All right. Back in 1990, were you so employed?

14 A. Yes, I was.

15 Q. Had you at that time been previously qualified  
16 as an expert in microanalysis?

17 A. Yes, ma'am.

18 MS. MCCARTHY: I believe counsel would  
19 stipulate that the witness is an expert in the  
20 field of microanalysis of hair.

21 MR. GILLICK: We would so stipulate.

22 THE COURT: All right.

23 Q. I'm going to call your attention back to  
24 1990, mid-1990. Did you have submissions from  
25 the Largo Police Department in relation to a case

1 involving Kevin Richard Herrick?

2 A. Yes.

3 Q. Okay. And did you happen to receive samples  
4 from bedsheets taken from the victims' home?

5 A. Yes, I received debris from the bedsheets.

6 Q. All right. And did you receive known hair  
7 standards of both victims, Cheryl Hagan and Darren  
8 Barfield, and the suspect, Kevin Richard Herrick?

9 A. Yes, I did.

10 Q. Did you compare those with the debris from the  
11 bedsheets?

12 A. Yes, I did.

13 Q. What were your results of that comparison?

14 A. Found within the debris from the bedsheet were  
15 two pubic hairs that were microscopically like  
16 Cheryl Hagan's known pubic sample, two head hairs  
17 that were microscopically like Hagan's known head  
18 hair sample, one animal hair, two head hair  
19 fragments that were too limited for a significant  
20 comparison, and three Caucasian head hairs that were  
21 microscopically different from all of the submitted  
22 known head hair samples.

23 Q. All right. So you did not find a comparison  
24 with any hair standard that was submitted by the  
25 Defendant Herrick?

1 A. That's correct. None of those hairs in the  
2 debris from the bedsheet were found to be like the  
3 known hair samples from the defendant.

4 Q. All right. Now, you had mentioned that there  
5 were three hairs that had different characteristics  
6 that you found that you didn't compare to any of the  
7 three; is that correct?

8 A. I did compare those three hairs to the known  
9 hair samples from all three of those individuals.

10 Q. And you weren't able to exclude or include  
11 them?

12 A. Those three hairs were all different from the  
13 submitted known hair samples from the victim, from  
14 Mr. Barfield, and from Mr. Herrick.

15 Q. Okay. I understand that micro hair analysis is  
16 a process of exclusion. Can it be a process of  
17 actually identifying someone as the source of the --  
18 or the contributor of the hair?

19 A. Based upon a microscopic hair comparison, I  
20 would never be able to say that a questioned hair  
21 came from a particular individual to the exclusion  
22 of all other individuals. If I find that a  
23 questioned hair displays all the same microscopic  
24 characteristics as a person's known hair sample,  
25 what I can say is that it's consistent with having

1     come from that person or it could have come from  
2     that person, but I can't say that it did come from  
3     that person. On the other hand, I can say, if there  
4     are significant differences, that a hair did not  
5     come from a particular person.

6     Q.     Now, you had described three different hairs  
7     that you excluded as coming from the victims and  
8     Herrick.

9     A.     That's correct.

10    Q.     Okay. Now, can you talk about those a little  
11    bit more? Describe for us the different  
12    characteristics of, I think how you described it is  
13    hair A, B, and C.

14    A.     That's correct. May I refer to my notes where  
15    I describe those characteristics?

16    Q.     Sure.

17    A.     The main differences with each of those hairs  
18    and the known hair samples would be related to their  
19    color and their pigmentation. For example, hair A I  
20    described in my notes as having no pigment, so that  
21    would be either a blond or almost colorless hair;  
22    and in that one characteristic alone, it was  
23    different from all the submitted known hair  
24    samples.

25           Do you want me to go into the other features of

1     that hair, as well, hair A?

2     Q.     Yes, briefly.

3     A.     Okay. I described the cortex. The cortex of a  
4     hair is the main central portion of the hair. It  
5     comprises about 90 percent of the hair. I described  
6     the cortex as being striated. The cuticle, which  
7     refers to the scales on the outside of the hair, I  
8     describe it as being thin and looped in some areas,  
9     looping being a form of cuticular damage. And the  
10    medulla, which is the central core of hair cells  
11    that run down the middle of the hair, I describe as  
12    being discontinuous, moderate in diameter, and areas  
13    where it's opaque and translucent.

14    Q.     All right.

15    A.     Then hair B?

16    Q.     Correct.

17    A.     Hair B I describe as being a light brown color;  
18    the pigment density was light to sparse; the pigment  
19    grain size was medium; the pigment was distributed  
20    along the periphery of the hair or toward the  
21    cuticle regions. The cuticle in this case, which,  
22    again, was the scales, I described as being thin and  
23    colorless with slight protrusion. And that medulla  
24    that I previously described as being discontinuous  
25    in hair A was absent in hair B.

1 Q. All right.

2 A. And then hair C I described as being a light  
3 yellow/brown color near the root, and it changed to  
4 a light red/brown color as you move to the tip of  
5 the hair. The pigment was sparse near the root and  
6 became a little more heavily pigmented toward the  
7 tip. The grain size was small, and it was  
8 distributed proximally, or near the root area; it  
9 was distributed peripherally, meaning along the  
10 cuticle edge; and then more even as you travel  
11 toward the tip of the hair. And the medulla on this  
12 particular hair, hair C, I describe there is no  
13 medulla in that hair, as well.

14 Q. All right. I understand there were differences  
15 in hair lengths.

16 A. Yes, that's correct.

17 Q. Could you describe that to the Court?

18 A. Yes, I could. Hair A is seven inches long;  
19 hair B, one-and-a-half inches; and hair C was two  
20 and three-quarter inches long.

21 Q. If you had been called to testify back in 1990  
22 to these findings, would you have been able to  
23 testify that the person who had been identified as  
24 contributing samples from Kevin Richard Herrick was  
25 not present in the -- or had any contact with the

1 bed clothing?

2 A. Based on the lack of a hair transfer or the  
3 lack of evidence of a hair transfer, I can't exclude  
4 anyone from being in contact with a particular  
5 item. I can merely say that the evidence that was  
6 submitted to me did not contain any hairs that were  
7 like that particular person.

8 Q. Can a person have contact with bedsheets  
9 without transferring hair?

10 A. Yes. That's certainly possible.

11 Q. All right. Now, with respect to these three  
12 hairs, did you come to any conclusion as to whether  
13 it came from one person, two people, or three  
14 people?

15 A. A hair comparison is normally approached from  
16 the aspect of receiving known hair samples from the  
17 individuals involved in an incident and then  
18 examining each unknown hair as an individual hair  
19 and comparing it just to those hair standards. So  
20 the question that you ask is not normally how I  
21 would approach an examination, but I wouldn't be  
22 able to tell you whether those three hairs came from  
23 one person, two people, or three people. Any of  
24 those would be possible.

25 Q. The differences in characteristics you

1 described today, would you characterize those as  
2 fairly broad differences?

3 A. I would say that those hairs are described as  
4 being fairly different from one another, correct.

5 Q. If you were asked as to the probabilities or  
6 possibilities as to whether those three hairs came  
7 from one person or more than one person, what could  
8 you say about that?

9 A. I would indicate in my opinion that it's more  
10 likely that they came from more than one person,  
11 just based on the range of characteristics that  
12 those hairs display.

13 Q. So if an attorney were to try to portray that  
14 there were alien hairs found there that didn't get  
15 compared to any of the known standards or that it  
16 was one person, you couldn't give an expert opinion  
17 that that was true at all? You couldn't --

18 A. No.

19 Q. -- reach that opinion?

20 A. I would not normally agree with that scenario  
21 with that hypothetical question, that they all came  
22 from one person.

23 Q. And can you tell us what the possibility, if at  
24 all, it was that those hairs came from three  
25 individuals?

1 A. That's possible. I don't know that I could  
2 give you a probability.

3 Q. Was it unlikely, likely?

4 MR. GILLICK: Judge, at this point she's  
5 asking for speculation. The witness has already  
6 testified in this regard that she doesn't know  
7 and can't say.

8 THE COURT: I'm going to overrule the  
9 objection.

10 Q. If you can't say, that's fine. That's a valid  
11 answer, too. But can you describe any kind of  
12 possibility as to whether these hairs came from  
13 three different individuals?

14 A. I'd say it's possible that it came from three  
15 individuals, but I don't know.

16 THE COURT: Ms. Hildreth, it's my  
17 understanding that you testified that it's more  
18 likely that these hairs came from more than one  
19 individual. Is that your testimony?

20 THE WITNESS: That's correct, based on  
21 the characteristics described by these hairs, but  
22 now I think the follow-up question is could they  
23 be from three, so it's --

24 Q. From three individuals?

25 A. I would say it --

1 THE COURT: And the answer is you don't  
2 know.

3 THE WITNESS: More than one, so that  
4 leaves --

5 Q. More than one? Okay.

6 A. Two or three --

7 Q. That's fine.

8 A. -- would be most likely.

9 Q. Now, referring to Respondent's Exhibit 30 ---

10 MS. MCCARTHY: If I can approach the  
11 witness.

12 THE COURT: You may.

13 Q. On the second page of the report, and I believe  
14 you do have a copy, you had analyzed -- and I'm  
15 going to the Herrick's pants.

16 THE COURT: You're going to the what?

17 MS. MCCARTHY: Herrick's pants, the  
18 analysis of Herrick's pants, as opposed to the  
19 bedsheets.

20 Q. Turning to the analysis of what you found  
21 there, I understand from your report there was a  
22 hair there that you've looked AT that you reached  
23 some, at least, observations about.

24 A. That's correct.

25 Q. And could you describe those for the Court?

1     A.     Yes.  The debris from the pants, from  
2     Mr. Herrick, there were two hairs that I founded on  
3     a microscope slide to do a comparison with.  One of  
4     the hairs was too limited for comparison.  The  
5     second hair is a Caucasian head hair that was  
6     microscopically different from the known hair  
7     samples of both Herrick and Barfield.  And when I  
8     compared that head hair then with the known head  
9     hair of Hagan, I found both similarities and  
10    differences with that particular hair.

11           And my result -- the paragraph you're  
12    referring to describes the fact that I found both  
13    similarities and differences and I was basically  
14    inconclusive as to the origin of that hair, although  
15    I can say it was different from the two males  
16    involved in this case.  I was inconclusive with  
17    whether or not it could have originated from Hagan.

18    Q.     Okay.  And when you talked about the hair  
19    analysis, micro hair analysis, as being one of  
20    exclusion, were you able to exclude the victim as  
21    the source of that hair?

22    A.     No, I could not exclude her as a possible donor  
23    of that hair.

24    Q.     And I understand there was also another hair  
25    that you had found on a shirt submitted by -- or of

1 Herrick's. Is that correct?

2 A. On the shirt from Mr. Herrick, there were  
3 actually two hairs that were microscopically like  
4 his own head hair sample and an additional Caucasian  
5 head hair that was different from all the submitted  
6 known hair samples.

7 Q. And were you able to exclude the victims?

8 A. Yes. None of those hairs were microscopically  
9 consistent with Hagan or Barfield.

10 Q. Were you able to reach any conclusion as to who  
11 that hair belonged to or came from?

12 A. The extraneous hair?

13 Q. Uh-huh.

14 A. No, I wasn't, other than saying it was  
15 different from each of these individuals and it  
16 didn't come from any of those three known hair  
17 samples I had.

18 Q. Now, with respect to the hairs that you  
19 described as A, B, and C found in the debris --

20 A. From the sheets.

21 Q. -- of the bedsheets, could the differences --  
22 let's say there's three different people or one  
23 different person. Can those be accounted for in  
24 just an innocent transfer?

25 A. That's certainly possible. Each individual

1 normally sheds approximately 100 hairs a day just  
2 through normal hair growth and hair shedding, so  
3 hairs can then be either directly transferred onto  
4 an item or indirectly transferred, and this happens  
5 all the time. For example, if I shed a hair on this  
6 chair and the next witness sits down, that  
7 individual can pick up that hair on their clothing  
8 even though I never had direct contact with that  
9 individual, we were just in the same location. So  
10 hairs are transferred that way, as well.

11 Q. So would it be correct to conclude the it is  
12 possible that the contributor of hair A, B, and C  
13 may not have had direct contact with the sheets?

14 A. That's possible.

15 MS. MCCARTHY: No further. Tender the  
16 witness.

17 MR. GILLICK: I've got no questions of  
18 this witness.

19 THE COURT: Okay. Thank you, ma'am.

20 THE WITNESS: Thank you.

21 MS. MCCARTHY: Oh, Your Honor, I'm  
22 sorry, just one additional question. I  
23 apologize.

24 THE COURT: Very well.

25 Q. When we talked about innocent transfer, is one

1 example, then, a transfer of laundry, say, a laundry  
2 service or a laundromat? Can hairs be transferred  
3 in that fashion?

4 A. They certainly can, yes, picked up in a washing  
5 machine or a dryer or anything, along those lines,  
6 correct.

7 MS. MCCARTHY: Thank you.

8 THE COURT: Thank you, ma'am.

9 THE WITNESS: Thank you.

10 THE COURT: Please continue,  
11 Mr. Gillick.

12 MR. GILLICK: Judge, could we take a  
13 very quick break before I call Mr. Doherty?

14 THE COURT: All right. Let's begin back  
15 again at 3 o'clock

16 (Recess at 2:48 p.m., until 3:03 p.m.)

17 THE COURT: Mr. Gillick, are you ready  
18 to begin?

19 MR. GILLICK: Yes, Your Honor. We would  
20 call Patrick Doherty.

21 MS. SWANK: Please raise your right hand  
22 and repeat after me.

23 PATRICK DOHERTY, PETITIONER'S WITNESS,  
24 SWORN

25 MS. SWANK: Please state your full name

1 for the record, and spell it for the record,  
2 please.

3 THE WITNESS: Patrick Doherty,  
4 D-O-H-E-R-T-Y.

5 DIRECT EXAMINATION

6 BY MR. GILLICK:

7 Q. Mr. Doherty, what is your profession?

8 A. I'm a lawyer.

9 Q. How long have you been a lawyer?

10 A. Since 1973.

11 Q. You're not a mathematician, so I won't ask you  
12 how many years. Where are you admitted to practice?

13 A. I'm admitted to practice in Florida,  
14 Massachusetts, Louisiana, and Colorado.

15 Q. And have you practiced since 1973?

16 A. Yes.

17 Q. And Mr. Doherty, where are you currently  
18 employed?

19 A. I'm presently working at Wilkes & McHugh, which  
20 is a personal injury firm in downtown Tampa.

21 Q. Mr. Doherty, since 1973, when you commenced  
22 practice, what has been the bulk of your area of  
23 expertise?

24 A. Criminal trial work.

25 Q. And how long did you do criminal trial work

1     since 1973?

2     A.     Probably 25 years, that period of time.

3     Q.     And Mr. Doherty, in your criminal trial work,  
4     did you practice in both state and federal courts?

5     A.     Yes.   The bulk of my work was in state court.

6     Q.     And where were you officed most of your career?

7     A.     Pinellas County, Clearwater.

8     Q.     And do you have a rating in Martindale-Hubbell?

9     A.     Yes.   I was --

10    Q.     What is it?

11    A.     -- AV.

12    Q.     That's the highest rating you can get?

13    A.     Yes.

14    Q.     Mr. Doherty, do you have any idea about  
15    approximately how many criminal cases you've handled  
16    in your career?

17    A.     Handled?

18    Q.     Yes.

19    A.     I really don't know how many I've handled.  I  
20    know I've tried about -- I think I've tried about  
21    125 felonies.

22    Q.     Would it be fair to say that the number of  
23    cases you've handled would be in the thousands?

24    A.     Oh, yeah.

25    Q.     And would that include felonies and other

1 serious crimes?

2 A. Oh, yes. Uh-huh, yeah.

3 Q. You handle murders?

4 A. Yes, a lot of them.

5 Q. Death penalty cases?

6 A. A lot of them, yeah.

7 Q. Have you handled other types of cases that  
8 potentially involved a life sentence?

9 A. Oh, yeah, a lot of them, of course.

10 Q. Mr. Doherty, aside from actually practicing  
11 criminal law, have you lectured in the area of  
12 criminal law?

13 A. Yes, I have. On several occasions, I've  
14 lectured in the area of criminal law, and I was  
15 Board-certified in the area of criminal trial work  
16 and all that sort of thing. I don't think I've ever  
17 written any articles, but -- well, yes, I have, as a  
18 matter of fact, now that I think of it. I did back  
19 in the '70s.

20 Q. And Mr. Doherty, have you ever before been  
21 qualified as an expert in --

22 A. Yes.

23 Q. -- in a criminal case?

24 A. Yes.

25 Q. And Mr. Doherty, have you ever met Kevin

1 Herrick prior to today?

2 A. No, I never have.

3 Q. Do you know any members of his family?

4 A. I don't believe I do, no.

5 Q. And Mr. Doherty, have you reviewed any  
6 materials in the Kevin Herrick's case?

7 A. Yes, I have.

8 Q. Can you give us an idea of what types of  
9 materials you reviewed?

10 A. Well, of course, I read the transcript; and in  
11 addition to reading the transcript, I read Pat  
12 Porrey's deposition and I read Mrs. Porrey, Pat's  
13 mother's deposition. I read the police reports. I  
14 went through the hair analysis package, if you want  
15 to call it that. And I think that's about -- I  
16 think that's about it. I think there was some other  
17 trace analysis stuff along with the hair, but I  
18 think that's it.

19 Q. And do you know attorney Ed Leinster?

20 A. No, I don't.

21 Q. Ever had any dealings at all with Mr. Leinster?

22 A. No.

23 Q. Mr. Doherty, with your expertise in --

24 MR. GILLICK: Judge, first, I would  
25 offer Mr. Doherty as an expert in the area of

1 criminal defense law.

2 MR. FISHKIN: No objection.

3 THE COURT: All right.

4 Q. Mr. Doherty, in your expertise in criminal  
5 defense and your review of materials previously  
6 discussed, have you formed an opinion regarding  
7 Edward Leinster's performance in representation of  
8 Kevin Herrick --

9 A. Yes, I have.

10 Q. -- in this matter?

11 What is your opinion of Mr. Leinster's  
12 performance?

13 A. I feel that his performance was below the  
14 standard in the community, the prevailing standard  
15 in the community, and I think it was so much below  
16 the prevailing standard in the community that it  
17 affected the outcome of the trial; and but for his  
18 lack of preparation on several items really, the  
19 outcome of this case could have, would have, and  
20 should have been different.

21 Q. And Mr. Doherty, have you formed an opinion  
22 whether Mr. Leinster's deficient performance  
23 prejudiced Kevin Herrick in this case?

24 A. Yes, I have.

25 Q. And what is your opinion in that regard?

1     A.     When you read the transcript, I honestly  
2     believe that if a fair-minded person sits down and  
3     reads this transcript, they will get up from the  
4     table, and there is just no way in the world that a  
5     fair-minded person would say, "That's the truth. I  
6     know everything I need to know about this case."  
7     This is without a doubt one of the flakiest cases I  
8     have ever seen. It's certainly one of the flakiest  
9     cases I've ever seen. Therefore, this young man is  
10    on trial in this case; he's denied it from day one;  
11    he was adamant in his denial at the scene from day  
12    one; and his lawyer obviously, from the very record  
13    itself, was absolutely unprepared for this case.

14                 He's not bad on his feet. I don't mean to  
15    suggest that this is a person that doesn't have any  
16    talent, by any means. He just didn't do the  
17    groundwork that he needed to do to get ready for  
18    this trial with this young man, with this young  
19    man's stance in this case, being that he was  
20    innocent. This was a lawyer that was seeing things  
21    for the very first time right then, right there, in  
22    front of the jury. That should never happen. That  
23    should never ever, ever happen.

24    Q.     Could that be considered a strategic act by a  
25    lawyer to fail to investigate a case such as this?

1 A. There is no way that a failure to investigate a  
2 case can ever be explained as a strategic move.  
3 There is just no -- there is just no way. This is  
4 not just a guy who said, "I'm not going to call the  
5 hair expert because, in my opinion, the hair expert  
6 might be equivocal." He's hearing about the hair  
7 expert at the same time Kevin Herrick is hearing  
8 about the hair expert, in front of the jury. The  
9 jury is hearing about the hair expert at the same  
10 time as the defense lawyer, and he basically says  
11 so.

12 It's not that he made a conscious decision  
13 or a trial decision or weighed the strategy of  
14 introducing photographs. He clearly is saying in  
15 this trial transcript, "This is the first time I've  
16 seen the photographs. Let me take a look at them.  
17 Is there anything in here?" Given the fact that  
18 this young man from day one said that he was  
19 innocent, given the fact that this young man was all  
20 too eager to give up hair samples and whatnot to  
21 prove his innocence, this is egregious conduct.  
22 This is deficient conduct.

23 Q. Would there be an excuse for Mr. Leinster not  
24 to talk to or present as witnesses Patrick Porrey  
25 and David Stewart?

1     A.     I don't know about David Stewart, but I do know  
2     that Patrick Porrey was present during the time that  
3     the deposition of Theresa Porrey was taken because  
4     he has a cameo appearance in that. He comes on, he  
5     says something to his mother and is like, Are you --  
6     Do you need a glass of water, Mom, or something like  
7     that? He's definitely in the Theresa Porrey  
8     deposition, so he's definitely right there. And  
9     having read his deposition afterward -- he's  
10    looking back 13 years -- he would have corroborated  
11    Mrs. Porrey's prior testimony. And I think that in  
12    and of itself would have changed the outcome of this  
13    case.

14   Q.     Do you think that Mr. Leinster was acting  
15   competently or incompetently by failing to present  
16   the physical evidence results that were available, I  
17   don't know if he had them, but that were available  
18   regarding blood, hair, fiber, and fingerprints?

19   A.     Well, it is pretty clear when you read the  
20   transcript that he did not have them,  
21   notwithstanding the fact that he should have had  
22   them, but --

23           THE COURT:   What makes you say that he  
24   didn't have them, Mr. Doherty?

25           THE WITNESS:   Because on Page --

1           THE COURT: Particularly when you read  
2 his opening statement.

3           THE WITNESS: Beg your pardon?

4           THE COURT: I said particularly when you  
5 read his opening statement, because if I can look  
6 real quickly, they start talking on Page 122: I  
7 thought I'd been provided with all discovery,  
8 says Mr. Leinster. I did not specifically ask  
9 for photographs other than any kind of discovery  
10 request, but I have, as counsel, asked to have a  
11 copy of all reports and matters of evidence. I  
12 don't know that there's anything in here of  
13 materiality, but I would like to know if there is  
14 anything else I haven't gotten.

15           Mr. Bulone says, "We're going to introduce  
16 latent fingerprints taken from the door and the  
17 known fingerprints of the victim."

18           As it turned out, the fingerprints of the  
19 victim were matched by the fingerprints taken  
20 from the door and they all matched.

21           Did you receive a copy of the  
22 fingerprints?

23           Mr. Leinster says, "I've --" he doesn't  
24 say yes. He says, "I've been assured by counsel  
25 these were not a match from Mr. Herrick."

1           Mr. Bulone says, "What was sent to him  
2 was a report about a match for the victim. It  
3 wasn't a match for the defendant, but the  
4 victim."

5           The Court then says, "For the victim and not  
6 the defendant?"

7           Mr. Leinster, again, has an opportunity to  
8 say, "Well, yeah, I got those. I read those."  
9 He says, "I have no problem with that. I have no  
10 problem with these pictures. I just haven't seen  
11 them before. Are there any reports that you or  
12 the witnesses have that I never saw?"

13           Bulone said, "No."

14           THE WITNESS: I get the distinct  
15 impression, Judge, that he's saying this is all  
16 new to him and he's going on the word of the  
17 prosecutor right then, right there. It sure  
18 seems that way when he's talking, Judge.

19 Q.   Mr. Doherty, in a case where the evidence  
20 against Mr. Herrick was eyewitness identification  
21 only by Cheryl Hagan and Mr. Barfield, would it be  
22 important for a jury to see the actual laboratory  
23 reports that exculpated Mr. Herrick, such as hair,  
24 blood, fiber, and fingerprint reports?

25 A.   I would think so. I would think so for --

1           THE COURT:   How would laboratory reports  
2 even come into evidence, Mr. Doherty?

3           THE WITNESS:   No, I would say you should  
4 call the lab technician and have them testify to  
5 those results.   And the reason is that I think in  
6 this case Mr. Leinster had already made the  
7 decision to put on a piece of evidence other than  
8 Mr. Herrick's testimony, so he's already made the  
9 decision that he's giving up a closing argument  
10 to put on Mrs. Porrey.   Having made that decision  
11 there's no down side, then, to put on the lab  
12 technicians.   They can equivocate, to some extent  
13 I'm sure, but the bottom line is, nothing in this  
14 apartment matches Mr. Herrick.   That, in itself,  
15 is remarkable, if you think about what we're  
16 saying went on here.

17           We're thinking about -- we're thinking  
18 about a rape that is supposed to have occurred in  
19 a bedroom, in a crime scene that's fairly --  
20 it's -- the integrity is pretty well kept,  
21 according to these people.   The fact that there's  
22 no hair that matches Herrick is -- it's not in  
23 itself something that will exculpate him, but  
24 it's something that's odd.   That's certainly  
25 unusual where a rape has occurred just five

1 minutes ago.

2 The fact that there's no blood from  
3 Mr. Herrick, because people frequently, if  
4 they're stabbing other people, cut themselves in  
5 the process of doing so, ala O.J. Simpson. In my  
6 experience, blood is sticky and slippery and your  
7 hand can slip off the handle of a blade.

8 Okay. So the fact that there's no blood  
9 there of Mr. Herrick's, that's not that  
10 remarkable, but it's another thing that's  
11 missing. The fact that there's no fingerprints  
12 there of Mr. Herrick, that is pretty remarkable.  
13 The fact that there isn't any forced entry into  
14 this building, boy, that's very remarkable. And  
15 you go on and on and on in this case to the fact  
16 that these people who say they identified him did  
17 not identify him until later. That's unusual.

18 The fact that a dog is supposed to track  
19 the perpetrator of this crime but can't track  
20 anybody except Mr. Barfield from the police  
21 reports, that's kind of odd. The fact that  
22 Mr. Herrick is back at the house, how did  
23 Mr. Herrick -- how was that supposed to have  
24 happened? That's very, very odd.

25 And so in the final analysis, you get

1 all of these things and you add them up, and is  
2 there some mathematical possibility that all of  
3 those things could have occurred at the same  
4 time. And I think the answer is yes, there is  
5 some mathematical possibility of that, but it's  
6 on the order of the mathematical possibility of  
7 being hit by a meteor. It could happen.

8 Q. Mr. Doherty, you mentioned identification, and  
9 that's my next point. From your review of this  
10 case, do you have any conclusion about the  
11 identification by Hagan and Barfield being tainted  
12 in any way?

13 A. Yes, I do think it's tainted. And a person  
14 could file a motion to say that it's tainted, but  
15 here's how I've taken that, to be honest with the --  
16 to be honest. Those motions are in such disfavor  
17 that I'm not sure that the actual filing of the  
18 motion is critical; but every time I've reached a  
19 conclusion that a -- that I ought to file a motion  
20 and it ought to be suppressed, it never is  
21 suppressed. But the flip side of that is that a  
22 jury sees it the same way.

23 This is a -- to say this is highly  
24 suggestive is the understatement of the millennium.  
25 They lied to these people in order to get them --

1 they lied to these people for some reason. They  
2 told them that evidence was found in Mr. Herrick's  
3 room that would inculcate him, and it simply was  
4 not.

5 But I'll say one thing about this motion  
6 thing, and that is that when you start thinking  
7 about that, it does focus your mind on something,  
8 and that is that even the police, when they're  
9 saying this to Ms. Hagan and Mr. Barfield, even the  
10 police are saying, We should have found something in  
11 Herrick's room. If Herrick was the guy, we should  
12 have found something and we did. Okay. Well, that  
13 turns out to be false.

14 But I agree with the first part of the  
15 proposition. Yeah, they should have found  
16 something. If Herrick was the person who did that  
17 crime, among other things, you might want to find,  
18 say, the big belt buckle. Where is that? They  
19 talked about the -- you know, in the course of this  
20 identification, they testified -- Ms. Hagan  
21 testified that, why, she recognized Barfield because  
22 he had that big belt buckle. Where's the big belt  
23 buckle? There's not even that in his room.

24 Q. Mr. Herrick [sic], in a case of this nature  
25 where a person is charged with such serious

1 felonies, where a person is facing a life sentence  
2 in prison, would it be appropriate or would it be  
3 ineffective for a lawyer not to provide the  
4 defendant with any discovery materials?

5 A. Well, we used to common -- I will say that we  
6 used to commonly do that. I don't know that that in  
7 itself would be ineffective assistance of counsel.  
8 We used to commonly provide our client with  
9 discovery materiels because it is, after all, their  
10 trial and they have their own information and  
11 insight they can give to the stuff, and, yeah, we  
12 commonly would do that. And as public defenders in  
13 the Sixth Judicial Circuit, I think they always did  
14 that.

15 Q. Would it be important for a lawyer to discuss  
16 the trial strategy with a defendant sometime prior  
17 to trial?

18 A. Sure.

19 Q. Would it be important for the lawyer to advise  
20 a defendant in a serious case of what the witnesses  
21 are saying and what the evidence is against him?

22 A. Of course. Of course. And I would think that  
23 that would be ineffective assistance of counsel.  
24 And the reason is that, with rare exceptions, a jury  
25 wants to hear what the defendant has to say for the

1 simple common sense reason that most people feel if  
2 they were accused of a rape they'd want to say they  
3 didn't do it, no matter who the heck they were,  
4 whether they had two felony convictions or 10 felony  
5 convictions. If somebody accuses you of a rape that  
6 you did not do and you stand silent in the face of  
7 that accusation, that in itself is hurtful,  
8 notwithstanding the fact that the court can give an  
9 admonishment not to use a person's Fifth Amendment  
10 right against them.

11 So that's a long way around, but what I'm  
12 driving at is, you send your client the discovery  
13 materials, you discuss with your client what the  
14 discovery materials are, you discuss with your  
15 client what the trial strategy is, all in a kind of  
16 a overarching strategy of getting your client in a  
17 position where he understands what the Government or  
18 the State is saying and so that he can testify. And  
19 in the event that those discussions were not held,  
20 that would be ineffective assistance of counsel, and  
21 I mean without a doubt.

22 Q. Mr. Doherty, if an attorney had a long-standing  
23 history of chronic alcoholism, drug abuse, and  
24 numerous arrests, will that likely have an effect on  
25 his ability to properly perform at trial, or could

1 it?

2 MR. FISHKIN: I'm going to object to  
3 that, Your Honor, the --

4 THE COURT: Sustained.

5 MR. FISHKIN: -- material comment of  
6 long-standing, unless he puts it within  
7 parameters.

8 THE COURT: Sustained.

9 MR. GILLICK: I have no further  
10 questions.

11 CROSS-EXAMINATION

12 BY MR. FISHKIN:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. In your readings, did you read the opening  
16 statement that Mr. Leinster gave in this case?

17 A. I did.

18 Q. And did you read on -- depending on which  
19 number you want to use, Page 13 at the top or 39 at  
20 the bottom in his opening: Blood was, again, left  
21 by the assailant's hands on the doorknob. Prints  
22 were taken. They did not match Kevin Herrick.

23 A. Uh-huh.

24 Q. So he knew going into that case that there was  
25 no physical evidence linking Mr. Herrick to the

1 crime?

2 A. I think he knew. I think there are things that  
3 he knew, but I think he knew them from talking to  
4 Joe Bulone.

5 Q. But you don't know that?

6 A. I know he said he never saw the photographs,  
7 and I know that his testimony here seems to indicate  
8 that he didn't know about other things. The short  
9 answer is, no, I do not know what he knew.

10 Q. You've been practicing in Pinellas County for a  
11 number of years prior to moving over to Tampa?

12 A. Yes, I have.

13 Q. We won't go into which is better. Is it normal  
14 practice that as part of discovery, all the police  
15 reports are turned over?

16 A. That has varied from time to time over the  
17 years. I am not sure that that was the case in  
18 1989.

19 Q. If police reports contain exculpatory matter,  
20 that's something called Brady material, isn't it?

21 A. Do police reports --

22 Q. No, I said if.

23 A. If a police report contains exculpatory  
24 material, it would be Brady material.

25 Q. And that has to be turned over?

1 A. It's supposed to be turned over.

2 Q. And also it goes --

3 A. Wait, wait, wait, wait. Let's not get ahead of  
4 ourselves here. It is supposed to be turned over.  
5 Is it turned over? The truth is that in the rush of  
6 business, it may be or it may not been. It's hard  
7 to tell.

8 Q. In a life sentence case, wouldn't the police,  
9 as a matter of course, turn over in discovery  
10 witness statements, police reports that have police  
11 statements, lab reports that are contained in police  
12 reports? Isn't this done as a matter of course?

13 A. You're asking me what my opinion is of Largo  
14 Police Department. I do not know that they did it  
15 as a matter of course with Largo Police Department.

16 Q. I'm asking as your opinion as a defense  
17 attorney. Do you not normally get that?

18 A. Well, let me answer it by this. Yes, there  
19 have been periods in history where you normally get  
20 that and there were periods when you wouldn't get it  
21 and they would require you to take depositions, and  
22 then as depositions became -- well, the bottom line  
23 is depositions became so costly that you started to  
24 get police reports. And I'm not sure in 1989 where  
25 that fell in the whole process.

1 Q. Okay. Depositions were taken in this case;  
2 were they not?

3 A. Yes, I believe they were taken by Jane Brown.

4 Q. By the PD's office?

5 A. Yeah, Jane.

6 Q. And when you take the depositions of police  
7 officers, the police officers are asked to bring  
8 with them their reports; are they not?

9 A. Sometimes.

10 Q. And you indicated that in the Sixth Judicial  
11 Circuit -- that's Pinellas County, isn't it --  
12 that they've always given discovery over to the  
13 prisoners?

14 A. As a public defender, we used to do that.

15 Q. Now, what is --

16 A. Now, wait a second, wait a second. Let me just  
17 stop here. I can't be used to kind of give a  
18 imprimatur to what Mr. Jagger's office was doing in  
19 1989 because I left there in 1975.

20 Q. But it was the practice in 1975 to do that?

21 A. I think it was, yeah.

22 Q. Do you have any reason to believe today that  
23 the practice has changed?

24 A. I don't have any reason to know either way. I  
25 think it hasn't changed, but I wouldn't know.

1 Q. One of the first motions that's filed after  
2 arraignment is a discovery motion; is it not?

3 A. A demand for discovery.

4 Q. And that includes Brady and, you know, I  
5 haven't done this for a while and I don't remember  
6 all the cases, but Giglio, and there's a whole  
7 progeny of cases that go beyond just the scope of  
8 exculpatory material today. Is that not so?

9 A. Right.

10 Q. And if that's not turned over, that would be  
11 the basis for all kinds of problems for the  
12 prosecutor; would it not?

13 THE COURT: Where are we going,  
14 Mr. Fishkin? There's no claim that material  
15 wasn't turned over, at least no claim as such in  
16 the Petitioner's habeas corpus petition.

17 MR. FISHKIN: The claim, Your Honor, is  
18 that the lab reports were not admitted, and  
19 Mr. Doherty has stated that Mr. Leinster didn't  
20 know about them.

21 THE COURT: I think what he's actually  
22 saying is that Mr. Leinster may have had them but  
23 didn't read them.

24 MR. FISHKIN: Well, I didn't --

25 THE COURT: Is that what you're saying,

1 Mr. Doherty?

2 THE WITNESS: Yeah. Yes, Judge.

3 THE COURT: In other words, he didn't  
4 open his file.

5 Q. Yet he was aware -- just to follow up on that,  
6 he was aware of what they had, at least for opening  
7 statement, what they had in them?

8 A. He was aware, generally speaking, that they  
9 didn't implicate Kevin Herrick, but I don't know  
10 that he understood the significance of this or  
11 thought through the significance of this given what  
12 the allegations of this case are.

13 THE COURT: Mr. Doherty, are you saying  
14 that the decision by Mr. Leinster not to call  
15 experts such as the hair and fingerprint experts  
16 but yet to solicit the information included in  
17 those reports generally, namely that no physical  
18 evidence implicates Mr. Herrick, fell below that  
19 standard of effective assistance of counsel, that  
20 standard of professional representation demanded  
21 by the Sixth Amendment?

22 THE WITNESS: That decision in and of  
23 itself, no. The decision not to call these  
24 witnesses and to talk to them to see what they  
25 would say, yes. I would say that the lack of

1 preparation, the lack of that --

2 THE COURT: I'm talking solely about the  
3 experts, not Mr. Porrey or Mr. Stewart.

4 THE WITNESS: Right. But I mean I'm  
5 just saying in the context to say, "I didn't call  
6 the hair guy because I knew that there were no  
7 hairs of Mr. Herrick's;" well, were there other  
8 people's hairs? I've read this transcript, and  
9 there's a hair there that doesn't match  
10 Mr. Herrick and it's not a clear match to the  
11 victim, and that could be pivotal information to  
12 a jury.

13 Fingerprints, there are nine  
14 fingerprints that I counted, I think, that were  
15 taken. Four of them match Mr. Barfield. That's  
16 great evidence for Mr. Herrick. Who do the other  
17 five belong to? We know they don't belong to  
18 Herrick. Who do they belong to? And by the way,  
19 are any of those fingerprints in blood? Do we  
20 know the answer to that? No, we don't know the  
21 answer to that.

22 And I think that it would be -- I think  
23 it's one of those things that if it is in blood,  
24 for instance, or part of the fingerprint's in  
25 blood, then that's like a time-dated

1 fingerprint. That puts whoever is there at the  
2 time in the room at the time somebody is  
3 bleeding, so that could be critical exculpatory  
4 information. To not call these people without --  
5 to not call them as witnesses without having  
6 investigated it first, that does fall below the  
7 standard, I think.

8 Q. Mr. Doherty, you made a comment before that the  
9 fact that Mr. Herrick's fingerprints were not found  
10 there was incredible if he had been there; is that  
11 correct?

12 A. Well, I don't know. If I said that, I  
13 should -- it's not incredible. It's certainly  
14 exculpatory.

15 Q. Are you aware, sir, that Mr. Herrick was in  
16 that apartment twice within the day-and-a-half  
17 before this crime was committed, in fact, the very  
18 afternoon this crime was committed?

19 A. Uh-huh.

20 Q. You are?

21 A. Yeah.

22 Q. And yet they didn't find his fingerprints as a  
23 result of that?

24 A. Yeah, but he wasn't -- no one ever said that in  
25 those instances -- they said he was in and out, but

1 no one said in those instances that he was touching  
2 anything. The person who came in this house that  
3 night touched the door, obviously, because they got  
4 in, they touched the sliding glass door because they  
5 were trying to get out that sliding glass door, and  
6 I think there were a couple of other things that  
7 they mentioned that were touched and I can't think  
8 of those off the top of my head. But at any rate,  
9 there ought to be fingerprints of the perpetrator of  
10 that crime.

11 Q. Is it your experience, sir, that because  
12 somebody touches something they necessarily leave a  
13 readable fingerprint?

14 A. No, they don't necessarily leave a readable  
15 fingerprint, but once again, that's one of those  
16 things that where if somebody's life is on the line  
17 and they have uniformly said they were innocent from  
18 day one, you ought to look at it. You ought to talk  
19 to somebody about that.

20 Q. You've talked about the fact that not  
21 interviewing Mr. Porrey and Mr. Stewart fall below  
22 the realm of acceptable conduct. Is that a fair  
23 statement?

24 A. I don't know about Stewart because I don't know  
25 what Stewart had to say, but I think the failure to

1 interview Porrey is pretty low and that's pretty --  
2 I don't mean low morally. I mean, that's pretty far  
3 below the standard, yeah.

4 Q. Do you know that he did not interview  
5 Mr. Porrey?

6 A. I believe he said he didn't.

7 Q. He said he didn't? When did he say that?

8 A. It was my impression that he said to  
9 Mr. Herrick that he hadn't interviewed Porrey.

10 Q. When did he say that?

11 A. I don't know.

12 Q. Now, there's an interrogatory where he confuses  
13 Mr. Stewart with Mr. Porrey.

14 A. I think it might be the interrogatory I'm  
15 talking about.

16 Q. And that was some four or five years after the  
17 event. And it's clear, if you look at the context  
18 of the interrogatory, that he's talking about  
19 Mr. Stewart, not Mr. Porrey, because obviously he  
20 does talk to Mr. Porrey 'cause Mr. Porrey, as you  
21 said, is in the videotape, so he was there. Now, is  
22 it possible, sir --

23 A. Wait a second, wait a second. Wait a minute.  
24 Let me just -- I don't mean to be facetious, but  
25 what's obvious to you and me may not be obvious to

1 somebody who's floridly alcoholic.

2 Q. Was what?

3 A. Floridly alcoholic.

4 Q. Well, do you know that he was at that time?

5 A. I know he has a record that is unbelievable.

6 Q. And that record is mostly post 1989, isn't it?

7 A. Okay.

8 Q. I think you've indicated you don't know him;  
9 you've never met him.

10 A. I don't know him.

11 Q. And you have no idea of his physical or  
12 substance situation in 1989; is that fair?

13 A. Yes. And the next thing I would say is, in  
14 addition to that, I don't know whether this person  
15 13 years ago knew that that was the person that his  
16 client had told him about 10 times. I don't know  
17 that he knew enough to talk to that person, and I'm  
18 not willing to sit here today and say that he made a  
19 conscious decision not to talk to that person.

20 Q. My question was, do you know whether he talked  
21 to him?

22 A. No, I don't. I'm just saying I don't know  
23 personally, but I'm reading the same answer that  
24 you're reading.

25 Q. Okay. Do you know if he talked to him whether

1 Mr. Porrey claimed to have any knowledge of this  
2 incident?

3 A. I don't know. All I know is what Mr. Porrey  
4 said in his deposition with Mr. Gillick.

5 Q. You've read the police reports; have you not?

6 A. Uh-huh.

7 Q. There's nothing in the police report where  
8 Mr. Porrey claims, I know this individual couldn't  
9 have done it for this reason, this reason, or this  
10 reason, is there?

11 A. No.

12 Q. Yet Mr. Porrey claimed in his deposition that  
13 he told Mr. Leinster all of this; is that right?

14 A. Uh-huh.

15 Q. And he also told the Largo Police Department  
16 everything he told to Mr. Leinster?

17 A. Right.

18 Q. And yet there's nothing in the reports to  
19 sustain that, is there?

20 A. No. You can't possibly be surprised by that.  
21 Are you?

22 Q. Well, let's talk about facts, not what  
23 surprises me.

24 A. All right. Let me just say this, then.

25 THE COURT: Why don't you wait till a

1 question's put to you, Mr. Doherty? Let's go  
2 ahead and proceed.

3 Q. Now, again, in the videotaped deposition,  
4 Mrs. Porrey gives Mr. Herrick an alibi; does she  
5 not?

6 A. Yes.

7 Q. She claims that he couldn't have done it 'cause  
8 she woke him up?

9 A. Right.

10 Q. She was there when the police were there. She  
11 consented, did she not, to the police searching the  
12 room in which Mr. Herrick was staying? Did she not?

13 A. I believe so, yes.

14 Q. Did she ever, according to the police report,  
15 tell the police that Mr. Herrick could not have done  
16 it because, I just woke him up when I heard the  
17 screaming?

18 A. I'm trying to say to you I don't know what she  
19 told the police, and I'm not sure that you could  
20 know that from a police report.

21 Q. In any event, it's not in the police report?

22 A. (Nods head up and down.)

23 Q. Now, I think you mentioned -- or did you  
24 mention that Patrick and Mrs. Porrey were  
25 consistent?

1 A. I thought they were.

2 Q. In Mr. Porrey's deposition, did he not testify  
3 that he was the one that woke up Patrick and that's  
4 how he knew Patrick didn't do it?

5 A. You mean Kevin.

6 Q. Kevin, I'm sorry.

7 A. I think that what happened was that Kevin  
8 Herrick was awakened by Mrs. Porrey, came out, and  
9 went back in and laid down. That was my  
10 understanding of the factual situation.

11 Q. When he laid down, he was awakened three hours  
12 later by Mr. Porrey, according to testimony here  
13 today. Now, according to Mr. Porrey in his  
14 deposition, when this happened, he was across the  
15 street at Poor Boys. He heard a commotion, that's  
16 Page 12 of his deposition, and there's a  
17 digression. Then how did he hear about it.  
18 Everybody was outside, I believe, my mother said  
19 something about it, and I believe Darren came  
20 running back and said he chased some guy down the  
21 street.

22 And then on the next page, it goes on: All I  
23 remember doing is waking him out of the -- out of  
24 the room. That's all I can remember about that. I  
25 don't know if he -- he might have went outside when

1 we were all standing out trying to figure out what  
2 happened.

3 Now, that's pretty inconsistent with the two  
4 stories, isn't it?

5 A. I don't think it is, particularly given the  
6 fact that 13 years have elapsed between the  
7 testimony of Mrs. Porrey and the testimony of her  
8 son.

9 Q. Okay. Now, in his deposition, Pat Porrey also  
10 agreed that he spoke to Mr. Leinster, didn't he?

11 A. I think he mentioned something about  
12 Mr. Leinster being at the deposition of his mother.

13 Q. Didn't he say he spoke to Mr. Leinster and that  
14 he told Mr. Leinster everything he knew about the  
15 incident and he told the police the same thing?

16 A. Okay.

17 Q. Isn't that what the deposition says?

18 A. I don't know. That doesn't ring a bell, but go  
19 ahead. Show me.

20 Q. I don't know if I can find it.

21 Well, the deposition will speak for itself.

22 A. Okay.

23 MR. FISHKIN: That's all I have.

24 THE COURT: Anything else, Mr. Fishkin?

25 MR. FISHKIN: That's it. Thank you.

1 THE COURT: Mr. Gillick?

2 MR. GILLICK: No, Your Honor.

3 THE COURT: Mr. Gillick, do you intend  
4 to ask Mr. Doherty any questions about the  
5 failure to file a motion for new trial?

6 MR. GILLICK: Yes, briefly, Your Honor.  
7 I apologize.

8 REDIRECT EXAMINATION

9 BY MR. GILLICK:

10 Q. Mr. Doherty, are you aware that Mr. Leinster  
11 failed to timely file a motion for a new trial?

12 A. Yes.

13 Q. And do you think that is significant?

14 THE COURT: In the sense that the motion  
15 for a new trial is addressed to whether the judge  
16 should act as a seventh juror in the case and  
17 overturn the jury's verdict because of that.

18 THE WITNESS: I do not. And I do not  
19 for several reasons, one of which is that I don't  
20 know that Judge Downey would ever in a million  
21 years do that; and number two -- I've just never  
22 seen Judge Downey do that.

23 THE COURT: In your experience, have you  
24 ever seen any judge do that? Has it ever  
25 happened to you?

1           THE WITNESS: It's never happened to me,  
2 Judge.

3           THE COURT: It never happened to me  
4 either, so that's why I asked.

5           MR. GILLICK: And briefly, Your Honor.

6 Q.    Mr. Doherty, Mr. Fishkin indicated to you that  
7 Mr. Leinster had answered some interrogatories or  
8 request for admissions and made a mistake and  
9 indicated that --

10 A.   I had looked at those. If you've got them,  
11 I'll be able to find it.

12 Q.   I made a mistake in putting Mr. Stewart's name  
13 in place of Patrick Porrey.

14       I would like to show you a Response to  
15 Plaintiff's Request for Admissions and ask you to  
16 look at that, and ask you to read the answer to  
17 No. 4.

18       THE WITNESS: This is the thing that I  
19 was referring to, Judge. It's answers as to  
20 four, Patrick Porrey was not located. Neither  
21 were exculpatory.

22       MR. FISHKIN: Excuse me. Can I have  
23 some indication of where you're reading from?

24       THE WITNESS: I'm reading from Page 1 of  
25 Response to Plaintiff's Request for Admissions,

1     which is signed by Ed Leinster on the 27th of  
2     September, 1994.

3             It goes on to say that even Mrs. Porrey  
4     did not know where Patrick was. David Stewart  
5     had jumped you that night demanding if you did  
6     it. I don't know what that means. I don't know  
7     what that means. But I do know that I took that  
8     to mean that he had searched for Patrick Porrey  
9     and was unable to locate him. When you see the  
10    videotape, you see that Patrick Porrey's on the  
11    videotape. That's clearly not historically  
12    accurate.

13    Q.     Mr. Doherty, I'd like you to review the answer  
14    to question No. 5.

15    A.     Yeah, even Mrs. Porrey didn't know where  
16    Patrick was.

17    Q.     Is there any way that that could be confused  
18    with David Stewart, or does that directly relate to  
19    Mr. Porrey?

20    A.     No, that's Mr. Porrey.

21    Q.     And that is signed by Ed Leinster?

22    A.     Yes, it is.

23    Q.     Thank you, Mr. Doherty. I've got no further  
24    questions.

25             THE COURT: Any inquiry, Mr. --

1 MR. FISHKIN: Yes, Your Honor, just on  
2 that subject. Just a moment.

3 THE COURT: If you're looking for the  
4 transcript, I found it, Mr. --

5 MR. FISHKIN: No, I'm not looking for  
6 the transcript. I'm looking for -- it's in the  
7 police report.

8 RECROSS-EXAMINATION

9 BY MR. FISHKIN:

10 Q. When you read the police report and the -- did  
11 you read the depositions, also?

12 A. No.

13 Q. In the police report, I believe it was Officer  
14 Crosby, also, in his deposition indicated that when  
15 he arrived at the scene, Patrick Porrey was very,  
16 very upset and wanted to attack the defendant, or  
17 Mr. Herrick, for what he had done to Cheryl. Does  
18 that shed any light on whether or not when  
19 Mr. Leinster said even Mrs. Porrey he didn't know  
20 where Patrick was, David Stewart had jumped you that  
21 night demanding if you did it, that he was thinking  
22 of Patrick Porrey, not David Stewart?

23 A. I honestly didn't think so. When he refers to  
24 Mrs. Porrey doesn't know where Patrick is, I think  
25 that's pretty clear that he's talking about Patrick

1 Porrey.

2 THE COURT: All right. Thank you,  
3 Mr. Doherty.

4 Call your next witness, please.

5 MS. MCCARTHY: Your Honor, we have two  
6 witnesses left tonight that we were hoping to get  
7 on, and we'd like to know the Court's regular  
8 calendar. Do you recess at 5:00?

9 THE COURT: Well, I'll be glad to stay  
10 later than that. What is your situation?

11 MS. MCCARTHY: Well, we have the State  
12 prosecutor, he's got a murder trial tomorrow, I'd  
13 like to put him on. And Ed Leinster is on a  
14 furlough status just today, so I would like to  
15 try to complete him if, at all possible; but we  
16 have arrangements made to contact the control  
17 room at DOC if we have to have him again tomorrow  
18 morning. But that's the plan for tonight.

19 THE COURT: What's your situation,  
20 Mr. Gillick? Are you finished or --

21 MR. GILLICK: Yes, I am finished with  
22 witnesses, Your Honor.

23 THE COURT: So you rest.

24 MR. GILLICK: Yes, Your Honor.

25 THE COURT: Well, call whoever you would

1     like to call.

2                 MS. MCCARTHY:   Yes, Your Honor.   And I  
3     would like to renew our motion for summary  
4     judgment at this time that he has not called Ed  
5     Leinster, and the testimony is thus far  
6     susceptible to the conclusion that counsel had,  
7     in fact, all the information available to him,  
8     including contact with Pat Porrey.

9                 THE COURT:   No.   I'll deny the motion.  
10    Since everybody's here, let's hear everybody's  
11    testimony.

12                MS. MCCARTHY:   Yes, Edward Leinster.

13                THE COURT:   I take it you didn't want to  
14    call your Assistant State Attorney first?

15                MS. MCCARTHY:   They said he's not in  
16    yet.   He's not in yet.

17                MR. FISHKIN:   Can we interrupt when  
18    he --

19                THE COURT:   Sure.

20                THE CLERK:   Raise your right hand,  
21    please.

22                EDWARD LEINSTER, RESPONDENT'S WITNESS,  
23    SWORN

24                THE CLERK:   Sir, state your full name  
25    for the record, and spell your last name.

1 THE WITNESS: Edward Leinster,  
2 L-E-I-N-S-T-E-R.

3 THE CLERK: Thank you. Be seated.

4 DIRECT EXAMINATION

5 BY MS. MCCARTHY:

6 Q. Mr. Leinster, were you formally a criminal  
7 defense attorney?

8 A. Yes.

9 Q. When did you become admitted to the Florida  
10 Bar?

11 A. 1974.

12 Q. Can you tell us how many jury trials, criminal  
13 jury trials, you have had in your career in which  
14 you've had a main responsibility for?

15 A. No. A lot. I have no idea how many.

16 THE COURT: Mr. Leinster, if you would  
17 move closer to the microphone, please.

18 Q. Were you a Board-certified criminal trial  
19 attorney at the time of the Herrick trial?

20 A. Yes.

21 Q. Could you describe just to us a little bit your  
22 prior experience as a criminal defense attorney?

23 A. My prior experience?

24 Q. Uh-huh. What type of work did you do? Did it  
25 include trials, jury trials?

1 THE COURT: This is prior to 1989?

2 MS. MCCARTHY: Right, 1989.

3 Q. Have you ever tried a case?

4 A. Yes.

5 Q. Now, I know you said you don't recall how  
6 many. Had you had more than one jury trial?

7 A. I worked for the State Attorney's office as a  
8 prosecutor for about a year-and-a-half; after that,  
9 I went into private practice. I tried a lot of  
10 cases. That's all I did was criminal trial law.

11 Q. These are jury trials?

12 A. Yes.

13 Q. Did you happen to have capital cases?

14 A. Yes.

15 Q. Involving penalty phase?

16 A. Yes.

17 Q. At the time prior to the Herrick -- or at the  
18 time of the Herrick case, was there a  
19 court-appointed list for capital cases in  
20 particular?

21 A. I don't believe there was.

22 Q. Were you on a court-appointed list, though, for  
23 any type of criminal case?

24 A. No, but that was by choice.

25 Q. So you took only cases for which you were

1 retained?

2 A. Yes.

3 Q. Can you describe a little bit to the Court --  
4 let's see. You were practicing in Orange County; is  
5 that correct?

6 A. Primarily.

7 Q. Is that where your law firm was located?

8 A. Yes.

9 Q. Okay. Did your criminal defense work take you  
10 into the federal arena, as well?

11 A. Yes.

12 Q. What type of cases did you handle?

13 A. Criminal.

14 Q. Did you also handle criminal appellate matters?

15 A. I have done federal appellate, yes.

16 Q. And would that be on the State and federal  
17 side?

18 A. Yes.

19 Q. Just as one example, can you tell us, had you  
20 had occasion to bring a case to the Florida Supreme  
21 Court?

22 A. I've been to the Florida Supreme Court twice.

23 Q. And what cases were those?

24 A. One was actually a divorce case, but the other  
25 case involved a racketeering matter,

1 prostitution-related racketeering, wiretapping.

2 Q. Were you successful in any of those appeals?

3 A. I lost the divorce appeal and won the  
4 wiretapping.

5 Q. What was the upshot of the wiretap?

6 A. That no longer in the State of Florida could  
7 they wiretap prostitution. That was the short  
8 version.

9 Q. Uh-huh. Did you have oral argument before the  
10 Florida Supreme Court?

11 A. Yes.

12 Q. Did there come an occasion when you had been  
13 interviewed by CNN regarding one of your criminal  
14 cases?

15 THE COURT: What's the relevancy of  
16 this, Ms. McCarthy?

17 MS. MCCARTHY: I'm just going into his  
18 background and qualifications.

19 THE COURT: Whether he's been  
20 interviewed by CNN or the local gazette doesn't  
21 make much difference to me.

22 MS. MCCARTHY: If I may tender to the  
23 Court, without being argumentative, I think  
24 there's been a claim that there was signs of  
25 intoxication of Mr. Leinster at or about the time

1 of the trial, and due to the fact that there was  
2 an interview with CNN might be probative of --

3 THE COURT: Well, then get to the point  
4 as far as date and time concerning this case is  
5 concerned.

6 MS. MCCARTHY: All right.

7 Q. More particularly, with respect to this trial,  
8 this occurred in October of 1990, correct?

9 A. I don't know. I guess that's right.

10 Q. What was the time --

11 THE COURT: Let me ask you, do you have  
12 any independent recollection whatsoever of  
13 Mr. Herrick?

14 THE WITNESS: Sure.

15 THE COURT: Do you have any independent  
16 recollection whatsoever of the trial?

17 THE WITNESS: Yes.

18 Q. And in relation to the trial, do you remember  
19 when the CNN interview took place?

20 A. No. It would have been after that. It would  
21 have been early '90s.

22 Q. Prior to your incarceration?

23 A. Oh, yes.

24 Q. All right. I'm going to call your attention  
25 more to your criminal prosecutions in Pinellas. How

1 did you have occasion to take cases out of Pinellas?

2 A. Well, I had cases other than in Orlando. I had  
3 cases actually out of state. But in terms of this  
4 particular time period, it probably was traced to  
5 Bill Pettit, who was --

6 Q. And who was Bill Pettit?

7 A. Bill Pettit was incarcerated for rape. At the  
8 time, at least in Pinellas County, they housed all  
9 of the people in the same vicinity, same cell, and I  
10 believe that Bill Pettit had probably spread my name  
11 around in that cell, would be my guess.

12 Q. Had you had some degree of success in his case?

13 A. Yes.

14 Q. And what was that success?

15 A. Well, I lost the case, but -- we won several  
16 battles, but ultimately we lost the case.

17 Q. There was a major battle, I understand, on the  
18 DNA?

19 A. Yes. The DNA was suppressed, and that was a  
20 bit of a to-do at the time.

21 Q. How did you have occasion to be retained by  
22 Herrick?

23 A. I don't know. I mean, like anybody else. I  
24 don't remember, you know, if I got a phone call. I  
25 don't remember how we got involved.

1 Q. Had you had a degree of success with regard to  
2 other Pinellas prosecutions?

3 A. Yes.

4 Q. At or about that time?

5 A. Yes.

6 Q. And had some of them gone to jury trial?

7 A. I think all of them went to jury trials. They  
8 didn't settle cases, not those kind of cases.

9 Q. And you gained acquittals in them?

10 A. Yes.

11 Q. And that was prior to the Herrick trial?

12 A. I couldn't swear to that. It was right around  
13 the same time period.

14 Q. What was your relationship with the State  
15 Attorney's office at the time of the Herrick case?

16 A. Not good.

17 Q. Why?

18 A. They didn't settle cases. Their attitude was,  
19 you come to us with an offer and we'll see if we'll  
20 accept it, and that offer usually started somewhere  
21 around 40 years.

22 Q. In Mr. Herrick's case, do you remember who  
23 actually retained you --

24 A. No.

25 Q. -- of the family?

1 A. No.

2 Q. And I want to call your attention back to the  
3 original stages of it. You weren't the first  
4 attorney on this case, correct?

5 A. The public defender, as I understand.

6 Q. Do you recall your client contact with  
7 Mr. Herrick at all?

8 A. I can't say that I have specific recollection  
9 of times and places that I talked to Mr. Herrick or  
10 exact conversations.

11 Q. Can you testify that you did, in fact, have  
12 conversations with him about his case?

13 A. Sure.

14 Q. Do you see him here in the courtroom today?

15 A. Yes.

16 Q. Can you recall him?

17 A. Yes.

18 Q. Okay. Can you describe him for the Court?

19 A. Young, nice-looking fella in a blue jumpsuit.

20 MS. MCCARTHY: Let the record reflect  
21 he's identifying the Petitioner.

22 THE COURT: Seeing he's the only fella  
23 in the courtroom in a blue jumpsuit, I might as  
24 well.

25 Q. Can you say to the Court whether you, in fact,

1 discussed the case with Herrick, the case against  
2 him prior to going to trial?

3 A. Yes. Yes. Yes, we did.

4 Q. And can you tell us whether or not Mr. Herrick  
5 ever complained to you about what you were doing  
6 about getting ready for trial?

7 A. I do not recall ever having any conflict with  
8 Mr. Herrick before trial, during trial, or directly  
9 after trial.

10 Q. Of course, you know, ultimately he had  
11 attempted some kind of lawsuit civilly --

12 A. Yes.

13 Q. -- against you --

14 A. Yes.

15 Q. -- subsequently?

16 A. Uh-huh.

17 Q. Okay. Now, if you have a client, in your  
18 experience, who is desirous of certain things being  
19 done, what was your normal practice in that regard?

20 A. Could you be a little more specific?

21 Q. Well, if a client were to ask you or tell you  
22 witness A is important, what would you do in your  
23 normal practice, Mr. Leinster?

24 A. I would determine whether or not, in my  
25 opinion, the witness was important. If the witness,

1 in my opinion, was not important, I would call that  
2 shot.

3 Q. Okay. And in this case more particularly, had  
4 Mr. Herrick pointed out to you a particular witness  
5 that he felt you needed to interview, what would you  
6 have done?

7 A. The same.

8 Q. Had you, in your past experience, utilized  
9 expert witness testimony before?

10 A. Yes.

11 Q. Had you called lab analysts before?

12 A. Yes.

13 Q. Did you deem it necessary in Herrick's case to  
14 call a lab analyst --

15 A. No.

16 Q. -- to testify?

17 We'll get into that a little bit further here.  
18 As you proceeded to trial, what steps did you take  
19 that you recall in getting ready for trial?

20 A. Well, I do not have any specific recollection  
21 of how I set up his particular case. I know how I  
22 went about preparing for most trials, and I had been  
23 over his files and so forth. I can only tell you --

24 MR. GILLICK: Judge, I would object as  
25 to what he did in most trials. This is

1 specifically about Kevin Herrick's trial.

2 MS. McCARTHY: Judge --

3 THE COURT: I'll overrule the  
4 objection. Lay a predicate as to what his habit  
5 and custom and routine was.

6 Q. Following up on the Court's comment, can you  
7 tell us what your standard and customary practice  
8 would be in preparing for a jury trial involving a  
9 criminal offense, such as a burglary or rape?

10 A. In a case like Mr. Herrick's where a lot of the  
11 discovery -- while we have depositions, and  
12 production of documents and so forth had already  
13 been done, I would simply acquire all of the  
14 information that had been obtained already, and then  
15 I would review it and collate it and cross-reference  
16 it, depositions and police reports and whatnot. And  
17 that's what I believe I did in this case.

18 Q. All right. One of the allegations of  
19 Mr. Herrick I think you're aware of from the  
20 petition is that you had not done any independent  
21 investigation in his case?

22 A. Well, I didn't hire a private investigator.  
23 When you say independent investigation, I did in  
24 this case what I did in most cases. I did what I  
25 just said. I got all the information available and

1     went through it. I certainly didn't go into court  
2     without having a foreknowledge of what was going on.

3     Q.     Were you aware of the laboratory reports  
4     concerning the hair analysis and the blood  
5     submissions?

6     A.     Yes.

7     Q.     Prior to Herrick's --

8     A.     Yes.

9     Q.     -- trial?

10           Prior to opening statements?

11     A.     Yes.

12     Q.     Did you make any judgment call, Mr. Leinster,  
13     about whether you needed to -- or did not need to  
14     have some testimony from those lab experts?

15     A.     Yes. My recollection about that is that I was  
16     left pretty much an open field with the way the lab  
17     reports came out to argue that in the absence of  
18     anything incriminating Mr. Herrick, that he was  
19     clearly innocent of the crime.

20     Q.     Did you regard the lab reports as containing  
21     anything exculpatory in nature?

22     A.     Yes. I thought they were exculpatory in that  
23     they did not point to Mr. Herrick.

24     Q.     Did you feel that you needed the lab analyst to  
25     promote that claim?

1 A. I felt that calling the analyst would do  
2 nothing but subtract ultimately from my ability to  
3 argue that that lack of evidence was tantamount to  
4 innocence when, in fact, that lack of evidence is  
5 not tantamount to innocence, but that's the way it  
6 can be parlayed without the lab analyst.

7 Q. Had you, in your prior experience, ever  
8 encountered a situation where a lab analyst was  
9 called and the effect that you wanted to portray  
10 diminished by the State's cross?

11 A. I can't recall specifically. The point I was  
12 trying to make being somehow attenuated, but I have  
13 certainly seen that happen in court. I find that  
14 the analyst very rarely is helpful if what you're  
15 trying to do is basically obviate reality. The lab  
16 analysts are not very helpful.

17 Q. Have you ever seen an analyst been able to -- a  
18 hair analyst, more specifically, able to say your  
19 particular client didn't have contact with the  
20 submission?

21 A. No.

22 Q. And why is that?

23 A. Well, I don't know why exactly. My at least  
24 one experience with a hair analyst, in fact, the  
25 Bill Pettit case, was that although they examined

1 the hair for 16 characteristics, all of which were a  
2 match in whatever sense they meant that, they still  
3 couldn't say it was his hair. They meant to say it  
4 was his hair, they wanted to say it was his hair,  
5 they simply wouldn't say it was his hair; so from  
6 the other side of the fence, I was left to argue  
7 that it must not be his hair.

8 I mean, it's pretty hard to pin down the  
9 analyst on hair, in my opinion, to get a concrete  
10 answer out of them; but in this particular case, my  
11 opinion would have been that they would have said  
12 that the absence of hair means nothing. It means no  
13 hair wound up where we looked for it. That's all it  
14 means. It doesn't mean that Mr. Herrick is  
15 innocent.

16 Q. Now, in making the decision whether to call the  
17 micro hair analyst, if the analyst found more than  
18 one hair that couldn't be compared to the victims  
19 and defendant, and in this case particularly Hagan  
20 and Barfield and Herrick, would you have found it  
21 necessary to put on that lab analyst to talk about  
22 those three -- or different hairs that are found  
23 that are not compared to anyone?

24 A. No. If there were three different hairs  
25 unidentified, meaning three different people, it

1 would have done more, I think, to subtract from the  
2 conclusion that no hair means he's innocent. It  
3 means that three other people unknown have been in  
4 and out and left hairs around.

5 Q. What did the absence of the reports, or,  
6 rather, the testimony from the analysts, what did  
7 they do for you from a defense perspective not  
8 having the analyst on the stand?

9 A. It gave me the opportunity to not imply, but  
10 basically to say that he gave him the hair. The  
11 part of what's critical to their investigation is to  
12 get this evidence, these forensics. They didn't run  
13 a match, ergo, he's innocent. I mean, I said that,  
14 I believe, in opening; I said it during the trial;  
15 and I said it in closing.

16 Q. I think there was references in the closing  
17 that there were no forensic comparisons. Were you  
18 saying you didn't know that there were any  
19 comparisons?

20 A. No, I said there was no match. If I said  
21 comparison, that's what I meant, there's not a  
22 match.

23 Q. Okay. So you were wanting to promote to the  
24 jury that there was nothing there?

25 A. Right.

1 Q. Now, with respect to these lab reports, did you  
2 have them --

3 A. Yes.

4 Q. -- prior to trial?

5 A. Yes.

6 Q. Now, specifically the blood and the hair  
7 analysis, we've covered that. What about the  
8 fingerprints?

9 A. I knew about the fingerprints.

10 Q. Had you reviewed the depositions?

11 A. Yes.

12 MS. MCCARTHY: Do you have the exhibits,  
13 the file you introduced?

14 MR. GILLICK: Yeah. It's up there.

15 MS. MCCARTHY: The exhibit,  
16 Mr. Leinster's file.

17 MR. GILLICK: It's right in front of  
18 you.

19 MS. MCCARTHY: May I approach the  
20 witness?

21 THE COURT: You may.

22 Q. If you could take a moment to look over this.

23 THE COURT: I believe you're showing him  
24 Petitioner's No. 1?

25 MS. MCCARTHY: Yes, Petitioner's Exhibit

1 No. 1.

2 Q. If you could take a moment to review those  
3 documents.

4 A. All of them?

5 Q. Well, take a moment to look over it. See if  
6 you can identify what that is.

7 A. Well, I could read what it is, motions for --  
8 they're pretrial motions, it looks like.

9 Q. All right. Maybe to shorten this a little bit,  
10 it's our understanding that these documents were  
11 originally obtained from you.

12 A. Oh, okay. I'm going to have to say I assume  
13 that's true.

14 Q. Did you furnish your file to the Herrick  
15 family?

16 A. I believe some of it I did. That's what one of  
17 the interrogatories suggests. I don't recall doing  
18 that, but I must have.

19 Q. Did you submit the complete file to them?

20 A. I don't think so.

21 Q. And why not?

22 A. I don't recall. I think they wanted a portion  
23 of the file, and I gave them what they were looking  
24 for. That's my recollection, at least.

25 Q. Now, depositions are not included in that

1 packet. Would you have had depositions in your  
2 file?

3 A. Yes. I should have had depositions in my file.

4 Q. All right.

5 MS. MCCARTHY: May I approach?

6 THE COURT: You may.

7 THE COURT: How would you maintain your  
8 files?

9 THE WITNESS: How would I maintain  
10 them?

11 THE COURT: Yes. For example, if you  
12 visited a client after being retained and got his  
13 side of the story, did you just simply commit  
14 those to memory, or did you write notes down so  
15 that you could refer to them later?

16 THE WITNESS: Maybe a little --

17 THE COURT: What was your standard  
18 practice?

19 THE WITNESS: It might have been a  
20 little bit of both. I would write down something  
21 that I might have thought was important. I  
22 wouldn't write down everything necessarily that a  
23 client said.

24 THE COURT: And going back to, say,  
25 1989, typically how many cases would you open a

1 year?

2 THE WITNESS: Per?

3 THE COURT: Per year, per calendar year,  
4 or per fiscal year.

5 THE WITNESS: 150.

6 THE COURT: All right.

7 Q. Taking a look at this file, the first  
8 approximately five pages of it are a list. Is that  
9 a list that you prepared or --

10 A. This list here?

11 Q. Right, the first couple of pages. Can you tell  
12 us whether you can identify those?

13 THE COURT: It's already been  
14 established that Mr. Herrick has prepared those.

15 Q. Would those have been part of your file at the  
16 time that you tried the case?

17 A. Yes, I imagine they are.

18 Q. Or summaries of what are contained in the file?

19 A. Right.

20 Q. Could there have been attorney notes that you  
21 had that are not included in the packet that you  
22 turned over to the Herrick family?

23 A. Sure.

24 Q. Okay. Why wouldn't you have turned over the  
25 attorney notes?

1 A. Well, they're -- you're really -- you know,  
2 you're really asking me to speculate a lot here, but  
3 my notes on things, my impressions and so forth, I'm  
4 not sure I would have turned over.

5 Q. All right.

6 A. But I don't recall, you know, once again, I  
7 don't recall specifically what I gave to the  
8 Herricks. I'm basing this strictly on one of the  
9 interrogatories I read recently.

10 Q. Did you have a dispute with the Herricks over  
11 whether they had taken something out of your file?

12 A. I do not recall that.

13 Q. Now, in your preparation for trial, did you see  
14 or recall any need to do any additional  
15 investigation with respect to a witness or a  
16 potential witness by the name of Patrick Porrey?

17 A. No.

18 Q. Did Mr. Herrick tell you that he wanted you to  
19 call or to investigate a Patrick Porrey as a  
20 possible defense witness?

21 A. It's possible that he said he wanted me to talk  
22 to Patrick Porrey. That's very possible.

23 Q. Did you talk to Patrick Porrey?

24 A. Yes, I did.

25 Q. And how did you recall that you spoke with him?

1 A. Well, he was on the video deposition that I  
2 looked at again -- I say again, for the first time  
3 in several years, a couple of months ago -- and  
4 that's how I recall having talked to him about the  
5 case.

6 Q. Okay. Just to be a little bit more concise, do  
7 you recall actually having a conversation with  
8 Patrick Porrey about what he might know about the  
9 case?

10 A. Yes. I talked to him, as I recall, at Theresa  
11 Porrey's residence. I never took his deposition.

12 Q. In advance of Theresa Porrey's deposition, had  
13 you had a chance to know and suspect what she would  
14 say prior to perpetuating her testimony?

15 A. Yes.

16 Q. Okay. So if it were said you didn't do any  
17 investigation, something had to lead you to getting  
18 the prosecutor and yourself there at her home,  
19 correct?

20 A. Yes.

21 Q. Okay. Would that conversation of Patrick  
22 Porrey have been on the day that you spoke with  
23 Theresa or perpetuated her testimony?

24 A. Yes.

25 THE COURT: Let's try not to lead the

1 witness, please.

2 Q. Did Patrick Porrey ever give you any  
3 information about any conversation with Darren  
4 Barfield?

5 A. Nothing of any significance.

6 Q. Did Mr. Herrick ever advise you that Patrick  
7 Porrey had information that Darren Barfield was  
8 uncertain about his identification of Herrick?

9 A. No. The only information about the uncertainty  
10 of Mr. Barfield's identification surrounded his  
11 misleading the police. There was no evidence  
12 offered to me by anyone that sometime after this  
13 event that Mr. Barfield or the victim said, you  
14 know, We're not sure about Mr. Herrick, or, The  
15 fella that we've had imprisoned here, we're not sure  
16 that he's the one that did it. There was never  
17 anything like that. I would have called that person  
18 to testify if that were the case.

19 Q. Had Pat Porrey said to you in the conversations  
20 that you had back in 1990, "Barfield told me at some  
21 point at the scene, 'I'm uncertain of my ID,'" would  
22 you have called them?

23 A. I'm sorry. Could you ask that again?

24 Q. Had Pat Porrey told you that Barfield had said  
25 he was uncertain about his ID.

1 A. If he said at some time after this event, after  
2 the initial arrest and so forth, if he'd had a  
3 conversation with Barfield in which Barfield  
4 admitted that he had made a mistake, would I have  
5 called him? Absolutely.

6 Q. What if it had been right at the time of the  
7 incident, right within the immediacy of the arrest  
8 while emotions are still high?

9 A. As I recall, Mr. Barfield went to the  
10 hospital. It wasn't till after he came back that he  
11 corrected the misunderstanding. Had I been told  
12 about a statement after that point where he again  
13 flip-flopped and said, Despite having flip-flopped  
14 once, now I'm going to do it again, basically, and  
15 tell you for whatever reason that I'm not at all  
16 sure of what I just told the police, then I would  
17 have certainly used him.

18 Q. All right. To follow up on that, then, and try  
19 not to be leading, if Herrick had proposed that that  
20 had occurred, that scenario, that he had  
21 flip-flopped after being released, what would you  
22 have done?

23 MR. GILLICK: Objection to the vagueness  
24 of the question.

25 THE COURT: Sustained.

1 Q. Rephrasing, if Mr. Herrick had told you --

2 THE COURT: It's the same question.

3 It's speculative. We're talking about now 13  
4 years after the fact. The more important  
5 question is, what did Mr. Herrick tell him and  
6 what did he do, and those questions haven't been  
7 asked.

8 Q. What did Mr. Herrick tell you?

9 A. All right. You're asking me specifically what  
10 did Mr. Herrick -- I don't -- I don't -- I can't  
11 answer that question. I can't tell you specifically  
12 what Mr. Herrick asked at any particular time.

13 Q. Well, let me go back and follow through on  
14 that. Did Mr. Herrick ever complain that you had  
15 not followed through on anything he told you?

16 A. I do not recall ever having a cross  
17 conversation with Mr. Herrick about any part of my  
18 representation until well after the fact.

19 Q. All right. Now, following through to trial,  
20 what was your chosen defense?

21 A. That they had the wrong guy.

22 Q. Did you cross-examine the victims with their  
23 deposition testimony?

24 A. Yes.

25 Q. And you had had that deposition prior to trial,

1 the deposition?

2 A. Yeah.

3 Q. At the conclusion of the State's case, did you  
4 make some assessments whether to call Herrick?

5 A. I'm sure that I did. You always do.

6 Q. Did Mr. Herrick want to testify?

7 A. Not that I recall. If he did, it was nothing  
8 more than the conversation between attorney and  
9 client about whether or not it was a good idea or  
10 bad idea. There was never any controversy between  
11 me and Mr. Herrick, as I recall, about any of my  
12 strategy during trial.

13 Q. Do you recall what you talked to Mr. Herrick  
14 about in terms of the progress of the trial, such as  
15 the import of voir dire, opening statements --

16 A. I don't know that I did that.

17 Q. What is your normal and customary practice in  
18 that regard?

19 A. You mean to give them sort of a running game  
20 plan?

21 Q. Right.

22 A. I probably -- I probably didn't do that.

23 Q. And why would you not probably do that?

24 A. Because I'm involved in the trial rather than  
25 interpretation of the trial as we go along. You

1 know, you try to answer as many questions as you  
2 can, but a lot of times you get distracted with a  
3 client, you know, pulling on your lapel.

4 Q. Can you testify to the extent of the pretrial  
5 contact you had with Mr. Herrick?

6 A. No, I can't. I can't tell you the number of  
7 times or where it took place. I can say that we had  
8 adequate communication between us. Once again,  
9 there was no problem between myself and Mr. Herrick.

10 Q. Now, in addition to -- or you adduced Theresa  
11 Porrey's deposition. After doing that, did  
12 Mr. Herrick, to your recollection, ever say, "What  
13 else are you going to put on?"

14 A. No.

15 Q. Did he ever make any complaints with regard to  
16 what evidence you were putting on during the  
17 defense's case?

18 A. No.

19 Q. Now, I understand that you had addressed during  
20 closings the knife. There was a knife issue with  
21 regard to the knife?

22 A. Well, there wasn't an issue. There was a knife  
23 found under his bed.

24 Q. Did that come out during the State's case?

25 A. No.

1 Q. Could they link him to the knife?

2 A. No. I mean, with the exception it was found  
3 under his bed, I suppose that's a link, but they  
4 didn't have a blood match on the knife.

5 Q. One of the allegations is that you failed to  
6 take action with regard to suggestiveness of the  
7 identification by police; more specifically, that  
8 police had suggested to the victims at some point  
9 that there was a knife or a gun found in Herrick's  
10 bedroom.

11 A. Okay.

12 Q. Did you assess at the time the viability of a  
13 motion to suppress based on suggestiveness of police  
14 action?

15 A. I doubt seriously that that would even have  
16 occurred to me to do a motion to suppress in that  
17 context. I mean, they knew who Mr. Herrick was.  
18 This was not a stranger to them. Mr. Herrick was,  
19 according to the reports, the first person that she  
20 thought had done this. Although the lighting was  
21 bad and so forth, she thought that that was who had  
22 done it. She recognized his voice or one thing or  
23 another. This was not a stranger to them. And the  
24 fact that they had extraneous information which  
25 might have tainted their identification and be

1 subject to cross-examination is not the same thing  
2 as moving to suppress the identification.

3 Q. Did you see any viability of a motion to  
4 suppress --

5 A. No.

6 Q. -- on that basis?

7 Did you make any judgment call with regard to  
8 the jury having access to the video deposition of  
9 Theresa Porrey back in the jury room during  
10 deliberations?

11 A. The jury could have my exhibits all day long.

12 Q. And why is that?

13 A. I want them to have it. That's why I put her  
14 on. That's why I put the tape in.

15 Q. Did you have any concern about them having  
16 unsupervised access to Theresa Porrey's deposition?

17 A. No.

18 Q. How did you view her testimony?

19 A. About as good as it was going to get, I think.

20 Q. During the State's case, was there testimony  
21 elicited with regard to the victim's statements to  
22 police initially about who she thought was the  
23 perpetrator?

24 A. I'm sorry, who thought?

25 Q. Cheryl Hagan.

1 A. Were there reports?

2 Q. The statements of the victim to the police.

3 A. Yes. It didn't come out in trial quite that  
4 way, but, yes, her initial reports were that she  
5 thought that it was Mr. Herrick.

6 Q. How did you attack her identification or --

7 A. She didn't see --

8 Q. Pardon?

9 A. She didn't see Mr. Herrick. She saw what she  
10 thought was a pair of jeans. She thought she saw a  
11 buckle. She saw an outline. She never saw  
12 Mr. Herrick.

13 Q. With regard to Mr. Barfield, how did you attack  
14 his identification?

15 A. Essentially the same way. Mr. Barfield saw him  
16 in very limited lighting conditions. He claimed to  
17 have seen him under a streetlight as he paused in  
18 the middle of a frantic chase down the street. Bad  
19 identification.

20 Q. We've addressed this briefly. During your  
21 closings, you promoted that there were no forensics  
22 comparisons. Okay. And what was your objective in  
23 that regard?

24 A. Again, that the police think it's important to  
25 conduct these tests, and they conducted the tests

1 and came up empty, and the only way to translate  
2 that is he's not guilty.

3 Q. Immediately after the verdict or during the  
4 sentencing phase or that period of time, did  
5 Mr. Herrick ever complain that you had not produced  
6 those lab reports --

7 A. No.

8 Q. -- to the jury?

9 A. No.

10 Q. Now, had you filed a motion for new trial in  
11 this case, in Mr. Herrick's case?

12 A. It appears that I did.

13 Q. Okay. Did Mr. Herrick -- or let me back up.  
14 In your experience, have you ever seen a motion for  
15 new trial based on weight of the evidence granted?

16 A. No. I'm not saying it's never happened. I've  
17 never seen it.

18 Q. Now, you mention you referred to some  
19 interrogatories that were issued to you in the civil  
20 proceeding?

21 A. Yes.

22 Q. Okay. And had you had a chance to look at the  
23 inquiries regarding your investigation as to Patrick  
24 Porrey?

25 A. Yes.

1 Q. Did there ever come a time at that time when  
2 you were answering the interrogatories that you  
3 recalled who Patrick Porrey was?

4 A. Yes.

5 Q. And did you believe him to be the son of  
6 Theresa Porrey?

7 A. Did I think Patrick Porrey was Theresa -- yes,  
8 I would have said that Patrick Porrey was Theresa  
9 Porrey's son. But I think I got Pat Porrey confused  
10 with Dave Stewart at some point in time as to who  
11 they were, because in the interrogatories I made  
12 mention of Dave Stewart wanting to attack Kevin  
13 Herrick. In fact, that was Patrick Porrey that  
14 wanted to do that.

15 MS. McCARTHY: May I have one moment,  
16 Your Honor?

17 May I have one moment with counsel?

18 THE COURT: You may.

19 (Counsel confer)

20 MS. McCARTHY: Tender the witness, Your  
21 Honor.

22 THE COURT: Mr. Gillick.

23 MR. GILLICK: Thank you.

24 CROSS-EXAMINATION

25 BY MR. GILLICK:

1 Q. Good afternoon, Mr. Leinster.

2 A. Mr. Gillick.

3 Q. We've met before, haven't we?

4 A. Yes, we did.

5 Q. That was in prison last year?

6 A. That's where it was.

7 Q. And why were you in prison last year, sir?

8 A. DUI, serious bodily injury.

9 Q. And are you still under the control --

10 MS. MCCARTHY: Your Honor, I know we  
11 have a continuing objection in that regard, but I  
12 am sorry, I'd just ask to strike that as being  
13 irrelevant to the facts at issue.

14 THE COURT: Well, not under Rule 609  
15 potentially in that he's been convicted of a  
16 felony. I presume that's where you're going to  
17 go.

18 MS. MCCARTHY: The nature and the  
19 details and circumstances, I would submit, are  
20 irrelevant.

21 THE COURT: Just a minute.

22 Under Rule 609 A.1, the fact that this  
23 man has been convicted of a crime and the time  
24 limitations is admissible in my assessing his  
25 credibility. So for the limited purpose of what

1 occurred after Mr. Leinster was the trial  
2 attorney in this case within a ten-year period,  
3 if he has been convicted of a crime would be  
4 relevant, as far as I'm concerned, as to  
5 credibility.

6 MR. GILLICK: Okay.

7 Q. Mr. Leinster, you indicated you were convicted  
8 of a DUI, a felony of some type?

9 A. Yes.

10 Q. It wasn't your first DUI, was it?

11 A. No.

12 Q. It was your seventh, wasn't it?

13 A. No, my sixth.

14 Q. And where did that DUI -- that was an accident,  
15 wasn't it?

16 A. Yes.

17 Q. Involving serious bodily injury?

18 A. Yes.

19 THE COURT: Mr. Gillick.

20 MR. GILLICK: Yes, sir.

21 THE COURT: The fact he's been convicted  
22 of a felony is sufficient. I think the case law  
23 is such that you're not to inquire as to the  
24 nature. If it's relevant for some other purpose,  
25 you may establish some predicate.

1           MR. GILLICK: Yes, Your Honor. I intend  
2 to show this as a lack of regard for the court  
3 system. I intend to show that Mr. Leinster  
4 bonded out, fled the jurisdiction of the State of  
5 Florida, and had to be extradited back to the  
6 State of Florida for these charges.

7           MS. MCCARTHY: I would object. It's  
8 totally irrelevant to any ground in the  
9 petition. It's not been alleged that there's any  
10 link of any conduct, any underlying conduct, for  
11 which Mr. Leinster has led to his current  
12 situation.

13           THE COURT: Well, I'll tell you what  
14 I'll do, Mr. Gillick. I'll let you proffer that  
15 information as to Mr. Leinster's prior record,  
16 particularly the explanation of his prior record  
17 for his DUI felony conviction.

18           MR. GILLICK: Okay.

19           THE COURT: If you intend to go into a  
20 pattern of drinking, the critical time period is  
21 1989.

22           MR. GILLICK: Okay. And I will get to  
23 that, Your Honor.

24 Q. Now, do you recall how much you were paid to  
25 represent Mr. Herrick?

- 1 A. No, I don't.
- 2 Q. I'm sorry?
- 3 A. No, I do not.
- 4 Q. Do you recall who paid you?
- 5 A. I do not.
- 6 Q. You didn't go see Mr. Herrick at the time you  
7 were paid, did you, in the Pinellas County jail?
- 8 A. The day I was paid?
- 9 Q. Yes.
- 10 A. I have no idea.
- 11 Q. Do you know a man named Charles Tiffany?
- 12 A. I do.
- 13 Q. And who is Charles Tiffany?
- 14 A. He's an attorney in Kissimmee, Florida.
- 15 Q. Do you know if Charles Tiffany went to jail and  
16 got paid and interviewed Mr. Herrick the first time?
- 17 A. That could have happened, yes. I do not know,  
18 but that's very possible.
- 19 Q. Do you recall if you received any notes of  
20 Mr. Tiffany's interview with Kevin Herrick?
- 21 A. I do not remember.
- 22 Q. Is it possible you did?
- 23 A. Sure.
- 24 Q. Is it very likely that you did?
- 25 A. I can't answer that.

1 THE COURT: Did you have any association  
2 with Mr. Tiffany at the time?

3 THE WITNESS: Yes. Yes, I did.

4 THE COURT: And what was your  
5 association with him?

6 THE WITNESS: He worked with me. He was  
7 not employed by me, but we worked very closely  
8 together.

9 THE COURT: Well, is there any reason  
10 for Mr. Herrick to believe that if Charles  
11 Tiffany interviewed him it was you who would be  
12 representing him and not Mr. Tiffany?

13 THE WITNESS: If Mr. Tiffany had gone to  
14 speak to him, it would have been to assist me and  
15 it would have still been under my aegis. I mean,  
16 he would have thought I was representing him, not  
17 Mr. Tiffany.

18 Q. You and Mr. Tiffany no longer have a business  
19 relationship, do you?

20 A. No, we don't.

21 Q. And, in fact, you never visited Mr. Herrick in  
22 the Pinellas County jail prior to his trial, did  
23 you?

24 A. I don't know that that's true or not true.

25 Q. Do you recall if Mr. Herrick's case was set for

1 trial during your representation period prior to  
2 October when it actually went to trial?

3 A. Was what now?

4 Q. Do you know if Mr. Herrick's case was set for  
5 trial prior to the actual trial date of October of  
6 1990?

7 A. I do not recall. Whether it got continued, is  
8 that what you're asking?

9 Q. Yes, basically.

10 A. I think it probably did get continued.

11 Q. During your course of representation of  
12 Mr. Herrick, did you receive letters from  
13 Mr. Herrick?

14 A. I imagine I did.

15 Q. Do you know what happened to those letters?

16 A. No.

17 Q. They're not in the file before you, are they?

18 A. No.

19 Q. Did you receive phone calls from Mr. Herrick?

20 A. I'm sure I did.

21 Q. Did you ever refuse to take phone calls from  
22 Mr. Herrick?

23 A. I don't know. The only time that I -- as a  
24 matter of fact, I took phone calls at home. I had  
25 my office phone forwarded to my home, not just for

1 Mr. Herrick. The only time I would refuse to take  
2 calls from a client would be if I were with another  
3 client, or if I weren't there, the office might  
4 refuse.

5 Q. Do you recall if you ever spoke to  
6 Mr. Herrick's mother?

7 A. I'm sure I did.

8 Q. Do you recall how many times?

9 A. No, I don't.

10 Q. Did you obtain a file from the public defender  
11 regarding Mr. Herrick?

12 A. I believe I did.

13 Q. Do you recall what was in it?

14 A. No. The depositions, the police reports, I  
15 mean, you're asking me do I specifically recall each  
16 document?

17 Q. Yes.

18 A. No, I do not. It would have been the  
19 compilation of all of those things.

20 Q. Did you take any depositions in this case other  
21 than the video deposition of Theresa Porrey?

22 A. I don't believe I did.

23 Q. And who would that be?

24 A. I said I don't believe I did.

25 Q. Oh, I'm sorry. I misunderstood you.

1           And you took Theresa Porrey's deposition the  
2   day before trial, didn't you?

3   A.    I don't know, but if you say so, I take your  
4   word for it.

5   Q.    Did you provide Kevin Herrick with any copies  
6   of depositions or police reports or laboratory  
7   analysis reports?

8   A.    I don't know if I did or not. It would not  
9   have been my practice necessarily to supply a client  
10   with copies of those things.

11   Q.    Why not?

12   A.    Well, in 25 years of doing that sort of thing,  
13   it just didn't seem to me to be all that pertinent,  
14   that the client have everything that I have. I  
15   don't know a lot of trial lawyers that do that.

16   Q.    In this case, the identification was a key  
17   issue, wasn't it?

18   A.    It was the issue.

19   Q.    The State had no physical evidence linking  
20   Kevin Herrick to the crime, did they?

21   A.    In my opinion, the State had a very weak case  
22   against Mr. Herrick.

23   Q.    In was it your opinion that the identification  
24   by Ms. Hagan in Mr. Barfield was tainted by contact  
25   they had with police officers?

1 A. In the sense that my understanding was that the  
2 police had told Mr. Barfield in Ms. Hagan that they  
3 had found the weapon with blood on it. I believe  
4 that was what was said to them.

5 Q. And at that point the identification became  
6 positive rather than speculative?

7 A. No, I'm not making that leap. My understanding  
8 was that before anything was communicated to them by  
9 the police that she had already decided it was  
10 Mr. Herrick. I think that's what her reports  
11 reflect. I mean, you could make that argument, I  
12 suppose, that all of her identification was somehow  
13 infected by this information, but I'm not sure that  
14 that would be chronologically accurate.

15 Q. Now, do you recall specifically talking with  
16 Patrick Porrey?

17 A. I remember the man's face from the video. I  
18 remember talking to him. I do not remember the  
19 exact nuts in bolts of what we had to talk about.  
20 I'll leave it at that for now. You can ask another  
21 question. I don't mean to get too far with you.

22 Q. Did you make any notes of your conversation  
23 with Pat Porrey?

24 A. I don't recall, sir.

25 Q. There are no notes in the file before you?

1 A. There are no notes in the file, that's right.

2 Q. You don't have any notes anywhere at this  
3 point, do you?

4 A. No.

5 Q. Do you know why you did not call Patrick Porrey  
6 as a witness?

7 A. Yes.

8 Q. Why?

9 A. The primary reason would have been that  
10 Mr. Porrey, at the time after the police arrived,  
11 according to the police reports, wanted to beat up  
12 Mr. Herrick because he assumed that he was guilty.  
13 Now, there's another reason, but that was really my  
14 primary reason.

15 Another reason would be that when the police  
16 arrived, when they found the gun and the knife under  
17 Mr. Herrick's bed, both Theresa Porrey and Patrick  
18 Porrey, according to the reports again, had  
19 disavowed any knowledge of those items, said they  
20 must be Mr. Herrick's and they would testify to that  
21 effect, which is not the sort of testimony you would  
22 expect from people that were incensed by having a  
23 good friend accused of rape wrongfully. But my  
24 primary reason would have been the fact that he was  
25 angry in thought that Mr. Herrick might be guilty,

1 ergo, wanted to beat him up.

2 Q. Do you recall discussing that with Patrick  
3 Porrey?

4 A. No, I do not recall discussing that with  
5 Patrick Porrey. I may have, but I don't recall  
6 doing that.

7 Q. Did you ever tell Kevin Herrick that you could  
8 not locate Patrick Porrey?

9 A. I think that I answered one of the  
10 interrogatories that I could not locate Patrick  
11 Porrey. I was simply wrong. I think it was  
12 Mr. Stewart we were having trouble locating.

13 Q. I'll show you, sir, a copy of a document marked  
14 Response to Plaintiff's Request for Admissions, and  
15 ask you to look at the back page.

16 A. Uh-huh.

17 Q. Is that from you, sir?

18 A. Yes.

19 Q. Signed by you?

20 A. Well, it's from me. Yes.

21 Q. And when was it signed, sir?

22 A. 27, September, 1994.

23 Q. Would you read the answer to No. 4, sir?

24 A. True as to identity, Patrick Porrey was not  
25 located. Neither were exculpatory.

1           Would you like me to read No. 5?

2       Q.     Yes, please.

3       A.     Even Mrs. Porrey did not know where Patrick  
4       was. David Stewart had jumped you that night  
5       demanding that you did it. David Stewart is not the  
6       one that wanted to jump Mr. Herrick. It was Patrick  
7       Porrey.

8       Q.     But you indicated that even Mrs. Porrey did not  
9       know where Patrick Porrey was?

10      A.     I was mistaken. I was talking about  
11     Mr. Stewart, I believe. I think I confused the two  
12     of them.

13      Q.     Did you talk to Mrs. Porrey about Mr. Stewart?

14      A.     According to that, I must have.

15      Q.     But you don't have any independent  
16     recollection?

17      A.     I do not have independent recollection of that,  
18     no, sir, I don't.

19      Q.     Thank you.

20            Did you make any attempt to locate David  
21     Stewart?

22      A.     I don't recall. I must have made enough of an  
23     effort to realize we weren't going to be able to  
24     locate him, but it wasn't critical to me one way or  
25     the other.

1 Q. And is there some reason you waited until about  
2 15 months after the incident, the day before the  
3 trial, to take a video deposition of Theresa Porrey?

4 A. I have no idea why we waited that long. There  
5 may have been a reason. I don't recall at this  
6 point.

7 Q. As to Cheryl Hagan, didn't Officer Crosby in  
8 his police report and deposition indicate that  
9 Cheryl told him she's not a hundred percent sure  
10 that Kevin was the attacker?

11 A. Oh, yeah.

12 Q. Is there some reason you didn't call that  
13 officer?

14 A. I don't recall. I think it was real clear that  
15 Cheryl Hagan wasn't at all sure who her attacker  
16 was.

17 Q. As to the forensic evidence, hair, blood,  
18 fiber, prints, et cetera, do you know if you had  
19 laboratory analysis reports on hair, blood, fiber?

20 A. I would have had all of the lab reports.

21 THE COURT: I'm sorry, Mr. Leinster, I  
22 didn't hear your answer.

23 THE WITNESS: Yes, I would have had the  
24 lab reports.

25 Q. Are those lab reports in the file before you?

1 A. I don't know if they're in this file or not.  
2 I'm assuming you know, so if you say they're not in  
3 here, I'll take your word for it.

4 Q. You were under a court order to provide your  
5 entire file, Mr. Herrick's file, to him, to his  
6 sister.

7 A. Okay. I may have done that.

8 Q. You indicated that you didn't call the lab  
9 experts for certain reasons and you felt it would be  
10 better to argue. Is that a rough statement of --

11 A. That's an exact statement.

12 Q. Did you call and talk to the lab analyst?

13 A. I do not recall.

14 Q. Did you talk --

15 A. It's very possible I did not.

16 Q. In this file before you, are Charles Tiffany's  
17 notes of his interview with Kevin Herrick in there?

18 A. I wouldn't know.

19 Q. Do you recall if you saved Mr. Tiffany's notes  
20 or if you ever saw any notes from Mr. Tiffany?

21 A. I do not recall.

22 Also, with regard to your question of seeing  
23 Mr. Herrick at the jail, I have no specific  
24 recollection, but I came over to St. Petersburg  
25 fairly regularly at that period of time and saw my

1 clients. I'm not saying I didn't see him at the  
2 jail. You're asking me for a specific recollection,  
3 and I don't recall one way or the other. It would  
4 be highly unlikely we didn't meet.

5 Q. Your representation of Mr. Herrick commenced in  
6 1990, didn't it?

7 A. I don't know. I think that's about right.  
8 That's a rough time period.

9 Q. Okay. If I told you that the trial occurred in  
10 October of 1990, would you have any argument with  
11 that?

12 A. If you can look at the notice of appearance and  
13 it's 1/31/90, so that would be a pretty good time  
14 period.

15 Q. Okay. Mr. Leinster, in 1990 and prior to 1990,  
16 you had considerable problems with alcoholism,  
17 didn't you?

18 A. No, as a matter of fact, I didn't.

19 Q. Have you ever been arrested for any alcohol  
20 offenses?

21 A. Yes, I have.

22 Q. How many prior to October of 1990?

23 A. Well, I got arrested for DUI --

24 MS. MCCARTHY: Objection on relevancy.

25 THE COURT: Overruled.

1 A. I got arrested for DUI in 1979; I got arrested  
2 for DUI in 1983. What else?

3 Q. In or prior to 1990, you were also using  
4 cocaine, weren't you?

5 A. Yes, I was.

6 Q. A lot of cocaine?

7 A. No.

8 Q. Did your cocaine use have any affect on your  
9 performance?

10 A. No.

11 Q. Ever?

12 A. No.

13 Q. You were drinking a lot in 1990 and prior?

14 A. Well, we're going to have to define our terms.  
15 I always drank a lot, okay. I mean, you could make  
16 a good argument that I was an alcoholic from the  
17 time I was 16 because I drank a lot my entire life.  
18 You asked me whether or not it affected me or if I  
19 ever had a problem with alcohol. I had a problem  
20 certainly getting arrested for DUI. That's always a  
21 problem. Alcohol did not affect my ability to  
22 practice law or to carry on my life. Alcohol was,  
23 to me, a very integral part of my social life. I  
24 grew up that way. A lot of people did in those  
25 days. It became a problem, it became a huge problem

1 much later on. As I got older, it became a huge  
2 problem, and I am a terrible alcoholic, but I wasn't  
3 then.

4 Q. The Florida Bar would disagree with you about  
5 the effect of alcohol.

6 A. Well, I guess you'd have to talk to them  
7 because you're asking my opinion.

8 Q. You were put on probation, you were suspended,  
9 and eventually resigned when termination proceedings  
10 were ongoing; is that correct?

11 A. Yes to all of those.

12 MS. MCCARTHY: Again, objection, and  
13 that was remoteness to the time of the trial.

14 THE COURT: Well, I don't have any  
15 information, Mr. Gillick, about what time period  
16 you're talking about.

17 Q. Mr. Leinster, you indicated you started  
18 drinking as a child?

19 A. Yes.

20 Q. Were both of your parents alcoholics?

21 A. Yes.

22 Q. Weren't you arrested in 1976 on an  
23 alcohol-related charge, disorderly intoxication?

24 MS. MCCARTHY: Objection, relevancy.

25 THE COURT: Sustained. I think we have

1 a pattern of alcohol-related activity,  
2 Mr. Gillick. I think the more precise question  
3 is, was he using alcohol during the time he was  
4 trying this case; and if so, what quantities of  
5 alcohol he was imbibing and what effect did it  
6 have on him.

7 MR. GILLICK: Yes, Your Honor.

8 Q. In 1990, were you using alcohol?

9 A. Yes.

10 Q. And to what extent were you using alcohol?

11 A. You know, that's a really hard question to  
12 answer. I probably drank more than the average  
13 person.

14 THE COURT: What was average for you,  
15 Mr. Leinster?

16 THE WITNESS: Well --

17 THE COURT: Did you drink every day?

18 THE WITNESS: No, I didn't drink every  
19 day. As a matter of fact, my usual regimen was  
20 that I would be at the gym four or five days a  
21 week or -- I mean, I was fairly religious. I was  
22 a very hard-working man, a very disciplined  
23 fella. I worked real hard, but I also drank; and  
24 I probably drank, I would say, three or four  
25 times a week.

1 THE COURT: Did you drink at a certain  
2 hour?

3 THE WITNESS: Yes, usually at night.

4 THE COURT: So you never started  
5 drinking in the morning?

6 THE WITNESS: Not then.

7 THE COURT: When did you begin drinking  
8 in the morning?

9 THE WITNESS: Four or five months before  
10 this accident, 1998.

11 THE COURT: And your use of cocaine in  
12 1990, on or about October of 1990, was that a  
13 recreational use of cocaine?

14 THE WITNESS: Yes. I quit cocaine in  
15 1984. I had no interest in it at all after that.

16 THE COURT: Prior to 1990, had you been  
17 in any rehab programs?

18 THE WITNESS: Yes.

19 THE COURT: How many times?

20 THE WITNESS: Four.

21 THE COURT: Did you consume alcohol  
22 during the course of the trial, that is, either  
23 at a recess or --

24 THE WITNESS: No.

25 THE COURT: -- prior to trial?

1 THE WITNESS: No.

2 THE COURT: Did clients of yours  
3 complain to you during this time period asking  
4 whether or not you were using alcohol because  
5 they smelled it on your breath?

6 THE WITNESS: Did clients?

7 THE COURT: Yes.

8 THE WITNESS: No.

9 THE COURT: That occurred later; did it  
10 not?

11 THE WITNESS: No, I don't recall that it  
12 did.

13 THE COURT: All right.

14 THE WITNESS: I'm not saying that never  
15 happened. I don't recall it ever happened.

16 THE COURT: Go ahead, Mr. Gillick.

17 MR. GILLICK: Just a second, Your  
18 Honor. One second.

19 (Counsel for Petitioner and his client  
20 confer)

21 MR. GILLICK: I have nothing further.

22 MS. MCCARTHY: Very briefly.

23 THE COURT: All right.

24 REDIRECT EXAMINATION

25 BY MS. MCCARTHY:

1 Q. Basically one question. Mr. Leinster, were you  
2 impaired at all due to intoxicants during  
3 Mr. Herrick's trial?

4 A. No.

5 Q. Were you using or consuming alcohol or any type  
6 of intoxicants during the trial?

7 A. No.

8 MS. MCCARTHY: No further.

9 THE COURT: Anything else, Mr. Gillick?

10 MR. GILLICK: No, Your Honor.

11 THE COURT: Thank you, Mr. Leinster.

12 MR. FISHKIN: Your Honor, we have one  
13 brief witness, Joe Bulone, the State Attorney.

14 MS. MCCARTHY: But we also have to  
15 notify the department that Mr. Leinster is on the  
16 way.

17 THE COURT: Why don't we just take a  
18 ten-minute recess?

19 MS. MCCARTHY: Okay. Thank you.

20 (Recess at 4:55 p.m., until 5:05 p.m.)

21 MR. FISHKIN: Call Joe Bulone.

22 THE COURT: Mr. Fishkin, do you think  
23 you'll be long with this witness?

24 MR. FISHKIN: No, sir, I would say  
25 nine-and-a-half minutes.

1 THE COURT: I'll keep you to it.

2 THE CLERK: Sir, raise your right hand  
3 please.

4 JOSEPH BULONE, RESPONDENT'S WITNESS, SWORN

5 THE CLERK: Sir, please state your full  
6 name for the record, and spell your last name.

7 THE WITNESS: Joseph A. Bulone,  
8 B-U-L-O-N-E.

9 THE CLERK: Thank you, sir.

10 MR. FISHKIN: I assume my time starts  
11 now, Your Honor.

12 THE COURT: It starts now, yes, sir.

13 DIRECT EXAMINATION

14 BY MR. FISHKIN:

15 Q. Mr. Bulone, by whom are you employed?

16 A. At the State Attorney's office in Clearwater,  
17 Pinellas County, Florida.

18 Q. How long have you been so employed?

19 A. Since May 1 of 1985.

20 Q. How long have you been licensed to practice law  
21 in the State of Florida?

22 A. Since 1983.

23 Q. During the time that you've been with the  
24 Pinellas State Attorney's office, I assume you've  
25 tried a few cases?

1 A. A few, yes.

2 Q. Do you have a handle on approximately how many?

3 A. Definitely well over a hundred jury trials,  
4 perhaps more than 200.

5 Q. And these would have all been criminal cases?

6 A. Yes, sir.

7 Q. And would they have ranged from the most  
8 obscure to capital murder cases?

9 A. Yes.

10 Q. Do you know or are you familiar with an  
11 individual by the name of Ed Leinster?

12 A. Yes.

13 Q. Did you, in fact, try a case against him back  
14 in 1989?

15 A. I believe it was 1990, but --

16 Q. That's even better.

17 Do you know Mr. Herrick?

18 A. Yes.

19 Q. Now, at the trial and prior to the trial, did  
20 you have occasion to have much interaction with  
21 Mr. Leinster?

22 A. Yes.

23 Q. And during that time through the end of that  
24 trial, did you ever have any reason to believe that  
25 Mr. Leinster was impaired in any way?

1 A. No. I observed nothing which would indicate  
2 that, and I didn't hear anyone else mention it.

3 Q. Now, had you had any inkling that Mr. Leinster  
4 was impaired during the course of that trial or  
5 perhaps any case that you might have been involved  
6 in, would it have been your duty to bring that to  
7 the attention of the court and have a hearing on it?

8 A. Yes.

9 Q. And why is that?

10 A. Well, because the potential that the defendant  
11 may not have gotten a fair trial, and that is  
12 something that should be brought to the attention of  
13 the court. And I have done that before, not in this  
14 case and not with this lawyer, but with another  
15 lawyer.

16 Q. Okay. There was no reason that you saw to do  
17 it in this case?

18 A. No.

19 Q. Was this a hard-fought case?

20 A. Yes, it was.

21 Q. And how would you describe the job that  
22 Mr. Leinster did on behalf of his client?

23 A. I thought that he worked hard for his client, I  
24 thought he hit all the issues, and I thought he did  
25 a competent and a good job.

1 Q. And based upon your experience as a 19-year  
2 lawyer, did you have any reason to believe that his  
3 performance was ineffective?

4 A. No.

5 Q. Now, did you know or do you know of an  
6 individual by the name of Patrick Porrey?

7 A. I knew of him, yes.

8 Q. And was he a potential witness in this case?

9 A. Yes, he was.

10 Q. Were you ever able to communicate with him and  
11 get him to come in and talk to you?

12 A. He was listed as a State's witness; however, it  
13 appeared as if he wasn't really cooperative with the  
14 police or the State. At one point, in reviewing my  
15 file, you know, I noticed that, you know, I tried to  
16 subpoena him in for a ring investigation and he  
17 failed to appear. I did have a file on him, as I  
18 had on all of the witnesses, and the only thing that  
19 was in there was his prior judgments and sentences;  
20 and I don't have any notes of what he said, so I  
21 don't believe I sat down and talked to him.

22 Q. Was he a well-known individual in Pinellas  
23 County at that time?

24 A. Yes. Well, he definitely had quite a prior  
25 record. I don't know how well-known he is because

1     it's a big county.

2     Q.     Okay. Now, was there any attempt at plea  
3     bargaining this case?

4     A.     I really don't recall that.

5     Q.     To your knowledge or based on your knowledge of  
6     the case, would you have offered a five-year plea on  
7     this case?

8             MR. GILLICK: Judge, objection. He's  
9     already indicated he doesn't know about plea  
10    bargaining.

11            THE COURT: Sustained. I don't think  
12    that's an issue anyway, Mr. Fishkin.

13            MR. FISHKIN: Maybe I can try it another  
14    way.

15    Q.     Was there a policy in your office as to  
16    bargaining on life sentence cases?

17            MR. GILLICK: Judge, objection, the same  
18    objection.

19            THE COURT: I don't think this inquiry  
20    is relevant, Mr. Fishkin. Mr. Herrick has not  
21    made it part of his complaint that Mr. Leinster  
22    did not give him information regarding any plea  
23    offer, and whether it was true or not,  
24    Mr. Herrick rejected it.

25    Q.     Did Patrick Porrey in any way communicate with

1 your office indicating that he had evidence that the  
2 defendant, or the Petitioner in this case,  
3 Mr. Herrick, could not have committed this crime?

4 A. I do not recall that at all, and there's  
5 nothing in the file that indicates that.

6 Q. Excuse me. One last question, and I'm within  
7 time. Does your office supply or did they in 1990  
8 supply discovery --

9 A. Yes.

10 Q. -- to defendants?

11 A. Yes.

12 Q. Would that discovery include complete police  
13 reports, lab reports, and what have you?

14 A. Yes.

15 Q. Was that done in this case?

16 A. Yes.

17 Q. Was that done substantially prior to trial?

18 A. Yes.

19 MR. FISHKIN: Thank you.

20 MR. GILLICK: Briefly, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. GILLICK:

23 Q. Good afternoon, Mr. Bulone.

24 A. Good afternoon.

25 Q. As far as discovery, you provide that to a

1 defense attorney; you don't provide it directly to a  
2 defendant, do you?

3 A. No.

4 Q. So you don't know what the defense attorney in  
5 this case did with the discovery that you provided?

6 A. No, I wouldn't know that.

7 Q. You don't have any information or idea of what  
8 contact Mr. Leinster had with Mr. Herrick prior to  
9 the actual trial, do you?

10 A. I would have no way of knowing, no.

11 MR. GILLICK: Okay. I've got no further  
12 questions.

13 THE COURT: Thank you.

14 MR. FISHKIN: Nothing, Your Honor.  
15 Thank you.

16 THE COURT: Okay. Anything else,  
17 Mr. Fishkin and Ms. McCarthy?

18 MS. MCCARTHY: Your Honor, we do have  
19 additional witnesses. Because it's close to the  
20 conclusion of the day, I'd ask the Court to  
21 recess. We have six witnesses, I believe,  
22 tomorrow.

23 THE COURT: Just a moment.

24 Do you think that you'll be finished  
25 before the noon hour?

1 MR. FISHKIN: I would think we should  
2 be. We have three witnesses who will be so-so.  
3 That's our expert and the two victims. Then we  
4 have -- the rest of them are going to be rather  
5 short. They're police officers and what have  
6 you.

7 THE COURT: All right. Well, let's plan  
8 on this: Maybe we'll go to 12:30, and for you  
9 we'll take an extended lunch break so I can deal  
10 with traffic court, which hopefully won't be too  
11 long since it's not like the traffic court that  
12 you have in your county, in Pinellas County  
13 rather; and then we'll reconvene hopefully, if  
14 we're lucky, 2:30. All right?

15 MS. MCCARTHY: Just as a -- does the  
16 Court typically do closing arguments, 'cause I  
17 know we've previously scheduled for our  
18 memorandum?

19 THE COURT: When did I set for that?

20 MS. MCCARTHY: That was the 30th, I  
21 believe, if I'm not mistaken.

22 THE COURT: Well, if we need to revisit  
23 that, we can. I don't think it's particularly  
24 necessary that you make closing argument, but I  
25 don't want to deny you the right to make a five-

1 or ten-minute closing argument. I don't  
2 particularly see it as all that helpful, but I'll  
3 leave it up to you.

4 MR. GILLICK: What time do we start  
5 tomorrow morning?

6 THE COURT: 9 o'clock. And let me see  
7 the lawyers at sidebar a moment.

8 This is to be recorded.

9 (At sidebar on the record)

10 THE COURT: I asked Mr. Leinster a  
11 series of questions. One of the questions I  
12 asked him was whether later on clients complained  
13 about him. So that you know, in 1995,  
14 Mr. Leinster was retained to represent an  
15 individual. I do not know the defendant's name.  
16 I have a distinct recollection of the proceeding  
17 because I was the magistrate judge assigned to  
18 the case.

19 The allegation by the defendant was that  
20 he no longer wanted Mr. Leinster as his counsel,  
21 and there were allegations that Mr. Leinster had  
22 been drinking. Ultimately, Mr. Leinster was  
23 removed from the case.

24 Shortly thereafter, Mr. Leinster had all  
25 his problems, particularly in Orlando, before

1 Judge Fawsett, I believe, or Judge Conway, and  
2 then other problems with the Florida Bar and with  
3 the criminal justice system, so I'm not operating  
4 on a blank slate with Mr. Leinster.

5 I tell you that out of an abundance of  
6 caution. I am, however, confining myself as to  
7 Mr. Leinster's alcohol usage as to what he may  
8 have been doing in 1990 and how that may have  
9 affected his performance. All right?

10 MS. MCCARTHY: Uh-huh.

11 MR. GILLICK: Judge, Kevin Herrick just  
12 indicated to me that he's concerned about the DOC  
13 order. It had listed for him to be here today.  
14 He wants to make sure they bring him back  
15 tomorrow. Is there anything we need to do in  
16 that regard?

17 MR. FISHKIN: Just have a guard -- it's  
18 too late to get DOC, but we can tell them.

19 MS. MCCARTHY: Yeah, it's past my  
20 transport time. I'm sure the guards can tell  
21 them.

22 MR. FISHKIN: I have a better idea if  
23 you wish, an order.

24 THE COURT: Do I have to do a written  
25 order?

1           MR. FISHKIN: No, just tell the guards  
2 to have him back here.

3           THE COURT: All right.

4           (End of discussion at sidebar)

5           THE COURT: As far as Mr. Herrick's  
6 appearance for tomorrow, he will be required to  
7 appear tomorrow, so I ask that those responsible  
8 for his transportation make the necessary  
9 arrangements to have him here for tomorrow's  
10 hearing, and I appreciate your getting him here  
11 today on time.

12           Thank you very much. We'll be in  
13 recess.

14           (Proceedings adjourned at 5:19 p.m.)  
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