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Date

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

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEVIN RICHARD HERRICK,)

Petitioner,)

Vs.)

MICHAEL W. MOORE,)

Respondent.)

COPY

CASE NO:
8:97-cv-2205-T-23MAP

Tampa, Florida

May 21, 2002

9:01 a.m.

VOLUME III (320 - 415)
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE MARK A. PIZZO

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INDEX

	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
--	---------------	--------------	-----------------	----------------

<u>WITNESSES FOR THE</u>				
<u>RESPONDENT:</u>				

Cheryl H. Sullivan	323	342	343	
--------------------	-----	-----	-----	--

Darren S. Barfield	345	357	360	
--------------------	-----	-----	-----	--

Off. Thomas Nilsson	362	372	374	
---------------------	-----	-----	-----	--

Richard N. Watts	375	390	399	
------------------	-----	-----	-----	--

Off. Howard Crosby	400	403		
--------------------	-----	-----	--	--

Dep. Brian LaVigne	408			
--------------------	-----	--	--	--

<u>EXHIBITS</u>				
-----------------	--	--	--	--

		<u>Marked</u>	<u>Received</u>	
--	--	---------------	-----------------	--

R-35 Photograph			342	
-----------------	--	--	-----	--

1 THE COURT: Good morning.

2 MS. MCCARTHY: Good morning, Your Honor.

3 THE COURT: Are we ready to begin?

4 MS. MCCARTHY: Yes, Your Honor. I would
5 just like to advise the Court as a preliminary
6 matter that our expert broke down on the other
7 side of the bridge --

8 MR. FISHKIN: This side.

9 MS. MCCARTHY: This side, right.

10 And he's having his secretary come pick
11 him up, and he thinks he'll be here by 10:00.

12 THE COURT: Do you have any other
13 witnesses you can call?

14 MS. MCCARTHY: Yes, Your Honor, Cheryl
15 Hagan.

16 THE COURT: Are you ready to begin,
17 Mr. Gillick?

18 MR. GILLICK: Yes, Your Honor.

19 MS. MCCARTHY: Sullivan. Cheryl Hagan
20 Sullivan.

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

23 CHERYL H. SULLIVAN, RESPONDENT'S WITNESS,
24 SWORN

25 MS. SWANK: Please say your name for the

1 record, and spell your last name.

2 THE WITNESS: C-H-E-R-Y-L;

3 S-U-L-L-I-V-A-N.

4 DIRECT EXAMINATION

5 BY MS. MCCARTHY:

6 Q. Good morning.

7 A. Good morning.

8 Q. I'm going to call your attention back to 1989,
9 mid-July of 1989, July 14th and 15th. Did you go by
10 Cheryl Sullivan at that time?

11 A. (Shakes head from side to side.)

12 Q. What was your name?

13 A. Cheryl Hagan.

14 Q. Okay. Is that your maiden name?

15 A. Yes.

16 Q. Have you married since then?

17 A. Yes.

18 Q. And when was that?

19 A. July 16th.

20 Q. Of?

21 A. Oh, it's been three years.

22 Q. Three years?

23 A. Uh-huh.

24 Q. I'm going to call your attention back to 1989.
25 Did you have a relationship with a Darren Scott

1 Barfield?

2 A. Yes.

3 Q. What was your relationship with him?

4 A. He was my fiance and the father of my son.

5 Q. Were you living together?

6 A. Yes.

7 Q. All right. Where were you living back on July
8 15th?

9 A. Audubon Drive.

10 Q. And is that in Pinellas County?

11 A. Uh-huh.

12 Q. What city?

13 A. Largo.

14 Q. Largo?

15 THE COURT: Ms. Sullivan, if you would
16 speak a little louder, please.

17 MR. GILLICK: Your Honor, I'm going to
18 object to any testimony from this witness as
19 being irrelevant. Everything is already in the
20 record or on the record that this witness can
21 testify to.

22 MS. MCCARTHY: Judge, the underlying --

23 THE COURT: Why don't you come to
24 sidebar?

25 (At side bar on the record)

1 MS. McCARTHY: There's two points.

2 THE COURT: Just a second.

3 Are you ready?

4 THE COURT REPORTER: (Nods head up and
5 down.)

6 MS. McCARTHY: Two points. In the
7 petition, the underlying issue is the
8 identification, and I think it's relevant,
9 Cheryl's identification testimony, which we have
10 the trial testimony, but they have challenged it
11 and attacked it. The identification is Herrick
12 as the actual assailant in this case.

13 Secondly, even if the Court were to
14 restrict or rely on the trial testimony, which,
15 of course, was adequate and quite sufficient, the
16 issue of omission with respect to Porrey has to
17 do with whether Darren Barfield had a
18 conversation with Patrick --

19 THE COURT: I'm sorry. There are two
20 Porreys in this case.

21 MS. McCARTHY: And I need to be more
22 specific. The claim is that Patrick Porrey
23 should have been called as a defense witness.
24 And Cheryl Hagan was present when Patrick Porrey
25 came over to her mother's house after the event.

1 I think that would be relevant to the claim. And
2 she can describe his demeanor, what he was like,
3 and what he was doing over there, the
4 relationship between her and Barfield, because
5 the claim is that Patrick Porrey had a
6 conversation with Darren Barfield and that he
7 told him he was uncertain as to his identity.
8 And I think the Court is appropriate to explore
9 the circumstances in which that occurred.

10 THE COURT: Mr. Gillick.

11 MR. GILLICK: My objection is, I don't
12 want to retry the whole case. If she has
13 pertinent testimony relating to conversations
14 with Patrick Porrey, I don't object to that, but
15 I don't want to retry the whole case. This
16 witness has given the police a statement, she has
17 written a statement, she was deposed, and she
18 gave trial testimony, all four of which are
19 already in the record for this case.

20 THE COURT: Well, I'm going to overrule
21 the objection and see where we go.

22 MS. MCCARTHY: Also, I have a photograph
23 of them at the time, so you can see what the
24 victims looked like at the time. There was some
25 hair analysis done, as the Court knows, the hair

1 with respect to lightened hair, and you can see
2 the difference. This is her hair color. That's
3 simply what that's offered for.

4 THE COURT: All right.

5 (End of discussion at side bar)

6 Q. How old was your child back on July 15th?

7 A. Three months. Three months old.

8 Q. Earlier in the day on July 15th, had you had
9 occasion to come into contact with Kevin Richard
10 Herrick?

11 A. Yes.

12 Q. And how did you know him?

13 A. He was living with the landlord and her son.

14 Q. Okay. You need to speak up just a little bit
15 more.

16 A. Sorry.

17 Q. All right?

18 A. (Nods head up and down.)

19 Q. How long had you known Mr. Herrick?

20 A. I guess a couple of weeks he'd been there.

21 Q. All right. And how did he have occasion to
22 come in contact with you?

23 A. Well, he walked around the apartment quite a
24 bit, and him and Scott, Darren Scott, had talked
25 quite a bit; and we had barbecue over there; and we

1 had watched a movie with them and played chess with
2 them.

3 Q. Okay. Now, on the day in question, how had he
4 had occasion to come in contact with you,
5 specifically earlier in the day?

6 A. He knocked on the door and asked if Scott was
7 home yet and wanted to play chess.

8 Q. Did that seem unusual to you?

9 A. No. I think they had talked about it before, I
10 guess.

11 Q. Can you describe your relationship with
12 Mr. Herrick before, or at that time, rather?

13 A. He was friendly. He got the mail for me one
14 day when I was taking the baby out 'cause he was
15 real young and I was trying to guard his eyes from
16 the sun, and he offered to get the mail when I was
17 walking there. He'd been friendly. We didn't know
18 each other that well, but that was really it.

19 Q. Okay. You weren't -- were you close or --

20 A. No.

21 Q. -- was the relationship casual?

22 Can you describe it more for the Court?

23 A. It wasn't close at all. It was like an
24 acquaintance, I mean.

25 Q. All right. Now, when he came over, was Scott

1 home?

2 A. No, he had -- he was going to be home in a few
3 minutes, and I told him that he'd be home in a
4 couple of minutes.

5 Q. What happened then?

6 A. I offered -- I said I'd play a game of chess
7 with him.

8 Q. And what happened after that?

9 A. Scott and a couple of his friends came over
10 after work, and we finished playing our chess game.

11 Q. Do you remember what time that was
12 approximately?

13 A. Not really.

14 Q. Was anyone else there with you and Herrick?

15 A. Yeah, after they came home from work.

16 Q. When you were playing chess?

17 A. Right. Tammy, and Darryl, and Darren Scott.

18 Q. No, when you were playing chess.

19 A. No, just us were playing. We were playing
20 chess. The baby was home sleeping in the crib.

21 Q. All right. Do you remember the time when
22 Darren and his friends came home?

23 A. Not exactly. I know that we were still playing
24 chess. We had started playing chess, and we were
25 still playing chess when they came home.

1 Q. All right. And do you recall the time that
2 Mr. Herrick left?

3 A. No.

4 Q. All right.

5 A. I guess it was after Scott came home, after a
6 few minutes, or I don't know if he hung out for a
7 while or not.

8 Q. Was there anything remarkable or unusual about
9 that particular contact with Mr. Herrick?

10 A. No.

11 Q. Now, prior to that, had you had occasion to
12 have Mr. Herrick come to your home, inside your
13 house?

14 A. Yeah. He'd been there before when we had a
15 barbecue and, you know, hung out -- he would walk
16 around the back of the apartments and smoke
17 cigarettes and talk with Scott.

18 Q. All right. Now, after Mr. Herrick left, what
19 did you do, or what do you recall doing?

20 A. After, I don't --

21 Q. Uh-huh.

22 A. I guess we had dinner later that evening, and
23 we went to a drive-in later that night.

24 Q. Okay.

25 A. I mean, I took care of the baby most of the

1 time, so, I mean, time, I don't know.

2 Q. Did there come an occasion when Darren left the
3 apartment that night, the complex that evening?

4 A. After the drive-in.

5 Q. How did he have occasion to leave?

6 A. I'm sorry?

7 Q. After the drive-in, what did you do?

8 A. Came home and put the baby down and I took a
9 bath, and he came to the bathroom door and told me
10 he was going to run with Dave, the guy that lived
11 across the way from us.

12 Q. Is that David Stewart?

13 A. I think that's his last name, yeah.

14 Q. And what was he going to do?

15 A. He was going to return a tropical fish that was
16 dying in his tank to his mom's tank, and Scott said
17 he was going to run with him and he'd be back
18 shortly.

19 Q. Okay. And what occurred after that?

20 A. Well, I laid down on the bed after my bath and
21 fell asleep, and when I --

22 Q. What's the next thing you know occurred?

23 A. I woke up and I had a knife at my neck and
24 there was somebody over me, told me if I didn't suck
25 his penis that he would go in and kill the baby.

1 Q. Okay. The person specifically named the baby?

2 A. Oh, Darren. What do you mean? I'm sorry.

3 Q. The person over you specifically named the
4 baby?

5 A. He said "baby," he would go in and kill the
6 baby.

7 Q. What was the lighting like, if at all?

8 A. It was pretty dark.

9 Q. Were there lights on in the bedroom?

10 A. No, there was no lights on in the house. There
11 was just the light from outside shining in a little
12 bit.

13 Q. Could you see who was on top of you?

14 A. Well, the first thing I thought was it looked
15 like Kevin and just the outline and everything, and
16 I just thought, well, God, it couldn't be him. And
17 I was scared to say anything.

18 Q. All right. And then what occurred after that?

19 A. I went hysterical, I guess, and kept screaming,
20 and he told me to -- he put his hand over my mouth
21 and told me to shut up, and if I didn't suck on it,
22 he was going to go and kill the baby. And I told
23 him, you know, Scott was going to be here soon, and
24 he said, "Then you'd better hurry up." I mean, I
25 was kind of hysterical. He tried to -- he shoved

1 his penis in my mouth when I was hysterical with my
2 screaming and crying.

3 Q. All right. And how long did this occur?

4 A. It's hard to say. It was pretty rattled. It
5 seemed like forever, but --

6 Q. What's the next thing you recall occurring?

7 A. He took the knife from my neck and went --
8 started going down to my underwear, and just then I
9 didn't know what he was going to do. He turned
10 around, and Scott had walked in and was like, What's
11 going on, and he jumped off the bed. And they
12 started going back and forth, and I was screaming.

13 Q. Could you see with any clarity who it was at
14 that time?

15 A. I still felt like it was him, just the hair and
16 the build and everything looked like him, but it was
17 still pretty dark. And I could see -- when him and
18 Scott were talking, I could see he was trying to get
19 his pants off the floor. I could see a belt buckle
20 that looked like his, his pants.

21 Q. And what's the next thing that occurred that
22 you recall?

23 A. Well, they were going at it, and I didn't --
24 at that time, I didn't know Scott had been stabbed,
25 but apparently he was at that time. And he tried to

1 go get his pants, and Scott went after him, and he
2 said, "You'd better stop or I'm going to go in and
3 kill the baby."

4 Q. Who said that?

5 A. Kevin did.

6 Q. Where are you at that point?

7 A. I'm still on the bed screaming.

8 Q. And then what do you recall occurring?

9 A. He managed to get his pants on and out the
10 door, out our bedroom door, and he closed it and he
11 said to stay away from the door or he'd go in the
12 baby's room. And we both kind of went hysterical
13 then, and Scott said, "Leave my baby alone," and we
14 opened the door.

15 Q. The door to which bedroom?

16 A. Our bedroom door. He was holding it on the
17 other side, and we fought to get it open, and
18 finally we got it open and he chased after -- Scott
19 chased after Kevin. He ran for the back glass
20 sliding door, and I went to the baby's room and he
21 was still sleeping, amazingly enough.

22 Q. Was your sliding door locked or open?

23 A. It was locked when he got to it. He couldn't
24 open it. He was trying to get it open real quick
25 and he couldn't get it open, and Scott just wanted

1 to get him out of the house and told him, That's
2 locked, go to the front door, and he backed up.

3 Q. That path or that location he went to, would
4 you say there's any lighting by that sliding door
5 that was locked?

6 A. I don't know. I mean, it looked pretty much
7 the same.

8 Q. I mean, was the light on or light off?

9 A. I turned the baby's light on first thing, but I
10 don't know if any other lights were turned on.

11 Q. Could you see his features at that time when he
12 was at the sliding door?

13 A. No, pretty much just the same thing, the
14 outline of him.

15 Q. Okay. What occurred when Mr. Barfield told him
16 about the way to leave, or what did he say
17 specifically?

18 A. He let him go and then he chased after him. I
19 guess Kevin went through the kitchen and he chased
20 him from the hall. They went out the front door.

21 Q. Did you follow?

22 A. I pretty much stayed at the front door
23 screaming for the neighbors.

24 Q. No, no, at the point which he's chasing him
25 through the house back to the front, where were you?

1 A. I had the baby, but I stayed pretty much back
2 in the hall.

3 Q. Was the hallway lit?

4 A. I don't recall.

5 Q. Okay. At any time as he is going through the
6 house, were you able to get a good look at him?

7 A. Not myself, no.

8 Q. When you went to the front door -- well, first
9 of all, how did he leave, to be clear? How did the
10 assailant leave the house? By what means; what do
11 you remember?

12 A. The front door.

13 Q. All right. What did you see occur after that?

14 A. Scott went after him. He chased him up the
15 sidewalk. He took off the front door and ran up the
16 sidewalk.

17 Q. What did you do then?

18 A. That's when I went -- I had the baby and I was
19 yelling at the front door that somebody tried to
20 rape me and stabbed Scott.

21 Q. All right. Did you notify the police then?

22 A. Scott yelled at one point, I think, and I don't
23 know when they called the police, but I believe the
24 neighbors across the way called the police.

25 Q. What did you do next? I mean where --

1 A. I mean, basically I stood there screaming,
2 crying, but then when Scott came back -- Scott came
3 back. He lost him. He couldn't find him. He had
4 chased him down the street. And he said, "Did you
5 see who it was?" And I said, "Yeah, it looked like
6 the guy next door." And he said it was.

7 Q. All right. Did the police arrive?

8 A. Yes.

9 Q. Do you recall how long it was after the police
10 arrived from the time that --

11 A. He showed up pretty quick. I don't know
12 exactly how long.

13 Q. Did you tell the police who you felt had done
14 it?

15 A. Yes. You know, I told them, you know, I
16 couldn't believe it would be, but it looked like the
17 guy next door.

18 Q. As Scott was chasing after him, did you get any
19 other look at him outside the house?

20 A. Oh, after the police came.

21 Q. As Scott -- let me be clear, as Scott was
22 chasing him.

23 A. As Scott was chasing him?

24 Q. Uh-huh.

25 A. No, 'cause they ran down the street and I don't

1 know how far they went but he lost him behind some
2 bushes or something 'cause I didn't go out down the
3 sidewalk. I didn't see outside at all.

4 Q. When the police arrived, did they make any
5 immediate arrests?

6 A. No.

7 Q. Did Scott tell them who had done this to him?

8 A. No.

9 Q. Did Scott tell you why he didn't tell them?

10 A. He told me that he was afraid that if they
11 didn't take him off that they would try to kill us.
12 He was just trying to protect me and the baby. He
13 said at the time that he was so pumped full of
14 adrenaline after being stabbed that he wanted to
15 kill him.

16 Q. Were the police there a long time, a short
17 amount of time, or do you recall?

18 A. They were there -- they were there a while
19 asking questions and, you know, looking at the
20 house -- there was blood, bloody fingerprints on,
21 you know, the walls -- and just asking questions;
22 and Scott was stabbed, so they had to treat that.

23 Q. All right. Was there an arrest made at that
24 time?

25 A. No.

1 Q. What occurred after the police left?

2 A. I went with my mom's home, I was scared to stay
3 there, so I went to my mom's house with the baby,
4 and Scott went to the hospital. And when Scott got
5 back from the hospital, he said, "I'm going to call
6 them now and file a report." He was just so, you
7 know, full of adrenaline. I was afraid he was not
8 going to be taken away. He was afraid for our
9 safety, so he said, you know, he was going to call
10 and tell them who it was.

11 Q. When you were at your mother's house, did you
12 have occasion to have any contact with Patrick
13 Porrey?

14 A. He showed up with Scott, and I was really upset
15 at him because in -- you know I didn't -- I felt
16 like he was friends with Kevin and why would you
17 bring him to our house after that happened, but I
18 don't know, you know -- I didn't really talk to him
19 that much myself, Pat.

20 Q. Did you see Porrey's demeanor at that time?

21 A. He was really upset.

22 Q. Meaning Patrick Porrey?

23 A. He was really upset. He kept asking Scott
24 questions and he seemed like he was -- he felt bad
25 for us and couldn't believe it happened, but, I

1 mean, he seemed -- actually, at the time he seemed
2 concerned, you know.

3 Q. Do you recall what Scott told him?

4 MR. GILLICK: Judge, objection to this,
5 hearsay.

6 THE COURT: I'll overrule it.

7 Q. Do you recall what Scott told him in response
8 to his questions?

9 A. No. I wasn't really present for the
10 conversations.

11 Q. Did you let Patrick Porrey inside your mother's
12 home?

13 A. Oh, no.

14 Q. Why not?

15 A. I didn't trust him because he was friends with
16 somebody that just had attacked me and Scott.

17 Q. All right. Do you recall when Scott called the
18 police?

19 A. As soon as he got to my mom's house and got in
20 the house.

21 Q. Was that before or after Patrick Porrey was
22 there?

23 A. It must have been after. He tried to get rid
24 of him pretty quick and came in the house and
25 called.

1 Q. All right. Did you testify at Kevin Herrick's
2 trial?

3 A. Yes.

4 Q. And did you identify him as the one who had
5 committed this sexual offense --

6 A. Yes.

7 Q. -- upon you?

8 A. Yes, I did.

9 Q. Was there any doubt in your mind as to who had
10 done this to you?

11 A. No, not at all.

12 Q. Over the course of the years, have you had any
13 doubt as to who was your assailant?

14 A. No.

15 MR. GILLICK: May I approach the
16 witness?

17 THE COURT: You may.

18 Q. I show you Exhibit No. 35. Just could you
19 identify this photograph, please?

20 A. That is myself and Scott and the baby very
21 close to when that happened.

22 Q. Do you know when that picture was taken?

23 A. He was only a couple of months old, so it was
24 probably a month before it happened or so. I'm not
25 really sure of the exact time, but he was only a

1 couple of months old and it happened when he was
2 three months, so --

3 Q. Your hair color in this particular photograph,
4 is that your hair color approximately when this
5 offense occurred?

6 A. Oh, yeah. Yeah. I bleached it for eight
7 years, so --

8 MS. MCCARTHY: Move to admit Exhibit
9 35.

10 MR. GILLICK: May we view the exhibit?
11 We've got no objection.

12 THE COURT: It's admitted.

13 (Respondent's Exhibit No. 35 was received
14 in evidence)

15 MS. MCCARTHY: Tender the witness.

16 CROSS-EXAMINATION

17 BY MR. GILLICK:

18 Q. Good morning, Ms. Sullivan.

19 A. Good morning.

20 Q. Ms. Sullivan, do you recall which police
21 officer told you that the police found a bloody
22 knife and clothes in Kevin's apartment?

23 A. No, I do not.

24 Q. But some Largo police officer --

25 A. Yes.

1 Q. -- told you that?

2 A. Uh-huh.

3 Q. Did you ever talk to attorney Edward Leinster?

4 A. During the trial, I guess, is it?

5 Q. Just when you were on the stand?

6 A. Yes.

7 Q. The night of the incident, did you smoke
8 marijuana?

9 A. No. I was breastfeeding.

10 Q. Did you smoke with Kevin?

11 A. No, I was breastfeeding, I didn't smoke
12 marijuana.

13 Q. Did you smoke cigarettes?

14 A. No.

15 Q. No further questions. Thank you.

16 THE COURT: Just a moment.

17 MS. McCARTHY: One moment.

18 THE COURT: Do you have any questions?

19 REDIRECT EXAMINATION

20 BY MS. McCARTHY:

21 Q. Did you ever use marijuana in the presence of
22 Kevin Herrick?

23 A. No.

24 Q. Or Patrick Porrey?

25 A. No.

1 Q. When did the police talk to you or mention to
2 you about a knife or a gun being found in Herrick's
3 apartment?

4 A. I believe it was after -- it was at my mom's
5 house, and it was after they had arrested him they
6 told me what they found.

7 MS. MCCARTHY: No further.

8 THE COURT: Let me ask you, did you ever
9 find out that that was not the case, that is, a
10 bloody knife or bloody clothes were not found in
11 Mr. Herrick's case, that the police officer had
12 misstated the evidence?

13 THE WITNESS: Yes. Actually, it was
14 before the trial. It was like a year later, I
15 guess, they said that the supposed blood on the
16 shirt was actually grease and that they did not
17 find a knife with blood on it.

18 THE COURT: Did that change in any way
19 your identification of who the attacker was?

20 THE WITNESS: No.

21 THE COURT: In other words, did it
22 change your opinion or the confidence in your
23 opinion as to whether Mr. Herrick did this or
24 not?

25 THE WITNESS: No, it didn't change my

1 confidence at all. I just was disappointed that
2 there wasn't physical evidence. I was
3 disappointed there wasn't just more than our
4 word.

5 THE COURT: All right. Any questions as
6 a result of my questions?

7 MS. MCCARTHY: No further.

8 MR. GILLICK: No, Your Honor.

9 THE COURT: Thank you, ma'am.

10 MS. MCCARTHY: Our next would be Darren
11 Scott Barfield, if he's arrived. I talked to him
12 this morning. He was en route.

13 MR. FISHKIN: Do you want to call him.

14 MS. MCCARTHY: Yes.

15 THE CLERK: Good morning, sir. Raise
16 your right hand, please.

17 DARREN S. BARFIELD, RESPONDENT'S WITNESS,
18 SWORN

19 THE CLERK: State your full name for the
20 record, and spell your last name.

21 THE WITNESS: Darren Scott Barfield.
22 Last name is spelled B, as in boy, A-R-F, as in
23 Frank, I-E-L-D.

24 THE CLERK: Thank you, sir. Be seated

25 DIRECT EXAMINATION

1 BY MS. McCARTHY:

2 Q. Mr. Barfield, I'm going to call your attention
3 back to July 15th of 1989. Did you have occasion to
4 live at that time with Cheryl Hagan?

5 A. Yes, ma'am, I did.

6 Q. Now Cheryl Sullivan?

7 A. Yes.

8 Q. What was your relationship with her?

9 A. We were engaged at that time. She was my son's
10 mother.

11 Q. Do you want to speak up into the mike?

12 A. She was my son's mother. We lived together.

13 Q. Back in July of 1989, did you know Kevin
14 Richard Herrick?

15 A. Yes, as an acquaintance.

16 Q. How did you come to know him?

17 A. I lived in a triplex, and they lived in the
18 middle unit with the landlord and the landlord's
19 son.

20 Q. Did you have occasion to testify at Kevin
21 Richard Herrick's trial?

22 A. Yes, I did.

23 Q. In July on or about July 14th and 15th, did you
24 have occasion to come in contact with him in the
25 evening hours in your home?

1 A. Yes, I did.

2 Q. I want to call your attention to that night
3 that led to the events and eventual trial. Had you
4 been at your home earlier that day?

5 A. Yes, I was.

6 Q. Okay. Had you worked? Can you describe
7 briefly where you were that day?

8 A. I worked full-time at my job; came home. I had
9 plans to go out with Cheryl for the evening. We
10 went out to a movie, and then we came back home and
11 I was home for a little while. And the other
12 neighbor in the triplex across from us, Dave, came
13 by and he said he needed help with his fish, his
14 fish was having problems, a saltwater fish, and his
15 tank wasn't stabilized, and he needed to bring it to
16 his mother's house which had a stabilized tank.

17 Q. What did you do?

18 A. Well, I told him that I would help him, and I
19 went over and told Cheryl what I was doing.

20 Q. Where were you when you told her that?

21 A. I was in my apartment, or in my triplex unit.

22 Q. Just backing up, right before you went to the
23 movie, had you seen Kevin Richard Herrick at your
24 home?

25 A. Yes, I believe he was in my home when I came

1 home.

2 Q. Okay. Was there anything unusual or untoward
3 that you felt about that?

4 A. No, not at all at the time.

5 Q. Now, after advising Cheryl that you were going
6 to your friend's house, how long were you gone?

7 A. Approximately 45 minutes to an hour. I don't
8 know exactly.

9 Q. When you returned, what happened?

10 A. Well, I came back, Dave went into his place,
11 and I was standing out in the courtyard between the
12 buildings smoking my cigarette because I don't smoke
13 in my house because of my son. And I was standing
14 outside our bedroom window and I heard Cheryl
15 crying. At first I thought she was talking on the
16 phone or something, but then I kept hearing it and
17 then it sounded muffled, so I went in to
18 investigate.

19 Q. And what did you see?

20 A. I went inside the house. The house was
21 completely -- there was no lights on in the house.
22 I went down the hallway to the bedroom. I opened
23 the bedroom door, and at that time I saw someone on
24 top of Cheryl and I told him to get up and leave,
25 and he told me to leave or that they would kill me.

1 Q. Did you comply?

2 A. No, not at all. I continued to, you know, tell
3 the person to leave. They got up and we struggled.
4 I got stabbed twice in the chest, so I backed up.
5 And then he was getting his pants on and I saw an
6 opportunity, so I went after him again and he hit me
7 in the jaw and started swinging whatever I was
8 stabbed with at me, so I backed up again. My
9 concern at that time was to get the individual out,
10 away from my family, to make sure my family was
11 safe.

12 Q. Could you tell who it was at that point?

13 A. At that point all I could see was silhouette
14 because there was no lights, there was just the
15 light coming through the Venetian blinds which were
16 closed; but as you know, Venetian blinds don't block
17 out a hundred percent of the light, there's cracks
18 right where they come together, and I saw a
19 silhouette of the person and I thought I recognized
20 them at that point.

21 Q. Who did you think it was?

22 A. I thought it was Kevin Herrick from next door.

23 Q. What happened then?

24 A. And the individual left the bedroom. I went to
25 the bedroom door. They closed it behind them. They

1 were holding the door.

2 Q. You say they?

3 A. Or, I'm sorry, he. I apologize. He was
4 holding the door and we exchanged words. There was
5 things brought up about my son.

6 Q. What was said?

7 A. I don't remember at this particular time
8 verbatim. I can't recall. It was something to the
9 extent of, you know, I'll kill your son. I said,
10 "No, not my son." You know, I was saying get out.
11 They released -- he released the door. I opened the
12 door, and then me and Cheryl checked on my son
13 briefly. She went into the room. I looked to make
14 sure that he was, in fact, you know, alive and well;
15 and then I proceeded down the hallway and I saw him
16 at the glass door trying to get out. I knew he
17 could not get out the glass door because I had it
18 barred.

19 Q. Was there any other point of egress from the
20 apartment or your home that he could get out besides
21 the sliding door?

22 A. No. There's only two entrances, the front door
23 and the back sliding door. I guess it would be the
24 side sliding door.

25 Q. Now, when he's back there and you're telling

1 him about the sliding door, could you see him?

2 A. At that time I couldn't, you know, see him
3 positively; but when he left the sliding door to go
4 out the front door, the kitchen window was open, the
5 blinds were not closed, and there was good light
6 coming in from the kitchen window. And at that time
7 I positively identified him as Kevin Herrick when he
8 went past the kitchen and the kitchen light and he
9 went out the front door.

10 Q. Did you see his face? Did you get a good look
11 at his face?

12 A. Yes, I saw his face. And I proceeded to chase
13 him out the front door and around the building to
14 the east. At just about a building down he turned.
15 It was well lit outside at the time. It was a clear
16 sky, moon, plus there's street lights. And I saw
17 his face again at that time, and I knew beyond a
18 shadow of a doubt it was, in fact, Kevin Herrick.

19 Q. What happened next?

20 A. I chased him down a couple of buildings. He
21 went around a building heading south. There was a
22 very large bush at the corner of the building, so I
23 hesitated because I didn't know if he was hiding
24 behind the bush and I didn't want to be ambushed,
25 and that was the -- I didn't see him after that

1 during the chase. I went around the building and,
2 you know, I didn't see him or where he went. I went
3 behind the building. I assumed at that time that he
4 had jumped the fence, the back yard fence of the
5 building, so I went up there. And there was an
6 electrical box, and I jumped up and I saw a car
7 right at the time, so I jumped over, hid behind two
8 boats, and got the license plate number. There was
9 people. I could not make out any faces or features
10 in the car at that time.

11 Q. What did you believe with respect to that car?

12 A. I did not know at that time. I knew it was a
13 possibility that he might have been in the car at
14 that particular moment in time, and then I went back
15 to the apartment, told them to call the police, and
16 gave them the license plate number.

17 Q. What happened next?

18 A. The police came; the paramedics came.

19 Q. What do you recall next in the way of seeing if
20 at all Kevin Herrick at the scene?

21 A. Well, at this time, 13 years later, I'm not
22 sure. I did go over my deposition and the court
23 hearings, but at this time my recollection is that I
24 did not see him until I was being wheeled out on the
25 stretcher is when I first saw him in the doorway.

1 Q. What doorway?

2 A. His doorway of the dwelling he was living in.
3 And I looked at him and he looked at me, and there
4 was two words exchanged.

5 Q. Did you tell the police who had stabbed you?

6 A. Not at that particular moment. I did not tell
7 them until I got back from the hospital.

8 Q. Would you explain to the Court why you didn't
9 tell them immediately who had stabbed you?

10 A. Well, I was extremely outraged. My adrenaline
11 and hormones were running rampant. Basically, I
12 wanted to take justice in my own hands. It was very
13 stupid, but I wanted to take care of it myself. I
14 was at the hospital, I came back to my senses and
15 knew that, you know, vigilante justice is not right,
16 so I decided to call the police and let them deal
17 with it.

18 Q. All right. Now, how did you get from the
19 hospital, or leave the hospital? Did someone pick
20 you up, or do you recall?

21 A. I honestly do not recall at this time how I
22 left the hospital.

23 Q. Where did you leave, or where did you go,
24 rather, after the hospital?

25 A. I went back to the triplex.

1 Q. How long did you stay there?

2 A. Not long, just very briefly. I got a ride from
3 Dave to where Cheryl was.

4 Q. Was there anyone else with you when you rode
5 with Dave to where Cheryl was?

6 A. I believe Porrey, Pat Porrey, the son of the
7 landlord jumped in. I wasn't comfortable, but it --
8 but, you know, I didn't feel like any conflict at
9 that time.

10 Q. All right. How long had you known Pat Porrey?

11 A. Just since I lived there, you know, a few
12 months. It was just a hi/bye type relationship.

13 Q. Where did you all drive to?

14 A. To Cheryl's mother's house.

15 Q. All right. When you got to Cheryl's house,
16 what happened?

17 A. Well, I called the police and let them know who
18 it was. Cheryl was upset that Pat was there because
19 he was friends with Kevin. I was upset that he was
20 there, too. They wouldn't leave. They kept -- I
21 mean, he was being nice, but he was like antsy, like
22 kept going on badgering me and badgering me. He
23 wouldn't leave.

24 Q. What kind of questions was he asking you?

25 A. You know, Are you positive it was him? He just

1 kept going on and on. As far as the verbatim words,
2 it was 13 years ago. I honestly do not recall.

3 Q. Do you recall the substance of how you
4 responded back to him?

5 A. Well, you know, I kept telling him, yes, you
6 know, it was Kevin, it was Kevin. And then, you
7 know, he kept going on and on and on and just was
8 relentless, so finally, you know, I told him what I
9 thought he wanted to hear.

10 Q. Which was what?

11 A. I said -- I do not, you know, recall at this
12 time verbatim, but it was basically, well, you know,
13 maybe it wasn't, you know, just to get him to leave,
14 to get off the property.

15 Q. Were you telling him that because you were
16 uncertain --

17 A. No.

18 Q. -- about who had done it?

19 A. I was not uncertain whatsoever. I know beyond
20 a shadow of a doubt who it was.

21 Q. Did he eventually leave?

22 A. Yeah. He left right directly after that.

23 Q. Did he leave on foot?

24 A. No.

25 Q. How did he leave?

1 A. With Dave, I believe.

2 Q. What do you recall doing next?

3 A. I -- consoling Cheryl.

4 Q. Do you recall when you had actually called the
5 police and told them who --

6 A. It was right --

7 Q. -- was the assailant?

8 A. It was right then. I'm not a hundred percent
9 sure as far as it was before Pat left or after.

10 Q. And what did you tell police?

11 A. Oh, I informed them, yeah, who it was, where
12 they could find him, and then they went and they did
13 their part.

14 Q. Did you identify Kevin Richard Herrick at trial
15 as the person who had stabbed you --

16 A. Yes, I did.

17 Q. -- in your apartment on that day in question?

18 A. Yes, I did.

19 Q. Did you have any doubt --

20 A. None whatsoever.

21 Q. -- that that was him?

22 A. No. And to this day I still don't.

23 Q. When you saw him that night in the kitchen and
24 again outside as you were chasing him, did you have
25 any doubt in your mind it was Kevin Herrick?

1 A. No, ma'am. I had no doubt whatsoever.

2 Q. Now, have you had any misgiving after all these
3 years, have you had any misgiving in your own mind
4 as to your identification?

5 A. No, not at all. I saw him clearly twice.

6 MS. MCCARTHY: Tender.

7 MR. GILLICK: Thank you.

8 CROSS-EXAMINATION

9 BY MR. GILLICK:

10 Q. Mr. Barfield, good morning.

11 A. Good morning.

12 Q. Mr. Barfield, you testified that Pat Porrey
13 came over to the house where you were after the
14 incident?

15 A. He came over to Cheryl's mother's house.

16 Q. Okay. He was there with David Stewart?

17 A. Yes, I believe so.

18 Q. David Stewart and Pat Porrey talked to you at
19 Cheryl's mother's house after the incident?

20 A. Yes, sir.

21 Q. And when you were chasing this person through
22 your house, or struggling with him, what did he look
23 like?

24 A. At which point?

25 Q. In your apartment.

1 A. Okay. Do you want me to go step by step then?

2 Q. Just tell us what this person's physical
3 appearance was, if you could.

4 A. Well, in the bedroom, I saw his silhouette.
5 His hair was greased back and his -- I saw the
6 silhouette of his body, which looked exactly like
7 Kevin Herrick. Then when he crossed from the
8 sliding glass door to the front door, I got a
9 positive ID on his face and I knew, in fact, it was
10 Kevin.

11 Q. And then you indicated you saw him subsequent
12 to chasing a person. Did you see him when you got
13 back to your apartment?

14 A. After I got back to my apartment, after the
15 chase?

16 Q. Yes.

17 A. Yes.

18 Q. And what was Kevin Herrick's appearance at that
19 time?

20 A. At that time he had poofed his hair up. His
21 hair was normally -- at that time was normally curly
22 and raised off of his head, and he had poofed it
23 back up, but whatever he had used to slick his hair
24 back was still in his hair. The light was
25 glistening off of it.

1 Q. And how long did you know Kevin Herrick before
2 the incident of July 14th?

3 A. Just a couple of months, two months. He was
4 also an acquaintance, hi/bye. You know, he lived
5 next door.

6 Q. You talked to him several times?

7 A. Yeah, nothing, you know, just casual
8 conversation.

9 Q. You had been with him in your apartment?

10 A. A few times, yeah.

11 Q. Did you smoke pot with him?

12 A. I don't recall. I might have. I was very
13 social at that time and at that time I did on
14 occasion, so, you know, I might have offered. And
15 if he did, you know, at this time I don't recall.

16 Q. Nowhere in your testimony today, your trial
17 testimony, your statements to the police officers,
18 or written statements did you indicate that you
19 recognized the voice of Kevin Herrick, is that
20 correct, when you were talking with or struggling
21 with your attacker? Is that correct?

22 A. Yeah. I don't think that ever came up.

23 Q. Thanks. No further questions.

24 Just a second, sir.

25 (Counsel for Petitioner and his client confer)

1 MR. GILLICK: I have no further
2 questions.

3 REDIRECT EXAMINATION

4 BY MS. MCCARTHY:

5 Q. Calling your attention back to the day and
6 after you had chased who you've identified as Kevin
7 Herrick, did you ever come in contact with Herrick
8 prior to the police coming and him telling you to
9 put away any pot?

10 A. No.

11 Q. Or warning you to put away any type of
12 marijuana or illicit drug?

13 A. No. No.

14 Q. Were you subsequently informed or informed at
15 any time that the police had found a knife, a bloody
16 knife, and a gun in Herrick's room?

17 A. No. I did not find that out until days later.

18 Q. Did you subsequently find out that they did not
19 ascertain that there was blood on a knife found in
20 his room?

21 A. Can you repeat that question again?

22 Q. Did you subsequently find out that they did not
23 have or did not find blood on a knife that was in
24 his room?

25 A. I subsequently --

1 THE COURT: Did you later find out that
2 the police had mistakenly told you that there was
3 blood and bloody shirt?

4 THE WITNESS: Oh, okay. The trial took
5 a year-and-a-half after the incident, and at that
6 point the police stated that it wasn't what they
7 thought it was, and that's at that point I found
8 out that.

9 Q. Did that fact change your confidence at all in
10 your identification of Herrick?

11 A. No, not at all.

12 MS. MCCARTHY: No further.

13 THE COURT: What injuries did you
14 suffer, Mr. Barfield?

15 THE WITNESS: Two stab wounds
16 approximately here.

17 THE COURT: Did you lose a lot of
18 blood?

19 THE WITNESS: A fair amount.

20 THE COURT: Was there quite a bit of
21 blood in the apartment, in your apartment?

22 THE WITNESS: A little bit. It was
23 mainly on me. My whole shirt was covered. It
24 was raining down into my pants and stuff.

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

1 You're excused.

2 MS. MCCARTHY: If we could have just one
3 moment. I'm trying to find out if our expert's
4 here.

5 MR. FISHKIN: Call Officer Nilsson.

6 MS. MCCARTHY: Officer Nilsson.

7 MR. FISHKIN: Those witnesses can be
8 excused, Your Honor.

9 THE COURT: As far as I'm concerned,
10 they can be.

11 MR. GILLICK: Yes.

12 THE CLERK: Good morning, sir. Raise
13 your right hand, please.

14 OFF. THOMAS NILSSON, RESPONDENT'S WITNESS,
15 SWORN

16 THE CLERK: Sir, please state your full
17 name for the record, and spell your last name.

18 THE WITNESS: Thomas Nilsson,
19 N-I-L-S-S-O-N.

20 THE CLERK: Thank you, sir. Be seated.

21 DIRECT EXAMINATION

22 BY MR. FISHKIN:

23 Q. By whom are you employed, sir?

24 A. City of Largo Police Department.

25 Q. How long have you been so employed?

1 A. 21 years.

2 Q. In what capacity?

3 A. Police officer.

4 Q. Now, in 1989 were you so employed?

5 A. Yes, sir, I was.

6 Q. What was your rank at that time, if you had a
7 rank?

8 A. Patrolman. The particular night in question I
9 was an acting supervisor.

10 Q. Okay. And do you have a current recollection
11 of any of the events of July 14/15, 1989 today?

12 A. Yes, sir.

13 Q. Have you also had occasion to review your
14 police reports and your trial deposition?

15 A. Yes, sir, I have.

16 Q. Okay. And did that help you refresh your
17 recollection as to what happened?

18 A. Yes, sir, it did.

19 Q. Now, how long after the event did you arrive on
20 the scene?

21 A. Estimating three, maybe four minutes.

22 Q. Would that be after the first officer got there
23 or after the call came in?

24 A. After the first officer got there.

25 Q. Do you know how long it would have taken the

1 first officer to get there after the call came in?

2 A. I can look at the report to reflect that, but
3 off the top of my head, I don't know.

4 Q. Okay. That's fine. Who was the first officer
5 on the scene?

6 A. Off. Brian LaVigne.

7 Q. Is he still with the Largo Police Department?

8 A. No. I believe he's with the Hillsborough
9 County sheriff's office.

10 Q. Okay. When you arrived at the scene, what did
11 you find?

12 A. Mr. Herrick was standing in a common courtyard;
13 fire rescue was on the scene treating Mr. Barfield.
14 There were, I believe, two other officers already on
15 the scene.

16 Q. Did you know Mr. Herrick at that time?

17 A. No, I didn't.

18 Q. All right. Do you recognize him today?

19 A. I believe it's this gentleman sitting here.

20 Q. Okay. But you're not sure?

21 A. It's been 14 years, sir.

22 Q. Did you have occasion to -- well, first of all,
23 how did you know at that time that the individual
24 you think was Mr. Herrick was at the scene?

25 A. Just from subsequent speaking with the other

1 officers I learned that Mr. Herrick was one of the
2 people that was standing out front when I got there.

3 Q. Did you have occasion at that time to observe
4 Mr. Herrick?

5 A. I didn't pay strict attention. I was more
6 interested in how serious the victim's injuries
7 were.

8 Q. Okay. Do you know an individual by the name of
9 Patrick Porrey?

10 A. Yes, sir, I do.

11 Q. And had you known Patrick Porrey prior to July
12 15th, 1989?

13 A. Yes, sir.

14 Q. Was he sort of a well-known character in Largo?

15 A. Yes, he was.

16 Q. What did Patrick Porrey do for a living at that
17 time, if you know?

18 A. I believe he was an exotic dancer.

19 Q. Now, did you see Patrick Porrey at the scene
20 when you first got there?

21 A. When I entered the apartment he was -- I
22 believe he was just arriving on the scene.

23 Q. Were you there that night throughout the
24 episode from the time you arrived a few minutes
25 after Officer LaVigne to after they arrested

1 Mr. Herrick?

2 A. I had left the scene briefly to return to the
3 police station.

4 Q. Now, did you see Mr. Porrey there the first
5 time you were there, the second time you were there,
6 or both times that you were there?

7 A. The second time I was there.

8 Q. Now, when you arrived at the scene the second
9 time, what was that in response to?

10 A. Information that I was given by the shift
11 commander at the police station.

12 Q. What was the nature of that information?

13 A. It was a phone conversation he had just had
14 with Mr. Barfield, and he had stated that
15 Mr. Barfield had identified the suspect to him.

16 Q. Okay. Now, what did you do when you received
17 that information?

18 A. I got on the radio to Officer LaVigne and gave
19 him a status update on the information I was just
20 told, and then I responded back to the scene.

21 Q. And based upon the information that you had as
22 you were responding back to the scene, what was your
23 purpose in going back to the scene?

24 A. To assist in any possible interviews or
25 anything else that might occur, including an arrest.

1 Q. And that would have been the arrest of who?

2 A. Mr. Herrick.

3 Q. When you got back to the scene, did you, in
4 fact, participate or supervise or whatever you did
5 in the arrest of Mr. Herrick?

6 A. Yes, sir, I did.

7 Q. Now, why don't you describe what occurred?

8 A. Okay. Mr. Herrick was asked to step outside of
9 the apartment to speak with the officers by -- I
10 believe it was Officer LaVigne had asked him to step
11 outside noting that Mr. Patrick Porrey was inside
12 the apartment. I tried to get between the apartment
13 and Mr. Herrick so that no one else could come out
14 and interfere with what was about to occur. As
15 Mr. Herrick was being taken into custody, Patrick
16 Porrey got very upset and irate and started
17 demanding to be allowed to commit bodily harm on
18 Mr. Herrick. I basically ran interference for them
19 while they placed Mr. Herrick in custody.

20 Q. And did Patrick Porrey tell you or tell anyone
21 in your presence that there was something
22 outstanding on him that would get him to the jail?

23 A. Yes, sir. Just prior to that, he had requested
24 five minutes alone with Mr. Herrick in the back of
25 the cruiser. Obviously, it was denied. Mr. Porrey

1 then voiced that he had an outstanding misdemeanor
2 warrant and he wanted to be picked up on it in hopes
3 of being placed in the same jail cell with
4 Mr. Herrick.

5 Q. Was, in fact, Mr. Porrey picked up on the
6 outstanding warrant?

7 A. Yes, sir, he was.

8 Q. Was he put in the same jail cell as
9 Mr. Herrick?

10 A. Not that I'm aware of, no.

11 Q. Did you have occasion after Mr. Herrick was
12 arrested to stay at the scene and conduct any
13 further investigation?

14 A. Yes, sir, I did.

15 Q. And what would that further investigation have
16 entailed?

17 A. Mr. Porrey voiced to all of us that were there
18 that Mr. Herrick had been staying in his room.

19 Q. His bedroom?

20 A. His bedroom. And that we were welcome to go in
21 and inspect the bedroom to see if there was any
22 evidence there.

23 Q. Now, was Mrs. Porrey present, also?

24 A. Yes, sir, she was.

25 Q. And did Mrs. Porrey also consent to your going

1 in and taking a look around?

2 A. Yes, sir, she did.

3 Q. And did you, in fact -- did you or with others
4 do just that?

5 A. Yes, sir, we did.

6 Q. Now, once in the bedroom, was this before
7 Patrick Porrey was taken in on the warrant?

8 A. Yes, sir. He was not taken in till much
9 later. We were trying to separate the two as much
10 as we could.

11 Q. Now, did anybody direct you or direct your
12 attention to any particular areas in the bedroom?

13 A. Yes, sir. Patrick Porrey did. He --

14 Q. What did he direct you to?

15 A. The bed itself.

16 Q. And what did he say about the bed itself?

17 A. He suggested that we look under the mattress,
18 that there may possibly have been something hidden
19 under the mattress, that that was the bed that he
20 and Mr. Herrick had slept on.

21 Q. And did you do that?

22 A. Yes, sir.

23 Q. And what did you find?

24 A. A loaded handgun and a knife that appeared to
25 contain some type of residue of blood, or something

1 along that line.

2 Q. You don't know what it was?

3 A. No, sir, I don't.

4 Q. Now, did you have any conversation with either
5 Patrick Porrey or Theresa Porrey regarding the items
6 that you found in the bedroom?

7 A. I requested of both as to whether or not either
8 owned the items. Both said no, they did not own
9 them, and it was their belief that they were brought
10 in by Mr. Herrick.

11 Q. Did they indicate anything to you about their
12 willingness to testify at a later trial regarding
13 those items?

14 A. Yes, sir. As a matter of fact, they both
15 indicated that they were willing to testify that the
16 items didn't belong to them and they belonged to
17 Mr. Herrick.

18 Q. Okay. Did you find anything else in the room?

19 A. There was a red shirt on the floor, and I
20 believe it was a pair of blue jeans that were
21 similar in description to those that the suspect in
22 the incident had been wearing at the time.

23 Q. Was there anything about them that attracted
24 your attention?

25 A. There appeared to be -- again, I'm not

1 medically knowledgeable, but it appeared to have
2 small bloodstains on the front of the trousers.

3 Q. Were you directed to them by anybody?

4 A. As we walked into the room, they were on the
5 floor in plain view. Mr. Porrey voiced me that they
6 were not his.

7 Q. Okay. Now, did you prepare any kind of reports
8 regarding this case?

9 A. Just the supplemental report that outlines what
10 I've told you.

11 Q. And had you been told by any witnesses any
12 significant item, you would have recorded that in
13 your report?

14 A. Definitely.

15 Q. And would it matter whether it was inculpatory
16 or exculpatory the alleged perpetrator?

17 A. No, it would not have mattered.

18 Q. Now, in your conversations with Patrick Porrey,
19 did he indicate that Mr. Herrick couldn't have done
20 it because he had awakened Mr. Herrick when this
21 incident first occurred?

22 A. No, sir, he did not tell me that.

23 Q. Did he indicate to you that he had any reason
24 to believe that Mr. Herrick was not the person who
25 did it?

1 A. No, sir, he didn't. As a matter of fact, from
2 his willingness to commit battery on Mr. Herrick, I
3 got just the opposite impression.

4 Q. Did Theresa Porrey tell you anything to
5 indicate that Mr. Herrick could not have committed
6 this crime because she had awakened him that night?

7 A. No, sir.

8 Q. Did she indicate anything to you that the only
9 way that Mr. Herrick could get in and out of the
10 apartment was to come past her and he didn't?

11 A. No, sir. She didn't say anything like that to
12 me.

13 Q. And was there anything from preventing them
14 from giving you this information when you were
15 interviewing them regarding their knowledge of this
16 crime?

17 A. No. No, there was nothing preventing them.
18 Mr. Herrick was already gone from the scene.

19 MR. FISHKIN: Okay. Can I have just one
20 moment, Your Honor?

21 THE COURT: You may.

22 (Counsel confer)

23 MR. FISHKIN: I have nothing further.

24 CROSS-EXAMINATION

25 BY MR. GILLICK:

1 Q. Good morning, Officer.

2 A. Good morning.

3 Q. You found a pair of pants and a pocketknife in
4 the apartment where Kevin was staying, correct?

5 A. Yes, as well as the shirt and the gun.

6 Q. And you thought that the knife had bloodstains
7 on it?

8 A. It had a substance on it that was still
9 somewhat sticky. I can't say for sure that it was
10 blood.

11 Q. That night you told people that you thought it
12 was blood, didn't you?

13 A. No. I don't believe I did.

14 Q. The same with the pants?

15 A. Yeah. I didn't handle the pants very much
16 because I wanted to preserve any evidence that was
17 there until the evidence technician had had a chance
18 to collect them.

19 Q. But you thought the pants had blood on them?

20 A. It appeared to have something on them.

21 Q. As far as your police report, you made a
22 supplemental report?

23 A. Yes, sir.

24 Q. It was, what, two pages?

25 A. Yes, roughly.

1 Q. You didn't put everything that Patrick and
2 Theresa Porrey told you in that report, did you?

3 A. Not everything, no, sir.

4 Q. Just a summary of what you thought was
5 important?

6 A. A summary, yes, sir, a summary of the -- yes.

7 Q. Okay. Thank you, sir.

8 REDIRECT EXAMINATION

9 BY MR. FISHKIN:

10 Q. Officer, as a trained police officer, would it
11 be significant to you if somebody said that the
12 particular individual could not have committed a
13 crime?

14 A. Yes, sir, it would be very significant.

15 Q. And is that something that you would put down
16 in your report regardless of how it affected your
17 investigation?

18 A. It would be put in the report and probably
19 highlighted.

20 Q. Thank you very much.

21 THE COURT: Thank you, sir.

22 THE WITNESS: Thank you.

23 MS. MCCARTHY: Richard Watts.

24 Your Honor, while Mr. Watts is coming
25 in, I just wonder, with the Court's permission,

1 if we could play the videotape of Theresa Porrey.

2 THE COURT: That's all right. I have
3 that. I can watch that.

4 MS. SWANK: Please raise your right
5 hand.

6 RICHARD N. WATTS, RESPONDENT'S WITNESS,
7 SWORN

8 MS. SWANK: Please state your full name
9 for the record, and spell it for the Court,
10 please.

11 THE WITNESS: Richard N-U-N-N-A-L-L-Y
12 Watts.

13 MS. SWANK: Thank you.

14 DIRECT EXAMINATION

15 BY MS. MCCARTHY:

16 Q. How are you currently employed?

17 A. I'm an attorney; sole practitioner in
18 St. Petersburg, Florida.

19 Q. How long have you been licensed to practice in
20 Florida?

21 A. 21 years.

22 Q. Have you had experience in criminal trials?

23 A. Yes, I have.

24 Q. How many criminal trials would you estimate you
25 have tried on behalf of the defense?

1 A. I'd say over a hundred.

2 Q. Any experience on the prosecution side?

3 A. No.

4 Q. Are your cases typically retained or
5 court-appointed?

6 A. It's a mixture. I am on the court-appointed
7 capital list in Pinellas County. All the other
8 cases are retained.

9 Q. Are you a certified trial attorney?

10 A. No, I'm not. I'm not certified, only through
11 experience.

12 Q. Okay. Did you have occasion to be retained in
13 this particular case?

14 A. Yes.

15 Q. By the Respondent?

16 A. Yes.

17 Q. Upon being retained, did you have occasion to
18 review the trial transcript of the Herrick trial in
19 1990?

20 A. Yes, I have.

21 Q. What other materials did you review?

22 A. I read depositions -- I read the habeas corpus
23 materials, the police reports.

24 Q. Now, when you say depositions, what depositions
25 did you review?

1 A. The police officers; the victims.

2 Q. These were the depositions before the trial?

3 A. Trial preparation depositions; and Patrick
4 Porrey's deposition taken after trial, I think, for
5 this proceeding. And also I reviewed the videotaped
6 deposition which was used at trial of Theresa
7 Porrey.

8 Q. Did you speak with any witnesses?

9 A. I did.

10 Q. Who did you speak with?

11 A. Ms. Hildreth from the FDLE for hair and fiber.
12 I spoke with Mr. Barfield, and I spoke with
13 Ms. Hagan.

14 Q. How about former trial counsel, Mr. Leinster?

15 A. Oh, of course, I spoke with Mr. Leinster.

16 MS. MCCARTHY: Your Honor, I would
17 stipulate this witness as an expert in the law.

18 THE COURT: You mean you would offer him
19 as an expert?

20 MS. MCCARTHY: I'd offer him as an
21 expert in the field.

22 THE COURT: Mr. Gillick?

23 MR. GILLICK: I would object, Your
24 Honor.

25 THE COURT: Well, I'll hear his

1 testimony, like I heard Mr. Doherty's testimony.

2 Q. All right. Now, you said you had occasion to
3 go over the habeas allegations, correct?

4 A. Yes.

5 Q. I'd like to turn first to the allegation that
6 counsel did not call Patrick Porrey. Did you have
7 occasion to -- you said you looked at Pat Porrey's
8 or reviewed Pat Porrey's deposition, correct?

9 A. Yes, I did.

10 Q. Did you have an assessment based on your review
11 of the materials you described to the Court as to
12 Mr. Leinster's judgment call as to Patrick Porrey?

13 A. I do.

14 Q. And could you describe to the Court what your
15 reasoning or your feelings were with regard to that
16 claim?

17 A. It seems a sound decision not to call Patrick
18 Porrey potentially presented with two alibi
19 witnesses, and I say alibi in quotations, that the
20 defendant was sleeping at the time of the incident.
21 Theresa Porrey says that she woke up Mr. Herrick and
22 Patrick Porrey says he woke up Mr. Herrick, and, in
23 fact, he says he woke him up, it seemed to me,
24 twice, that he woke him up upon arrival. That is,
25 Patrick woke up Kevin upon arrival. That is, when

1 Mr. Porrey arrived at the scene, and then maybe
2 Mr. Herrick went back to bed, but when the police
3 came, that he had to wake him up again.

4 Q. How did you find Theresa's testimony in
5 relation to Patrick Porrey's testimony?

6 A. Hers was -- the situation is, he's a convicted
7 felon; she's an older lady with an infirmity. I
8 would have chosen her demeanor. Apparently
9 Mr. Porrey was agitated toward the defendant at the
10 time that the police came to the scene to
11 investigate the crime. She didn't have that
12 baggage. She didn't have the baggage of prior
13 convictions.

14 My impression from going over the evidence
15 was that Mr. Herrick had come outside even before
16 the police arrived, which would have been
17 inconsistent with -- it seemed to me there were
18 inconsistencies between the two of them, and I liked
19 her better because of her age and her demeanor.

20 Q. Could you reasonably utilize both of these
21 witnesses?

22 A. Probably not.

23 Q. And why not?

24 A. Because there seemed to be an internal
25 inconsistency. If Theresa had woken Kevin up, it

1 doesn't make sense for him to be wakened again, and
2 it sounded like from a sound sleep. When Mr. Porrey
3 testifies, that is, when Patrick testifies, he says
4 he was asleep; he had bed head. If Theresa had
5 already awakened him, that doesn't seem like a
6 likely situation. It would have opened up potential
7 cross-examination issues.

8 The demeanor I saw of Mr. Porrey looked
9 like he would be somebody that would be easily
10 agitated on the witness stand and maybe appear to be
11 partisan.

12 Q. What do you mean by partisan?

13 A. Well, they were the same age. They were, if
14 not good friends, at least a friend of -- Patrick
15 Porrey was a friend of Kevin Herrick's brother, so
16 they would -- and that friendship, I think, would
17 have made it look like there was more interest, more
18 willingness to be a partisan.

19 Q. Did you find, in your own estimation, any
20 substandard investigation by Mr. Leinster with
21 regard to Pat Porrey?

22 A. No. According to Mr. Porrey, he told --
23 Mr. Porrey told Mr. Leinster what he knew and
24 Mr. Leinster took notes, and so that seems a
25 sufficient investigation to me.

1 Q. Upon your review and in your experience, did
2 you find any point that was substantial or
3 significant that should have been investigated in
4 this case by defense counsel?

5 A. I can't see anything that strikes me that was
6 omitted from address by the defense counsel.

7 Q. Do you have an opinion as to whether counsel
8 was acting reasonably in not calling Pat Porrey?

9 A. Yes, I have an opinion; and I think he acted
10 reasonably in not calling Patrick Porrey.

11 Q. Did you have an opinion as to the soundness of
12 the strategy of calling Theresa rather than Patrick?

13 A. Yes.

14 Q. And what's your opinion?

15 A. I would have chosen Theresa Porrey. My opinion
16 is that it was sound to choose Theresa Porrey over
17 Patrick Porrey.

18 Q. Now, you indicated you had spoken with
19 Mr. Barfield and had reviewed the deposition of
20 Patrick Porrey. Assuming for the moment there was a
21 conversation in which Mr. Barfield had said
22 something to Porrey about the identification that
23 was less than a hundred percent, would you have
24 found that to overcome the dangers or pitfalls of
25 Pat Porrey's testimony?

1 A. Well, I pointed out the dangers already. I
2 would have had to make a choice and not call Theresa
3 if I was going to put Pat Porrey on to impeach
4 Darren Barfield's identification, so I've already
5 made the decision to go with Theresa. So now I'll
6 assume for a moment that I didn't choose Theresa and
7 I was thinking of choosing Patrick Porrey. Would I
8 have challenged that? I probably would have, but
9 having spoken to Mr. Barfield, he had a
10 reasonable -- to me, reasonable explanation for his
11 hedging on the eyewitness identification when he
12 spoke with Mr. Porrey. It was to get rid of him.

13 Mr. Porrey was -- it was early in the
14 investigation. It was early after the crime had
15 been committed, as I understood it, although I may
16 be wrong on the timing of it. But at any rate, my
17 understanding was that Darren Barfield wanted to get
18 rid of Patrick Porrey. It worked and it got rid of
19 him to say, "I'm not sure of my identification."

20 Q. In your view, do you feel that the only
21 competent tact would have been to call Pat Porrey?

22 A. No, I think it would have -- to me, it would
23 have been dangerous to call Patrick Porrey.

24 Q. Now, I'd like to turn to the hair and fiber and
25 blood evidence. Did you have occasion to review the

1 FDLE reports?

2 A. I did.

3 Q. And you said you had spoken with or were
4 present when the analyst described her findings?

5 A. Yes.

6 Q. Did you reach any conclusions as to whether
7 counsel should or should not have presented the
8 testimony of the FDLE analyst?

9 A. Generally speaking, I don't like to call state
10 employees as witnesses, government employees, when
11 they're expert witnesses because they tend to
12 neutralize what I might get by giving explanations.
13 In other words, in this case it was a stipulation
14 to -- or there was an agreement to that there were
15 no findings regarding the victims transferring hair
16 and fiber to Kevin Herrick and no transfer for Kevin
17 Herrick to the scene. That was good for the
18 defense.

19 When the FDLE witness gets on the witness
20 stand, well, she says, "Well, in 80 percent of the
21 cases, we don't find anything." Well, there was a
22 hair on Kevin Herrick's pants for which Cheryl Hagan
23 could not be excluded as the source. Now, that
24 wasn't apparent from the reports, but I'm just sure
25 if that lady had testified to that, the jury would

1 have said, Well, there was this one hair that was
2 questionable. I didn't want to go all the way and
3 say it links up, but I couldn't exclude the victim's
4 hair from being on the defendant's pants.

5 And it seems to me every time that I've
6 thought about or called the state witness in such a
7 case, I've been neutralized by being told, Well, we
8 often don't find that type of evidence, or find
9 something that's somewhat damaging, and so as a
10 general rule, I don't call those witnesses.

11 It's sufficient for me to argue the absence
12 of any physical evidence, in this case hair and
13 fiber, linking the defendant to the crime scene or
14 the victims and the crime scene to the defendant.

15 Q. Did you have an opinion in this case as to the
16 reasonableness of how Mr. Leinster handled the
17 microanalysis that was conducted on his client's
18 case?

19 A. I thought it was reasonable.

20 Q. Did you find any indication from Analyst
21 Hildreth or the lab reports that would cause you
22 concern about arguing the absence of evidence as
23 opposed to putting on those witnesses and what they
24 found and did not find?

25 A. No.

1 Q. Now, with respect to the fingerprint evidence,
2 did you have an opinion as to how Mr. Leinster had
3 handled the fingerprint, the attempt to determine
4 whether there were fingerprints at Cheryl Hagan's
5 home, and Barfield's?

6 A. My recollection is that he handled it. I
7 thought the fingerprint expert might have
8 testified -- that's my recollection -- and he
9 cross-examined him about the lack of findings.
10 There was nothing in the fingerprint evidence that
11 linked the defendant to the scene. That was amply
12 brought out.

13 Q. Did you have an assessment as to whether
14 Mr. Leinster -- or an impression as to whether
15 Mr. Leinster was adequately prepared to --

16 A. Seemed to be.

17 Q. -- try this case?

18 A. Yes. Overall, yes; and with respect to the
19 fingerprint, yes. I thought that the impression
20 that was left of the fingerprints was that there
21 weren't any of the defendant's at the crime scene,
22 which is very favorable; coming away from that, that
23 there was no physical evidence whatsoever to link
24 the defendant to the crime scene. The only evidence
25 was the eyewitness identification testimony, and he

1 attacked that.

2 Q. How did you think he handled the identification
3 evidence?

4 A. He brought out the problems that were there in
5 the eyewitness identification. Each case is a
6 little bit different. In this case, there was
7 Mr. Barfield's hedging at first not being forthright
8 at first. In fact, a ruse that Mr. Barfield was
9 using, that he hadn't decided yet how he was going
10 to handle the situation, so he put the authorities
11 off. That was brought out. He didn't immediately
12 say "That's the man," even though they were not
13 strangers, and so that was brought out.

14 Then there was later some misstatement by
15 the authorities to the witnesses about items of
16 evidence that were found, a bloody knife, maybe
17 some -- some other items of misinformation were
18 given to the witnesses. And speaking to the
19 witnesses, they're saying the identification had
20 already been made before they received that
21 information. However, it was fully brought out in
22 cross-examination that that had happened, and so the
23 taint was addressed or the discrepancies were
24 addressed by defense counsel.

25 Q. What's your opinion as to the viability of a

1 motion to suppress based on police suggestiveness as
2 to evidence found at Herrick's apartment or bedroom?

3 A. I think it would go to the weight rather than
4 the admissibility of the evidence, that series of
5 events. The eyewitness identification had already
6 been made before the misinformation was given, and I
7 suspect that I would be denied in that motion and I
8 would be left to cross-examination as the only way
9 to rectify the situation, or to address the
10 situation.

11 Q. What's your professional judgment as to how
12 Mr. Leinster handled that issue?

13 A. I thought he handled it quite adequately. He
14 addressed the issues that were of concern. He
15 addressed them to me thoroughly. I thought that he
16 handled the eyewitness as well as he could.

17 Q. I'd like to turn to the issue in the habeas
18 petition concerning an allegation that counsel,
19 former counsel, had allowed the jury to have
20 unsupervised access with the video deposition of
21 Theresa Porrey. Did you have an opinion as to
22 former counsel's judgment call in that regard?

23 A. I do. I think that that's a reasonable way to
24 go. If you can get your best evidence back before
25 the jury, you may well choose to do that, or a

1 lawyer may well choose to do that.

2 Q. Did you find any aspect of that decision to be
3 substandard performance?

4 A. No. It could be that it was the wrong
5 decision, and it turned out that when the verdict
6 came back, it probably was. But at the time the
7 decision was made, any lawyer could make that
8 decision and I would not second-guess him. It's the
9 kind of decision that you're faced with in a trial.
10 Multiple decisions like that, you have to make a
11 judgment. You might think, or the lawyer might
12 think, this is my case, they want it, I want them to
13 have it, and welcome the opportunity to let that
14 video deposition go back.

15 Q. I'd like to go to after the verdict and the
16 motion for new trial filed in this case. Did you
17 have a chance to review the sentencing transcript?

18 A. I did.

19 Q. And did you have an opinion as to the viability
20 of a motion for new trial in this case, had it been
21 filed pursuant to state procedures?

22 A. Well, I know Judge Downey. I've tried many
23 cases in front of Judge Downey. I would not suspect
24 that a motion for new trial based -- in a case where
25 eyewitness identification was the issue and the jury

1 had come back and found someone guilty, that Judge
2 Downey would somehow find that there was not
3 sufficient weight in that evidence. There were two
4 eyewitnesses. I can't imagine the judge granting a
5 motion for new trial on the weight or the
6 sufficiency of the evidence.

7 Q. Have you ever had success in your own
8 background with a motion for new trial based on
9 weight of the evidence?

10 A. No.

11 Q. In other words, the judge acting as a seventh
12 juror?

13 A. No, never.

14 Q. Did you have an opinion in this particular case
15 as to whether -- had such a motion been timely
16 filed, whether there was a reasonable probability
17 that such would have been granted?

18 A. I do have an opinion, and that is that that
19 motion in all reasonable likelihood would have been
20 denied.

21 Q. With respect to Mr. Leinster's overall
22 performance, and more specifically in reference to
23 each of the allegations in the petition that you
24 reviewed, did you find any substandard
25 performance --

1 A. No substandard performance.

2 Q. -- of former counsel?

3 A. No, adequate at all levels of trial
4 preparation. The presence of the defense lawyer at
5 the trial, he's very present at the trial and
6 handles the issues that I saw to be the formidable
7 issues. In eyewitness identification cases,
8 probably the hardest type of case for a lawyer to
9 try, it's an all or nothing situation. Eyewitnesses
10 that are not strangers to the defendant are very
11 hard to overcome. The effort was made in
12 cross-examination, and that's really all you can do.

13 Q. Finally, did you have an overall assessment as
14 to Mr. Leinster's pretrial efforts and
15 investigation, or pretrial preparation?

16 A. It was adequate.

17 MS. MCCARTHY: Tender the witness.

18 MR. GILLICK: Thank you.

19 CROSS-EXAMINATION

20 BY MR. GILLICK:

21 Q. Mr. Watts, how long have you been practicing in
22 the area of criminal defense?

23 A. 21 years.

24 Q. And --

25 A. Let me hedge on that and say 20, anyway. I've

1 been practicing for 21. I can't say for sure when
2 the first criminal case came.

3 Q. And you're here today for the State of Florida,
4 the other side?

5 A. Yes.

6 Q. And you've done that before, haven't you?

7 A. I've been available before, but I haven't been
8 called to testify.

9 Q. You've been retained before by the State?

10 A. Yes.

11 Q. You indicated that Mr. Leinster's pretrial
12 investigation preparation was reasonable, or
13 adequate?

14 A. Yes.

15 Q. What do you base that on?

16 A. Well, I base that on the depositions that were
17 taken. You know, I don't know that he took them,
18 but they were taken, so they're there to be
19 reviewed. He brought forth Theresa Porrey, who I
20 saw as the only viable alibi witness. He was
21 prepared in his cross-examination, knew the issues.

22 Q. Well, the fact is, he didn't depose anybody
23 except Theresa Porrey the day before trial, which is
24 15 months after the incident. Isn't that right?

25 A. That's correct.

1 Q. He'd been in the case for nine months, hadn't
2 he?

3 A. Often you do the preparation right before the
4 trial. There's last minute things that you do, and
5 I've -- I will tell you that when witnesses -- yes,
6 I don't think there's anything untoward about taking
7 a video deposition to perpetuate testimony the day
8 before trial.

9 Q. If you were told, sir, that there were at least
10 two exculpatory witnesses who could specifically
11 testify that shortly after the incident that a
12 victim told them they really weren't sure that it
13 was Kevin Herrick, do you think that would be
14 important?

15 A. Are you referring to Patrick Porrey?

16 Q. I'm referring to Patrick Porrey and David
17 Stewart.

18 A. I can't speak about David Stewart because I
19 haven't seen his materials, but I've spoken about
20 Patrick Porrey, and I was dubious about his other
21 testimony being inconsistent with the other
22 evidence. And so I don't know that I'd have called
23 him for the purpose of impeaching Darren Barfield's
24 eyewitness identification because of the other
25 problems that I saw.

1 Q. Well, what other problems? Patrick Porrey was
2 present. Patrick Porrey, according to what
3 Mr. Leinster was told, could testify that Darren
4 Scott Barfield admitted after identifying Herrick
5 that he's really not sure. Is there anything that
6 would justify not calling this man?

7 A. Yes.

8 Q. Because he's got a record?

9 A. No, it's not the record. First of all, at the
10 scene, Patrick Porrey is observed by the police
11 being angry with Kevin Herrick, wanting to get at
12 him, and it seemed from the record that I read that
13 that was because he believed that Mr. Herrick had
14 committed the crime. And so it would be
15 inconsistent for -- now, at that time maybe he
16 hadn't heard the hedging of the identification
17 process, but he didn't take it to the authorities,
18 okay? That's one.

19 For the other is having heard
20 Mr. Barfield's explanation and seeing Mr. Barfield's
21 behavior and seeing how that explanation fits in
22 with his other behavior. In other words,
23 Mr. Barfield didn't immediately tell the police the
24 identity that he believed the assailant to be Kevin
25 Herrick. He had his own agenda on that. He was

1 dubious, my guess, with Patrick Porrey in saying to
2 Patrick Porrey "I'm not sure" just to get him off
3 his back, out of his face, or away from him, which
4 apparently was successful; is that I don't think
5 would be enough for me to call Patrick Porrey
6 knowing the inconsistent behavior at the scene and
7 the problems that I see between Patrick Porrey's
8 description of waking up Herrick twice and his
9 mother -- his mother Theresa's explanation or
10 testimony that she woke him up. I wouldn't want him
11 there.

12 And it's not a big thing, but you mention
13 the priors. I'd rather not have that. And he had
14 been drinking, and I guess it's the attitude -- to
15 summarize the behavior at the scene, he had an
16 attitude towards the defendant that would be
17 inconsistent with him not coming forward and saying,
18 "Woe, we made a big mistake." He didn't come
19 forward to the police and say that.

20 Q. But, sir, this case, as you indicated, relied
21 strictly on eyewitness testimony.

22 A. True.

23 Q. And if those two eyewitnesses acknowledged, one
24 or both of them acknowledged that they really
25 weren't sure, don't you think that is critical in a

1 case of this nature where a man's facing life in
2 prison?

3 A. It's something that you think about, but I may
4 make the same decision that was made by Mr. Leinster
5 to not involve Patrick Porrey in the case. A
6 witness like Patrick Porrey, I view, is extremely
7 dangerous and can sink the ship, but because he has
8 his own agenda, that was my feeling in my assessment
9 of Patrick Porrey as a potential player in the case.

10 Q. Sir, you take the witnesses you find. Patrick
11 Porrey was there that night. Patrick Porrey had --

12 MS. MCCARTHY: Objection, argumentative.

13 THE COURT: Well, let me tell you,
14 counsel, and I speak to both, the addition of
15 Mr. Doherty and Mr. Watts as experts in this case
16 I don't find particularly helpful given my
17 background, so I'm capable of making decisions as
18 to who should have been called and who should not
19 have been called, what was the standard to be
20 employed, and what would have been below that
21 standard.

22 MR. GILLICK: Thank you, Your Honor.
23 I'll move along.

24 Q. David Stewart, do you know who he is?

25 A. I do. He was the neighbor that had gone off

1 with Barfield to see about the fish.

2 Q. And are you aware that Kevin Herrick informed
3 his attorney that David Stewart was a critical
4 witness who could provide exculpatory evidence?

5 A. No, I'm not.

6 Q. Are you aware of any investigation whatsoever
7 that Mr. Leinster did to locate or talk to David
8 Stewart?

9 A. No.

10 Q. As to the hair fiber and blood analysis there,
11 are you aware that there was hair found on the
12 bedsheets that did not belong to Kevin Herrick, did
13 not belong to Mr. Barfield, and did not belong to
14 Ms. Hagan?

15 A. Yes, I am.

16 Q. Is that significant?

17 A. It is, and it isn't.

18 Q. Somebody on that bed who doesn't belong there
19 and it wasn't one of the three alleged characters in
20 this case, wouldn't that be critical?

21 A. Well, the problem with that -- this specific
22 situation would require the calling of the hair and
23 fiber witness, and having spoken to her, the three
24 hairs that were found on the, I think it was the
25 sheet of the victim, were inconsistent with each

1 other. In other words, it was three different
2 sources for the hair, three different origins. We
3 then hear about how hair gets transferred
4 secondarily and -- in other words, you do your
5 laundry at the laundromat and you bring home three
6 strange hairs, for instance.

7 So the significance of that gets watered
8 down if you call the expert witness and you get an
9 explanation for those hairs don't belong to anybody
10 or because there's three of them. If there had only
11 been -- or three sources for the hair. If there had
12 only been one source for the hair, well, then it
13 would be different to say, Well, there's the
14 perpetrator's hair, and you may then call the
15 witness.

16 Q. You did talk to the expert?

17 A. Yes.

18 Q. Do you think it was important for Mr. Leinster
19 to talk to the expert at some point by phone or in
20 person?

21 A. Maybe. My general principle is, I don't call
22 their experts. If I can get a neutral finding
23 before the jury, I wouldn't need to talk to their
24 expert.

25 Q. If there were exculpatory fingerprints in a

1 case like this where the only evidence is eyewitness
2 testimony and you're not going to call people to
3 counter that, do you not think it's important to
4 call a fingerprint expert?

5 A. If they're exculpatory fingerprints? In the
6 hypothetical that you're posing, I would want to
7 have that brought before the jury that they're
8 exculpatory fingerprints.

9 Q. And you discussed -- you were requested and
10 discussed Mr. Leinster's pretrial preparation. In a
11 case where a man is facing life in prison, where a
12 man vehemently denies being involved and proclaimed
13 his innocence, do you think it's ever a sound
14 strategy by counsel not to discuss the case with the
15 client?

16 A. I always like to discuss -- I think it's
17 important to discuss the case.

18 Q. Do you think it's important for the client to
19 know what the witnesses for the State are saying and
20 have said?

21 A. Yes.

22 Q. Do you think it's important for him to know the
23 contents of police reports and lab reports?

24 A. Often it is.

25 Q. When you're representing a criminal defendant,

1 is it your case or is it the client's case that is
2 at risk?

3 A. His case.

4 Q. Thank you, sir.

5 MS. McCARTHY: Just briefly.

6 REDIRECT EXAMINATION

7 BY MS. McCARTHY:

8 Q. Did you find any evidence overlooked by
9 Leinster with regard to the fingerprint evidence?

10 A. No.

11 MS. McCARTHY: No further.

12 THE COURT: Thank you, sir.

13 THE WITNESS: Thank you.

14 THE COURT: Any other witnesses?

15 MR. FISHKIN: Officer Crosby.

16 MS. McCARTHY: May I be allowed to step
17 out?

18 THE COURT: Why don't we take a
19 ten-minute recess at this time? We'll begin at
20 10 till 11:00.

21 (Recess from 10:38 a.m. until 10:51 a.m.)

22 THE COURT: Ms. McCarthy, how are we
23 making on time?

24 MS. McCARTHY: Great.

25 THE COURT: Well, what does that mean?

1 Great for you is what for me?

2 MS. MCCARTHY: We have two witnesses, so
3 we're hoping we'll be done by noon.

4 THE COURT: Oh, good.

5 MR. FISHKIN: We'll be done before
6 yesterday, Your Honor.

7 THE COURT: All right.

8 MR. FISHKIN: And from yesterday, you
9 owe us two minutes.

10 THE COURT: All right. Well, call your
11 next witness, then.

12 MS. SWANK: Raise your right hand,
13 please.

14 OFF. HOWARD CROSBY, RESPONDENT'S WITNESS,
15 SWORN

16 MS. SWANK: Please state your full name
17 for the record, and spell it for the record.

18 THE WITNESS: Howard Crosby,
19 C-R-O-S-B-Y.

20 MS. SWANK: Please take a seat, please.

21 DIRECT EXAMINATION

22 BY MR. FISHKIN:

23 Q. By whom are you employed, sir?

24 A. Largo Police Department.

25 Q. In what capacity?

1 A. I'm sergeant of special operations.

2 Q. How long have you been a police officer in
3 Largo?

4 A. 20 years.

5 Q. How big a town is Largo?

6 A. About 70,000.

7 Q. And back in 1989, was it measurably smaller,
8 like everything else in Florida?

9 A. Yes.

10 Q. Are you familiar with the various streets and
11 locales in Largo?

12 A. For the most part, yes.

13 Q. Now, in the middle of July of 1989, did you
14 respond to a crime scene?

15 A. Yes, sir.

16 Q. And where was that at?

17 A. It was on Audubon Drive.

18 Q. Could you speak up and --

19 A. On Audubon Drive.

20 Q. Were you then and are you now familiar with
21 that area?

22 A. Yes, sir.

23 Q. Now, an individual by the name of Patrick
24 Porrey stated in a deposition that at the time of
25 the incident he was across the street at a place he

1 thinks was called Poor Boys and he heard a
2 commotion. And Poor Boys is a restaurant/bar. Were
3 you familiar with any restaurant/bar in Largo in
4 1989 by the name of Poor Boys?

5 A. The only place that I could remember was
6 PoFolks, which is a restaurant, and, also, you could
7 get drinks there.

8 Q. And how far from the scene of this crime was
9 that located?

10 A. That's on Starkey Road, which is a major
11 north/south corridor, not on Belcher Road where
12 Audubon drive is.

13 Q. Was that the next block or --

14 A. No. You're talking six, seven, eight blocks --

15 Q. Now --

16 A. -- at least.

17 Q. In July of 1989, was there any bar or
18 restaurant/bar anywhere near this particular
19 location on Audubon Drive?

20 A. Not that I can remember.

21 Q. And do you know whether at that time there were
22 any liquor licenses outstanding for any place in
23 that vicinity?

24 A. Beverage and Tobacco advised that there were
25 none in the Audubon area back on that date.

1 Q. Okay. So there was nothing there where someone
2 could be having a drink and hear a commotion across
3 the street and go?

4 A. Not unless they were in a home.

5 MR. FISHKIN: That's all I have, Your
6 Honor.

7 THE COURT: Anything, Mr. Gillick?

8 MR. GILLICK: Yes.

9 CROSS-EXAMINATION

10 BY MR. GILLICK:

11 Q. Officer Crosby, the night of the incident, you
12 spoke to Cheryl Hagan, didn't you?

13 A. Yes, sir.

14 Q. And she told you that she thinks it is her
15 next-door neighbor, but she wasn't positive?

16 A. Yes, sir.

17 MR. GILLICK: Thanks. No further
18 questions.

19 THE COURT: Thank you, sir.

20 MR. FISHKIN: Your Honor, we have one
21 more witness who is due here in three minutes and
22 30 seconds, if he's on time.

23 THE COURT: You must be running by an
24 atomic clock, Mr. Fishkin. You're giving me
25 seconds all the time.

1 (Brief pause)

2 THE COURT: Who are you waiting for?

3 MR. FISHKIN: Brian LaVigne, who is, for
4 lack of a better term, the case agent, the main
5 police officer in this investigation.

6 THE COURT: Do you know where he is?

7 MR. FISHKIN: He worked last night and
8 was supposed to be here at exactly 11 o'clock,
9 and he'll be very brief once he gets here.

10 THE COURT: Do you have any other
11 witnesses other than LaVigne?

12 MR. FISHKIN: We do not. He's our last
13 witness.

14 THE COURT: Do you intend to call any
15 rebuttal witnesses, Mr. Gillick?

16 MR. GILLICK: No, Your Honor. I do
17 intend to make sure that Patrick Porrey's
18 deposition is in evidence, as was discussed.

19 THE COURT: Well, it's been filed with
20 the Court, I believe, by the parties. I know I
21 have had it and read it.

22 MR. GILLICK: Yes, it has.

23 THE COURT: So I can't give you the
24 exhibit number right now.

25 MR. GILLICK: No, I'm aware. I just

1 wanted to make --

2 THE COURT: I have it as -- I have it as
3 doc 35 in the court file.

4 MR. GILLICK: Okay, fine.

5 THE COURT: That's the exhibit that
6 was -- that was the deposition that was taken on
7 August 9, 2001.

8 MR. GILLICK: Yes. Judge, at this
9 point, we don't have any other rebuttal evidence
10 or witnesses.

11 THE COURT: All right. Well, I don't
12 know if the parties are prepared to discuss it,
13 but what I'd like to hear about, briefly, if
14 you're prepared to do so, why the testimony of --
15 I presume that the State is arguing in this case
16 that the issue pertaining to -- let me rephrase
17 this. That part of Mr. Herrick's claim that
18 Mr. Leinster was ineffective, constitutionally
19 ineffective, because he failed to investigate and
20 call as witnesses Mr. Patrick Porrey. Mr. David
21 Stewart is not appropriately before the Court
22 because the substance of that issue was not
23 exhausted.

24 MS. MCCARTHY: That's correct, not
25 properly exhausted and now procedurally barred,

1 but I believe he waived the claim by not raising
2 it in the preevidentiary stip with regard to Dave
3 Stewart.

4 THE COURT: All right.

5 MS. MCCARTHY: Just to follow up,
6 there's been no valid cause or prejudice or claim
7 of actual innocence with reliable evidence shown
8 here at this two-day hearing.

9 THE COURT: And what is the cause and
10 prejudice that you see, Mr. Gillick?

11 MR. GILLICK: As to --

12 THE COURT: Not raising that in the
13 first Rule 3.850.

14 MR. GILLICK: Not raising that. Well,
15 Judge, it certainly could have been heard in a
16 motion for new trial, and by not raising that, it
17 certainly became ineffective because both of
18 these witnesses could have testified, even from
19 the victim himself, Mr. Barfield, that
20 Mr. Barfield specifically told them that he was
21 not sure it was Kevin Herrick. Kevin Herrick
22 relayed that to his attorney in letters or
23 documentation, but, certainly, Mr. Leinster was
24 aware of that, failed to do anything about it,
25 denied even being able to find Patrick Porrey

1 when, in fact, he saw Patrick Porrey the day
2 before trial. This is a very close case relied
3 strictly on eyewitness identification. Those
4 eyewitnesses recounted their solid identification
5 to both Mr. Porrey and Mr. Stewart, and that by
6 not investigating and presenting, did certainly
7 prejudice the defendant.

8 THE COURT: I understand the argument
9 you are making as to why Mr. Leinster should have
10 presented those witnesses and why he was
11 ineffective for not presenting those witnesses.
12 The issue I'm asking you to address, and I think
13 it's a more difficult issue for you to address,
14 is why did Mr. Herrick fail to include that in
15 his Rule 3.850, the first time he filed such a
16 request, claiming that his attorney was
17 ineffective. And the only information that I
18 have at this point is that Mr. Herrick, given his
19 education and knowledge of the legal system, was
20 simply unaware of what he could claim or what he
21 couldn't claim.

22 MR. GILLICK: That's it, Your Honor,
23 ignorance. Mr. Herrick had a very limited
24 education, certainly no legal education, and had
25 not been provided with any counsel post trial,

1 including his motion for new trial where he could
2 have talked to a competent counsel, and ignorance
3 is his reason.

4 THE COURT: Is your witness here?

5 MR. FISHKIN: (Nods head up and down.)

6 THE COURT: All right. Call him.

7 DEP. BRIAN LaVIGNE, RESPONDENT'S WITNESS,
8 SWORN

9 MS. SWANK: Please state your full name
10 and spell it for the court reporter.

11 THE WITNESS: Last name is spelled L-A,
12 capital V-I-G-N-E.

13 DIRECT EXAMINATION

14 BY MR. FISHKIN:

15 Q. Good morning.

16 A. Good morning.

17 Q. Or is it good night?

18 A. It's the middle of the night, yes.

19 Q. By whom are you employed, sir?

20 A. The Hillsborough County sheriff's office.

21 Q. In 1989, who were you employed by?

22 A. Largo Police Department.

23 Q. How long have you been a police officer?

24 A. Somewhere in the vicinity of 13 to 14 years.

25 Q. Now, Mr. LaVigne, did you have occasion to

1 respond to a crime scene on Audubon Drive in Largo
2 on or about July 15, 1989?

3 A. Yes.

4 Q. What was your function at that scene?

5 A. I was one of the first responders to a sexual
6 battery call.

7 Q. And did you have some continuing responsibility
8 in the case?

9 A. Some continuing responsibility?

10 Q. Yeah, besides just being the first officer on
11 the scene. Did you have to write and compile many
12 pages of documentation?

13 A. Oh, yes. I initiated the offense report, yes.

14 Q. Okay. Now, your functions there include
15 talking to witnesses, gathering information, and
16 seeing that it was put down on paper?

17 A. Yes.

18 Q. Now, during the course of the investigation
19 that night, did you run into an individual by the
20 name of Theresa Porrey?

21 A. I don't recall a Theresa Porrey.

22 Q. Did you run into an older woman on oxygen?

23 A. Yes.

24 Q. In a wheelchair? Not in a wheelchair, but
25 taking an oxygen tank around with her?

1 A. Yes. If that was Theresa Porrey, I recall her,
2 yes.

3 Q. At any time that night did Theresa Porrey tell
4 you that Mr. Herrick, the ultimate suspect in the
5 case, could not have committed the crime because he
6 was asleep when the crime occurred?

7 A. No.

8 Q. Did Theresa Porrey ever tell you that for
9 Mr. Herrick to get in and out of the apartment he
10 would have had to go past her, that she had been
11 awake and no one had gone past her?

12 A. I don't recall that she said that she knew
13 where he was at all.

14 Q. Okay.

15 A. Or had seen him.

16 Q. Now, had she told you that, would that have
17 become memorialized in your report?

18 A. Most definitely that would have been.

19 Q. Do you know an individual or did you know an
20 individual by the name of Patrick Porrey?

21 A. The name, yes.

22 Q. Did Patrick Porrey ever tell you that night or
23 any time subsequent to that night that Mr. Herrick
24 could not have committed the crime because
25 Mr. Herrick was asleep at the time the crime was

1 committed?

2 A. No, not at all.

3 Q. Had he told you that, would that have been
4 memorialized in your report?

5 A. Most definitely, yes.

6 Q. Thank you very much.

7 MR. GILLICK: No questions.

8 THE COURT: Just a moment, Officer.

9 Are Officer LaVigne's reports at Exhibit
10 33?

11 MR. FISHKIN: Yes, Your Honor. It
12 includes Officer LaVigne's and everybody else's,
13 which is put together as one exhibit.

14 THE COURT: Just a moment.

15 All right. Thank you, sir. Anything
16 else?

17 MS. MCCARTHY: No, Your Honor,
18 Respondent would rest.

19 THE COURT: Any rebuttal?

20 MR. GILLICK: No, Your Honor.

21 THE COURT: Let me say I know that the
22 family has been here during the proceedings, and
23 no doubt you are concerned about Mr. Herrick, but
24 let me explain to you this proceeding is not a
25 retrial. This proceeding is one in which the

1 issues are whether Mr. Herrick was denied
2 constitutionally effective representation of
3 counsel guaranteed by the Sixth Amendment to the
4 United States Constitution; and this Court's task
5 as a federal court reviewing a writ of habeas
6 case, pursuant to United States Code Section
7 2254, is to consider such claims and to consider
8 them in an appropriate manner. That is, that
9 certain claims, claims raised in such an
10 application, have to be raised appropriately.
11 Those are the marching orders under the rules
12 governing habeas corpus petitions, as well as the
13 statute itself, as well as the Supreme Court case
14 law.

15 And just so that you understand, my task
16 here will be to issue a report and recommendation
17 to the district judge assigned to the case, that
18 is, United States District Judge Steven Merryday,
19 and to report to him what has occurred and what
20 my evaluation of the record is, and to give him
21 some recommendation as to the disposition of this
22 case, namely, whether the writ of habeas corpus
23 should issue requiring a new trial in this case
24 or whether the writ of habeas corpus should be
25 denied, in effect, a finding that no

1 constitutional violation occurred.

2 I do not sit as the seventh juror in the
3 case. I do not sit in this case, as a trial
4 judge would, to decide whether my decision would
5 be like the jury's decision. If you are seeking
6 that, this is not the forum where you will find
7 that. That forum may be to the governor for some
8 type of clemency or pardon or some other type of
9 executive relief. My task here is to decide
10 whether it's been a violation of Mr. Herrick's
11 constitutional rights, as he has claimed, not as
12 he may later claim in some other petition or --
13 and, also, as he claims appropriately in the
14 manner that procedurally must be done in a 2254
15 application, such as this one.

16 And given that all sides have rested,
17 I'll take the matter under advisement and will
18 issue a report and recommendation in due course.
19 I ask that you examine the exhibits that have
20 been introduced to make certain that all the
21 exhibits that have been introduced are with the
22 clerk so that I can consider them when I render
23 my report and recommendation to Judge Merryday.

24 Anything further in this matter?

25 MS. MCCARTHY: No.

1 MR. GILLICK: No, Your Honor.

2 THE COURT: All right. Thank you.

3 (Proceedings concluded at 11:11 a.m.)

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1
2 UNITED STATES DISTRICT COURT
3 MIDDLE DISTRICT OF FLORIDA
4 TAMPA DIVISION

5 KEVIN RICHARD HERRICK,

6 Petitioner,

7 vs.

8 MICHAEL W. MOORE,

9 Respondent
10
11

12 I, Lisa R. Every, RMR, CRR, certify that
13 the foregoing pages 1 to 414 is a correct
14 transcript from the record of proceedings in the
15 above-entitled matter. Dated this Tuesday, July
16 23, 2002.
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23 
24 Lisa R. Every, RMR, CRR
25

