IN THE SUPREME COURT OF FLORIDA

PERRY ALEXANDER TAYLOR,

Appellant,

v. **CASE NO. SC06-615**
L.T. No. CF 88-15525

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Other Authorities

PRELIMINARY STATEMENT

References to the record:

References to the direct appeal record will be designated as (R Vol. #/page #).

References to the resentencing record will be designated as (RS Vol. #/page#).

References to the post-conviction record will be designated as (PCR Vol. #/page #).

References to the supplemental record will be designated as (SR Vol. #/page #).

STATEMENT OF THE CASE AND FACTS

1989 – 1991: Trial and Direct Appeal Proceedings

In May of 1989, the defendant, Perry Taylor, was convicted of first degree murder and sexual battery of Geraldine Birch.[1] Taylor confessed to killing Geraldine Birch. At trial, Taylor claimed that the sexual contact was consensual and that the beating from which she died was done without premeditation. On May 12, 1989, Hillsborough County Circuit Judge William Graybill sentenced Taylor to death on the first-degree murder conviction and to life in prison on the contemporaneous sexual battery conviction. On direct appeal, Taylor v. State, 583 So. 2d 323 (Fla. 1991), this Court set forth the following summary of the facts:

> Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field. Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give her ten dollars in exchange for sex, and the two of

[1] Also referred to as Geraldine Johnson.

> them went to the dugout. [n1][2]
>
> Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

Taylor, 583 So. 2d at 325.

On direct appeal, Taylor raised three issues related to the guilt phase of his trial. First, Taylor argued that the trial court erred by failing to conduct a Neil inquiry upon the prosecutor's peremptory challenge of a black prospective juror. Taylor, 583 So. 2d at 326. Second, Taylor argued that the trial court erred in excluding testimony that the victim had been seen purchasing or using crack cocaine on various occasions before her death. Taylor, 583 So. 2d at 328. Third, Taylor argued that the trial court erred in denying his motions for judgment of acquittal. In rejecting Taylor's second and third claims, this Court stated, in pertinent part:

---

[2] [n1] "The testimony of defense witnesses Otis Allen and Adrian Mitchell, friends of Taylor, corroborated this portion of Taylor's testimony. Allen testified that he heard Birch tell Taylor that she wanted to have sex for money or crack cocaine and that he saw Birch and Taylor walk off toward the little league park together. Mitchell testified that he saw Birch talking to Taylor, then she walked away and he followed as though they were together." Id. at 325.

Taylor's defense to the sexual battery charge was consent. He argues that the fact that Birch was a crack cocaine user was relevant to his defense because it corroborated his version of the events preceding the victim's death. Taylor argues that a crack cocaine user would be much more likely than a nonuser to approach a group of men at 4 a.m. in the location where this crime occurred and offer sex for money and drugs.

We find no error in the trial court's exclusion of this testimony. A person seeking admission of testimony must show that it is relevant. Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S. Ct. 869, 88 L. Ed. 2d 907 (1986). To be relevant, evidence must tend to prove or disprove a fact in issue. Id. **The fact that the victim may have used or purchased crack cocaine on occasions prior to her death does not tend to show that she consented to sex with Taylor on the night in question. None of the witnesses whose testimony was excluded had observed the victim offer sex for drugs or money. Absent a link between the prior cocaine use and sexual activity by the victim, the testimony simply was not probative of whether she consented to sexual activity with Taylor before the fatal beating.**

Next, Taylor argues that the trial court erred in denying his motions for judgment of acquittal. **Taylor was charged with premeditated murder and with felony murder based on the alleged sexual battery. He claims that the state's circumstantial evidence was legally insufficient to prove lack of consent to the sexual battery and premeditation. We disagree.**

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, Taylor admitted the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such

differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Id. **We find competent, substantial evidence of premeditation and lack of consent to submit those issues to the jury.** Hufham v. State, 400 So. 2d 133, 135-36 (Fla. 5th DCA 1981) ("Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses.").

To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Further, to establish premeditation by circumstantial evidence, the state's evidence must be inconsistent with every other reasonable inference. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). However, the jury need not believe the defense version of facts on which the state has produced conflicting evidence. Id. **On the question of lack of consent, even accepting Taylor's assertion that the victim initially agreed to have sex with him, the medical examiner's testimony contradicted Taylor's version of what happened in the dugout. According to Taylor, he had vaginal intercourse with the victim for less than a minute without full penetration. He testified that she then indicated that she did not want to have intercourse and began performing oral sex on him. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina. Given the evidence conflicting with Taylor's version of events, the jury reasonably could have rejected his testimony as untruthful**. Cochran, 547 So. 2d at 930.

Further, the jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she

> released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. **The evidence was sufficient to submit the question of premeditation to the jury.** See Heiney v. State, 447 So. 2d 210, 215 (Fla.) (premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).
>
> Taylor I, 583 So. 2d at 328-329 (e.s.).

On direct appeal, this Court affirmed Taylor's convictions, but vacated Taylor's death sentence due to improper prosecutorial arguments during the penalty phase. Therefore, this Court remanded for resentencing before a new jury. Taylor, 583 So. 2d at 330.

1992: Resentencing Proceedings

Taylor's resentencing hearing began on May 18, 1992. Officer Edward Batson testified that he went to the Belmont Heights Little League ball field at 7:24 on October 24, 1988 in response to a report of a nude female passed out in the dugout. He arrived and observed the dead female. (RS2/195-96).

Officer Louis Potenziano observed the victim at the scene (RS2/204) and directed that photographs be taken. The photographs, State's Exhibits 2 - 17 were admitted without objection (RS2/211). There were drag marks in the dugout from one end of the dugout to the victim's body. (RS2/211). The victim was naked from the chest down, a pair of white underwear and red blouse or dress was pulled up over her breasts. (RS2/213). A purse was on top of the victim's body. A broken beer bottle, a broken denture and a portion of a wig was found above the victim's body. A shoe impression -- a sneaker -- was outside the dugout at the crime scene (RS2/214-15). There were bruises on the victim's body. (RS2/218).

Homicide detective George McNamara investigated the death of Geraldine Burch and spoke to Perry Taylor the day after the murder on October 25, 1988 (RS2/227). Taylor said that he had heard of this homicide, that Pine (real name Allen Sherry) told him that the victim had been found. (RS2/228-229). Taylor did not indicate he had any knowledge regarding the death. (RS2/231). Taylor claimed *not* to have frequented the area where the victim's body was found in the last six weeks. (RS2/231). Taylor consented to provide his clothing for tests. (RS2/232). McNamara attended the autopsy and observed a tear just below the vaginal area (RS2/234) and a photograph of same, Exhibit 24,

was admitted over objection. (RS2/235).

On October 27, McNamara again contacted Taylor and gave him Miranda warnings. (RS2/238). Taylor signed a consent to interview form. (RS2/239). Taylor admitted having been in the nearby basketball courts and he admitted having sex with a female at the ballpark on the Friday preceding the murder. The police told Taylor that his shoes matched the impressions in the dirt near the victim's body. Taylor paused, then said that it was an accident; that she'd agreed to have sex with him. Taylor stated that during oral sex, she bit his penis; he choked her and struck her several times in the face; he dragged her body in the dugout; he kicked her in the upper torso several times, and he stomped on her chest. Then he went home. (RS2/243). Taylor claimed he had not had vaginal sex with her. Hair samples were taken. (RS2/244). Taylor said that he was six foot two inches and weighed 235 pounds. (RS2/246). Taylor claimed that he did not know the victim. (RS2/247).

Detective Henry Duran interviewed Taylor and examined the defendant's penis; he made no observation of injuries or marks consistent with teeth marks. Photographs were taken and Exhibits 30 and 31 were admitted without objection (RS2/268-70). Taylor admitted to Detective Duran that he had vaginal sex with the victim (RS2/271) and Taylor admitted having denied that

before to McNamara. Taylor admitted kicking and stomping the victim. (RS2/273). Taylor did not indicate kicking her in the vaginal area. (RS2/275).

Associate Medical Examiner Lee Miller performed an autopsy on Geraldine Birch. (RS2/284). The victim was 38 years old. She was 5'2" and weighed 110 pounds. (RS2/286). Dr. Miller testified that the cause of death was massive blunt injury of the victim's head, neck, chest and abdomen. (RS2/286). There was a bald spot on the victim's head where a swatch of hair had been torn away. (RS2/293). The hair could have been pulled off by a hand or the result of a kick. (RS2/297). The victim had no teeth of her own -- a partial lower dental plate was not in place; the partial piece recovered by her leg fit like a jigsaw puzzle. (RS2/298). Dr. Miller testified that it was not likely that the victim's head injuries caused unconsciousness. (RS2/300). Her larynx was fractured. (RS2/301). Patterned injuries were consistent with stomping on her chest. (RS2/302). A broken rib had torn into the victim's heart and both lungs were similarly torn by compression of the chest. Great force would be required to cause those injuries. The victim's liver was crushed to a pulp, her kidneys were torn loose from their attachment, her spleen was torn, her pancreas was bruised and there were tears to both the small and large intestines.

(RS2/305-09). Her ribs were fractured. Every major organ of her body suffered some type of injury. There were ten tears inside the vagina. (RS2/310-11). It was possible, but unlikely, that vaginal intercourse caused it; Dr. Miller opined that something was inserted (such as a hand) to stretch it to the point of tearing. (RS2/313). It was not an instant death. (RS2/320).

The parties stipulated that Detective Hill could testify about Taylor's prior offense involving another victim, Tracie Barchie; and, therefore, the State would not call Barchie. (RS2/337–338). Detective Hill investigated a 1982 sexual battery of Tracy Barchie; she was age 12 and Taylor was 16. (RS2/339-40). The statements taken from Tracie Barchie were corroborated by Taylor. Taylor penetrated Barchie with a finger and attempted to penetrate her with his penis. Taylor threatened to kill her if she told anybody (RS2/342). Taylor was convicted of sexual battery. Exhibit 29, the judgment of conviction in the Barchie case, was introduced without objection (RS2/344). Exhibit 28, the sexual battery conviction in this case, was introduced without objection. (RS2/345).

The defense called Corporal Borhoss who worked at the county jail to testify that Taylor did not give him problems when he was supervising him. (RS3/356-65). Sergeant Sharon Smith (RS3/365-71) and Tammy Kirk (RS3/372-77) provided similar

testimony.

Otis Allen testified that the victim, Geraldine, was offering sex for crack and that Taylor left with her. (RS3/384). Otis Allen claimed that he told this to Detective McNamara. (RS3/387).

Alvin Thomas last saw Taylor when he was seven years old in foster care (RS3/405). Ollie May Rutlage, Taylor's grandmother, testified that Taylor first went into foster care at age seven. (RS3/413). Taylor expressed remorse to her. (RS3/416).

Taylor's brother, Stanley Graham, testified that his sister has epilepsy (RS3/421), that Taylor's father didn't help raise him (RS3/420) and that Taylor was in foster care from age seven to sixteen. (RS3/423). Taylor expressed remorse to him. (RS3/425).

Psychologist Robert Berland testified that he administered an MMPI (RS3/437) on two occasions. (RS3/443). The first MMPI indicated that Taylor was trying to hide what was wrong with him. (RS3/454). On the second MMPI, Taylor was feeling more pressure and making a greater effort to hide his problems. (RS3/456-57). Dr. Berland also gave the WAIS-revised test (RS3/460); Taylor scored as having an average I.Q. of 104. (RS3/463). In some areas, Taylor functioned like a retarded person and in others like a person of high average intelligence.

(RS3/468). Dr. Berland testified that there was evidence of brain damage. (RS3/472). This illness did not cause Taylor to commit the crime. (RS3/473). Taylor does not have a history of epilepsy. (RS3/479). Taylor had been extremely aggressive, extremely rebellious. (RS3/480). He was placed into foster care because of ungovernability at age 14. (RS3/482). Taylor's I.Q. score as a whole was above average. (RS3/485). There was no medical information to support the claim of brain damage. (RS3/485). Dr. Berland testified that Taylor is a very angry man, a sociopath (RS3/486) and that he was "not trying to say that he was a sweet and innocent person who is a victim of his mental illness." (RS3/488). Taylor relied on defense counsel's recommendation not to testify. (RS3/497).

Rebuttal witness, Detective McNamara, interviewed Otis Allen and Allen did not tell him he heard Geraldine Birch offer sex for rock cocaine. According to Detective McNamara, Allen never mentioned anything about drugs. (RS3/502-03).

The jury recommended the death penalty by a vote of eight to four and Circuit Judge Allen imposed the death penalty.[3] Judge

[3] On Taylor's resentencing appeal, Taylor argued, *inter alia*, that it was error for the trial judge to consider evidence which had not been provided to the jury and which had not been properly admitted under section 921.141, Florida Statutes (1987). In rejecting Taylor's resentencing claim, this Court found that, "[a]t a hearing held subsequent to the penalty phase

Allen's 1992 sentencing order stated, in pertinent part:

SENTENCING ORDER

> On May 18, 1992, a jury was convened to render an advisory sentence to be imposed upon the Defendant, PERRY ALEXANDER TAYLOR, for the First Degree Murder of GERALDINE BIRCH. The Defendant was found guilty by a previous jury of the First Degree Murder and Sexual Battery of GERALDINE BIRCH.
>
> On May 21, 1992, after hearing evidence from the State of Florida regarding aggravating circumstances and from the defense regarding mitigating circumstances, the jury recommended by a vote of 8 to 4 that the Defendant be sentenced to death in the electric chair.
>
> On June 12, 1992, the Court received, as requested, memoranda from both counsel for the State and counsel for the Defendant.
>
> On June 18, 1992, the Court received a Notice of Evidence in Rebuttal to Mitigating Circumstances from counsel for the State. On June 19, 1992, the Court held a sentencing hearing and, over objection from the Defendant, allowed the State to present testimony in rebuttal to mitigating circumstance and both the State and the Defendant made further legal argument. The Court set final sentencing for this date, June 23, 1992.
>
> This Court, having heard the evidence in the penalty phase, having had the benefit of legal memoranda and further argument both for and against the imposition of the death penalty finds as follows.
>
> A) AGGRAVATING FACTORS

---

proceeding but prior to sentencing, the trial judge allowed a detention deputy to testify that Taylor had attacked him with a homemade razor at the jail. The incident had occurred after the jury had been discharged. The evidence was submitted in rebuttal of the argument in mitigation that Taylor had behaved well in custody. Taylor could not have been prejudiced by the jury's failure to hear this unfavorable testimony. There was no error in the admission and consideration of this evidence. . ." Taylor II, 638 So. 2d at 33.

1. The Defendant was previously convicted of a felony involving the use or threat of violence to some person.

> The Defendant was convicted on September 22, 1982, in Hillsborough County, Florida, Case No. 82-8808, of Sexual Battery upon a twelve year old girl. During the course of said sexual battery the Defendant told the victim if she told anybody he would kill her. The Defendant was sixteen years of age at the time of that offense. This aggravating circumstance was proved beyond a reasonable doubt.

2. The capital felony was committed while the Defendant was engaged in the commission of, or attempt to commit, or escape after committing a sexual battery.

> The Defendant was charged and convicted of committing sexual battery upon the victim of the homicide. The Defendant was convicted by the previous jury on May 12, 1989, of sexual battery with great force, Hillsborough County, Florida, Case No. 88—15525, affirmed in Taylor v. State, 583 So. 2d 323 (Fla. 1991). This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was especially heinous, atrocious or cruel.

> The victim died of massive internal injuries. The injuries occurred prior to death as evidenced by the large amount of internal bleeding. There is no evidence as to when in the course of the brutal attack that the victim loss [sic] consciousness. There is evidence that the first injury inflicted was choking of the victim. The victim's larynx was crushed. Every major organ in the victim's body was either crushed, lacerated or torn from its position within the body. Many of the victim's ribs were broken, some of which then penetrated or tore major organs. The victim's dentures

were broken in half and were found outside of the body. There was a bite mark on the victim's arm and the victim's body was dragged the length of the dugout where the attack occurred. The victim's vagina was lacerated and the outside of the vaginal area sustained a large tear. There is no evidence to suggest that the victim loss [sic] consciousness until this brutal attack began and any one of the injuries sustained would have been powerful enough and delivered with such force that the victim would have been aware of her impending death at the hands of her attacker. This circumstance was proved beyond a reasonable doubt.

No other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court.

B). MITIGATING FACTORS

Statutory Mitigating Factors

The Defendant requested the Court to consider the following statutory mitigating circumstance:

1. The victim was a participant in the Defendant's conduct or consented to the act.

The defense presented the testimony of a witness who stated that he overheard the Defendant and victim discuss sex for drugs and that the victim and the Defendant left together going in the direction of the dugout. The State put on rebuttal testimony from the officer who interviewed this witness shortly after discovery of the crime that the witness did not tell him of such a conversation but rather that the victim approached a group of males and asked for a ride whereupon she was told no one had a car. The Court does not find this statutory mitigating circumstance to exist.

Non-Statutory Mitigating Factors

The Defendant presented evidence and asked the Court to consider the following non-statutory

circumstances.

1. Family background

2. Abuse of the Defendant as a child

3. Defendant's remorse

4. Suggestion of Organic Personality Syndrome indicative of brain injury

5. Good conduct in jail

6. Lingering doubt concerning sexual battery of this victim

1) & 2). The testimony of the Defendant's grandmother, brother and an acquaintance from a foster home established that the Defendant was placed in foster care at the age of seven (7) and remained in foster care with some brief exceptions until age sixteen. During this time he had very limited contact with his mother and eight siblings. The Defendant was beaten for bedwetting while in foster care. The Defendant's father never lived with him nor supported him. The Defendant's mother suffered a brain hemorrhage at a young age and neither reads nor writes. The Court finds these mitigating factors to exist and gives them some weight.

3). Defendant's remorse was expressed by his grandmother who testified that the Defendant calls once or twice a week and is remorseful in that he "could be home doing things for his sisters and mother." The Defendant's brother testified that the Defendant has expressed remorse about ten (10) times. The Court gave this mitigating circumstance very little weight.

4). The testimony of Dr. Berland, a forensic psychologist, was to the effect that the Defendant is of above average intelligence and that psychological testing suggests Organic Personality Syndrome. The Defendant's psychological history of aggression, rebellion and compulsiveness coupled with psychological testing is indicative of brain injury. The Court gave this mitigating circumstance very little weight.

5). The Defendant presented evidence of good conduct in jail through testimony of three detention

deputies with the Hillsborough County Sheriff's Office who had contact with the Defendant in 1988 and 1991-1992. All testified that the Defendant was one of the better inmates and never caused a problem. This mitigating circumstance was rebutted by testimony on June 19, 1992, that the Defendant attacked a 63 year old detention deputy, slashed him with a razor requiring eight sutures and bruising by striking the deputy with handcuffs. The Court gives the mitigating circumstance of good conduct in jail very little weight.

6). The Defendant argued, and the Court considered, lingering doubt concerning the sexual battery of the victim of this homicide through the testimony of Otis Allen and the statements of the Defendant to the officer that the initial contact was consensual. The Court rejects this as a mitigating circumstance with the observation that initial consent to a sexual act does not preclude a subsequent sexual battery.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

* * *

/s/ 23rd day of June, 1992.

(RS5/812-17) (e.s.).

1994 - Resentencing Appeal

On his resentencing appeal, Taylor argued that: (1) the jury should not have been allowed to consider sexual battery as an aggravating circumstance because it allegedly unconstitutionally repeated an element of first-degree murder; (2) a prospective juror was improperly excused after stating her

opposition to the death penalty; (3) the trial court erred in not requiring a Neil inquiry when the State exercised a peremptory challenge of a prospective juror; (4) the Florida death penalty statute which allows a bare majority death recommendation violates the Constitution; (5) the death penalty statute conflicts with the Florida Rules of Criminal Procedure; (6) the penalty phase judge erred in admitting a graphic photo into evidence; (7) the penalty phase judge failed to instruct the jury on the intent element of the HAC aggravator; (8) the penalty phase judge failed to instruct the jury on several nonstatutory mitigating factors; and (9) the sentence of death was not proportional considering the balance of aggravating versus mitigating factors. Taylor v. State, 638 So. 2d 30 (Fla. 1994). This Court rejected Taylor's resentencing claims and affirmed Taylor's death sentence, Taylor II, 638 So. 2d at 33, noting:

> The new jury recommended death by an eight to four vote. The judge found the following aggravating factors:
>
> (1) Taylor had a previous felony conviction involving the use or threat of violence; (2) the capital felony occurred during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel. The court found no statutory mitigators but did give some weight to Taylor's deprived family background and the abuse he was reported to have suffered as a child. The court considered but gave little weight to Taylor's remorse, to psychological testimony that while Taylor has above-average intelligence, he suffers from an

> organic brain injury, and to testimony concerning Taylor's good conduct in custody. The judge determined that the aggravating circumstances outweighed the mitigating factors and sentenced Taylor to death.

Taylor II, 638 So. 2d at 32.

On November 14, 1994, the U. S. Supreme Court denied Taylor's petition for writ of certiorari. Taylor v. Florida, 513 U.S. 1003 (1994).

1994 – 2005: Post-Conviction Proceedings

On December 16, 1994, Taylor submitted a Motion for Extension of Time to Designate Counsel and to File Motion under Rules of Criminal Procedure 3.850 and 3.851. (Fla. S. Ct. Case No. 80,121). On March 12, 1996, Taylor filed a Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend. On September 8, 1997, the State filed its Answer to Defendant's Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend. On October 6, 1998, Taylor filed his Third Amended Motion to Vacate. On November 4, 1998, the State filed its Answer to Defendant's Third Amended Motion to Vacate. A hearing was held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) on November 25, 1998. The Honorable Cynthia A. Holloway, Circuit Court Judge for the Thirteenth Judicial Circuit, entered an Order finding that it would be appropriate to have an evidentiary hearing on Claims 5

and 11 of Taylor's Third Amended Motion to Vacate Judgments of Conviction and Sentence.[4]

On September 19, 2003, Taylor filed amendments to two claims of his third amended motion. An evidentiary hearing was held October 7-8, 2003, after which a fourth amended post-conviction motion was filed on February 17, 2005. On April 8, 2005, another Huff hearing was held to consider whether an evidentiary

[4] The delays in this post-conviction case were attributable to several different factors. Among other things, evidentiary hearings were rescheduled on multiple occasions due, in part, to (1) various motions for continuances, (2) the successive recusal of three successor judges appointed in Hillsborough County, (3) the eventual reassignment of this case to Polk County, (4) the subsequent reassignment of this case to successor judges in Polk County on two separate occasions, (5) the pendency of interim Florida Supreme Court proceedings concerning the admissibility of PET scans, (6) post-conviction depositions of numerous expert witnesses, and (7) the authorization of neurological testing of the defendant. For example, on 10-6-98, Taylor filed his Third Amended Motion to Vacate (with 20 issues). On 11-5-98, the State submitted its Answer to the defendant's Third Amended Motion to Vacate. On 11-24-98, Hillsborough Circuit Judge Holloway granted an evidentiary hearing on issues 5 and 11. On 7-12-99, Judge Holloway recused herself from this case and the evidentiary hearing was cancelled. On 10-4-99, a successor judge in Polk County, Circuit Judge Robert A. Young rescheduled a Huff hearing. On 5-17-00, the successor trial court granted a motion to continue the evidentiary hearing and motion to transport the defendant for neurological testing (PET scan). On 6-5-00, the parties stipulated that a PET scan would be conducted of the defendant. On 6-22-00, Judge Randall McDonald entered an Order directing that the evidentiary hearing would be continued until resolution of the Hoskins case by the Florida Supreme Court on the admissibility of PET scans. On 8-21-00, Taylor was transported to Palm Beach Jail and then to testing site for the PET scan and state's expert permitted to witness the PET scan testing. On 10-7-03, the evidentiary hearing

hearing should include consideration of Defendant's PET scan, purportedly showing brain damage, to establish ineffective assistance of counsel, and/or to constitute newly discovered evidence requiring a new trial. The trial court heard testimony on Taylor's PET scan results as part of evidentiary hearings held on June 7 and 8, 2004.

On February 28, 2005, the trial court granted, in part, and denied, in part, Taylor's Fourth Amended Motion to Vacate. The victim's daughter, Sonya Davis, was deposed in 2005. Ms. Davis confirmed that she did not want to testify for the defendant, Perry Taylor, and that she would not have testified on Taylor's behalf at trial. (SR2/256-57). The trial court ruled, in pertinent part:

> The Motion is GRANTED as to the republication of the Third Amended Motion through page 85.
>
> The Motion is GRANTED as to Claim XXI, pages 86-92, so far as it is a republication of the previously granted "Nixon Claim" amendment; provided deletion of citations and reference to Nixon v. State, 572 So. 2d 1336, (Fla. 1990), do not alter the original claim.
>
> The Motion is DENIED as to "Amendment And Supplement To Claim V", pages 93-97, and Memorandum of Law On Amendment To Claim V, pages 97-101, as the claim is adequately raised in the pleadings and the issue has been litigated. In addition, Defendant's addition of this Amendment and Supplement and Memorandum is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.

---

commenced before Circuit Judge McCarthy in Polk County.

> The Motion is DENIED as to Claim XXII, pages 102-13, regarding the Sexual Battery charge, as the claim is already adequately raised in the existing pleadings. In addition, Defendant's addition of this claim is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
>
> The Motion is DENIED as to Claim XXIII, pages 113 – 114; Defendant's claim that trial counsel was ineffective pursuant to Strickland v. Washington, 466 U.S. 668 (1984), for failing to present the testimony of the Victim's sister, Gloria House, in the penalty phase. This claim was abandoned by the Defendant in Memorandum In Support Of Amendment Of Motion To Vacate, Motion To admit Deposition Of Sonya Davis Into Evidence, And Addressing Proposed Order On Amending Motion To Vacate, filed on February 25, 2005. In addition, Defendant's addition of this claim is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
>
> The Motion is DENIED as to Claim XXIV, pages 114 – 115; Defendant's claim that trial counsel was ineffective pursuant to Strickland for failing to present the testimony of the Victim's daughter, Sonya Davis, in the Guilt Phase. Defendant's proffer of the deposition of Sonya Davis taken on February 24, 2005, clearly shows Ms. Davis would not have been willing to testify in the prior proceedings. In addition, Defendant's addition of Claim XXIV is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.

(PCR5/787-88)

The trial court also found:

> Defendant's Motion to Admit Deposition Of Sonya Davis Into Evidence, filed on February 25, 2005, is DENIED. The Deposition would not have been admissible as substantive evidence in the guilt phase of the trial. In addition, the Deposition supports a new

> claim that is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing. Defendant's evidentiary hearing is scheduled for March 3, 2005.
>
> (PCR5/788)

Post-Conviction Evidentiary Hearing

The Circuit Court's final order denying post-conviction relief set forth the following comprehensive summary of the testimony presented at the post-conviction hearings:

> Evidentiary Hearing October 7, 2003 — Commencing at 9:30 a.m.
>
> Dr. Henry Dee — Pages 10 — 51, Transcript of Evidentiary Hearing on October 7, 2003.
>
> The defense called Dr. Henry Dee, a clinical psychologist and clinical neuropsychologist as a witness. Dr. Dee received his doctorate at the University of Iowa. The court accepted Dr. Dee as an expert witness in the area of forensic neuropsychology. Dr. Dee testified that he performed an evaluation of Perry Taylor in May 2000. Dr. Dee administered a Wexler battery of tests that showed that Mr. Taylor had a verbal IQ of 102, a performance IQ of 111, and a full scale IQ of 107. There was a 9 point difference between the verbal IQ and performance IQ, and Dr. Dee testified that a 10 or 11 point difference is considered to be clinically significant. Dr. Dee said a 9 point difference indicated an alert to the possibility that this is a significant finding. Dr. Dee also administered the Denman Test. Dr. Dee testified that Mr. Taylor's memory quotient was 86, his non-memory quotient was 117, and his full scale memory quotient was 100. Dr. Dee testified that 100 is right in the middle of the average range. Dr. Dee testified that the difference between the memory quotient and nonmemory quotient would indicate to most neuropsychologists that the left hemisphere of the brain is relatively more impaired that the right hemisphere. Dr. Dee testified that the Wisconsin Card Sorting Test he administered was normal, but the categories test performance was in the brain damage

range. Dr. Dee testified that the balance of the rest of the tests he performed were normal.

Dr. Dee testified as follows regarding his conclusions, “That there is evidence of brain damage and that’s evidenced by the discrepancy in the verbal and performance IQ and MQs. There’s certainly evidence that behavioral disorganization, if we can think of thinking as problem solving as behavior, is more apparent in left hemisphere functioning than in right and that there is evidence of frontal lobe involvement from the testing and probably the left hemisphere.” Page 21, Transcript of Evidentiary Hearing on October 7, 2003. Dr. Dee agreed that he could state within a reasonable degree of neuropsychological probability that based on the tests that he administered and the records he reviewed that Mr. Taylor suffers from brain damage. Dr. Dee testified that he couldn’t really comment on the ability of the Defendant to appreciate the criminality of his conduct, but he testified that the nature of the brain damage Mr. Taylor had would suggest it would be very difficult for him to conform his conduct to the dictates of the law. Dr. Dee also testified that the intensity of the violence and apparent rage manifested by Mr. Taylor in the commission of the crime was consistent with the crimes committed by patients with frontal lobe injuries or dysfunction. Dr. Dee acknowledged that Dr. Berland testified at the second trial that Mr. Taylor was brain damaged. Dr. Dee further testified that he had nothing that he would bet on as being the source of the brain damage. Dr. Dee mentioned that he knew of Mr. Taylor falling down the stairs when he was 7 years old, but testified that he would need more confirmatory information to make a conclusion about that incident. Dr. Dee testified that the crimes committed by the Defendant were committed in part because of his brain damage, because the brain damage lowers his ability to control his conduct. When asked about the instances of misconduct in the Defendant’s past including a rape and abduction of a 12 year old girl, a slashing of a guard, and the homicide, Dr. Dee agreed that none of them appeared to be well planned criminal episodes and were consistent with someone who has frontal lobe brain damage.

Mr. Stanley Graham – Pages 51 – 61, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called Stanley Graham, Mr. Taylor's brother, as a witness. Stanley Graham agreed that he was about 7 years older than his brother. Stanley Graham testified that he saw his brother fall down some steps when he was about 5 years old and hit his head. He testified his brother was taken to the hospital and he thinks he was there overnight. He further testified that when Perry Taylor returned home he went back to normal child play, but began suffering migraine headaches. Mr Graham testified that twice he saw Mr. Taylor hit his head on the banister on later occasions. Mr. Graham testified that when Mr. Taylor was 7 years old he pushed a principal at school, and he was taken from his mother and went to foster care. Mr. Graham testified that Mr. Taylor returned home again at about the age of 15. Mr. Graham testified that at that age the Defendant got angry quite a few times and would cool down after about 30 minutes of being angry.

Ms. Edwina Graham – Pages 62 – 66, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called Edwina Graham, Mr. Taylor's mother, as a witness. Ms. Graham testified that she was 82 years of age. She testified that she could not remember whether Perry Taylor ever hurt his head. Ms. Graham testified that she came to court in 1992 to testify, but she asked to go home because emotionally she couldn't stand it.

Mr. Charles Kelly – Pages 66 – 75, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called Charles Kelly, a Brinks Guard, as a witness. Mr. Kelly was working as a jail deputy at the Hillsborough County jail in 1992. Mr. Kelly was asked by the defense about an attack that occurred and what he thought might have caused it. Mr. Kelly testified that Mr. Taylor wanted to use the phone at 10:00, but circumstances rendered it impossible to pull Mr. Taylor out to use the phone before 10:15. Mr. Kelly said it was a requirement for prisoners using the phone to be handcuffed and in leg irons. Mr. Kelly testified that after Mr. Taylor was handcuffed with his arms in front, but before his leg

irons were put on, he attacked Mr. Kelly with a razor in his hand. Mr. Kelly testified that Mr. Taylor was subdued by him and another guard and by the time he was on the floor about 5 or 6 other deputies were there. Mr. Kelly testified that Mr. Taylor could probably not have escaped as a result of the attack, and it was just a vicious attack. The defense advised the Court that this incident took place after the jury in the second penalty phase had reached its verdict and before the Spencer hearing. Mr. Kelly testified that he was not armed when the incident occurred and that he was cut on his forearm-wrist and received 7 stitches. He testified that Perry Taylor was trying to hit his face and neck area, and he could have suffered more extensive injury.

Mr. Howard C. Ury – Pages 76 – 105, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called Howard C. Ury, a Security Officer at Media General. Mr. Ury was a foster child at Mrs. Rutledge's foster home at the same time as Perry Taylor. He testified that he and the other foster kids were not allowed to play with other kids unless one of Mrs. Rutledge's own children was around. Mr. Ury testified that Mrs. Rutledge would whip all of the kids with a rubber hose when she did not know who had done something. He testified that she would beat them long enough until somebody confessed whether they did it or not. He testified that he knew Perry Taylor got spankings, but he did not know how intense. He testified that Perry Taylor got punished for wetting the bed and that it was his responsibility to check on him for Mrs. Rutledge. He said he would tell on Mr. Taylor and he kept getting spanked, so he eventually started deceiving Mrs. Rutledge and started covering for Mr. Taylor. He testified that Mr. Taylor was one of the kids that joined him in running away from the home.

<u>Evidentiary Hearing October 7, 2003 – Commencing at 1:30 p.m.</u>

Mr. Mike Benito, Esq. – Pages 4 – 21, Transcript of Evidentiary Hearing on October 7, 2003.

The defense call Mike Benito, an attorney in private practice, who was the prosecutor at the 1989 trial. He did not recall getting an entire file from

the medical examiner. He testified that he normally just had the autopsy report. Mr. Benito agreed with the defense's statement that in 1989 a negative finding on acid phosphatase would have meant to him there was absolutely no acid phosphatase. He testified that he had no recollection of asking Dr. Miller what he meant by acid phosphatase being negative. Mr. Benito said he could not quantify what reasonable degree of medical probability meant. He testified as follows regarding acid phosphatase: "I don't recall how much a positive acid phosphatase would have made any difference to the actual trying of the case because it wasn't a situation where we were concerned about his identity, that there was DNA or anything of that nature. So looking back, I don't know how concerned I would have been about that, except for maybe the sexual battery charged, you know, I don't know, but he admitted having consensual sex with her, she just — she just angered him by biting his penis." Page 15, Transcript of Evidentiary Hearing on October 7, 2003. Mr. Benito testified that he was sure he argued that the significant damage done to the vaginal area of the victim was done by either Mr. Taylor himself or by Mr. Taylor using an object on the victim, and that any kind of sexual encounter Mr. Taylor had with her was not consensual based on the damage to her vagina.

Mr. James R. McNally — Pages 21 — 30+, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called James R. McNally, a retired administrator and clinical social worker. He got to know Mr. Taylor as a clinical social worker at the Mendez Center. He testified that the Mendez Center conducted a program for elementary school age children who were not able to function in a regular classroom setting because of behavioral and mental health problems. He said the majority of the children were called "oppositional defiant behaviored children". See Page 24, Transcript of Evidentiary Hearing on October 7, 2003. He testified that Perry Taylor came there after having some difficulty with a principal at his regular school assignment. He testified that Mr. Taylor was in the group of students who had angry, acting out type of behavior, but that he never actually saw him in the middle of an angry episode. He

testified he would see him after an episode and in the counseling sessions he wasn't angry.

Honorable Manuel Lopez, Circuit Court Judge - Pages 30 – 54, Transcript of Evidentiary Hearing on October 7, 2003.

The defense called the Honorable Manuel Lopez, a Circuit Judge in Hillsborough County, as a witness. Judge Lopez, as a private attorney, was court appointed to represent Mr. Taylor at his 1992 penalty phase. Judge Lopez testified that at the time he was appointed to represent Mr. Taylor he had handled somewhere between 50 to 75 trials including some capital cases. Judge Lopez testified that his job was to try to find as much mitigation as he could to defend Mr. Taylor. Judge Lopez testified that he made no strategic decision not to present any mitigating circumstances he might have discovered. Judge Lopez was asked about two statutory mitigators. Section 921.141(6)(b), Florida Statutes – "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance", and Section 921.141(6)(f), Florida Statutes – "The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired." He testified that he did conduct an investigation to see if either of the two statutory mitigators could be presented. He testified that he conducted a background investigation of the Defendant's family, his upbringing, and he retained Dr. Robert Berland to assist him to establish these mitigators. Judge Lopez was asked if he thought Dr. Berland would be the only mental health expert he would be calling. Judge Lopez testified that he recalled the policy in Hillsborough County at the time did not favor the appointment of another mental health expert without a showing of some extraordinarily good cause. He said looking back on it he may have been able to convince the court to have some brain testing done. Judge Lopez agreed that he was not aware in 1992 of any other neurological – neuropsychological testing that could be conducted on Mr. Taylor that might have elaborated on the extent and nature of the brain damage. He testified that he did not request a jury instruction on the two mitigators. He also

testified that if Dr. Berland had told him that they existed, he certainly would have put them on and asked for the instruction. Judge Lopez testified that it was Mr. Taylor's decision that he didn't want his mother to testify and that he basically went along with the decision, because Mr. Taylor's grandmother did testify and the mother's testimony would have been somewhat cumulative. In addition, he testified that the mother was pretty adamant that she didn't want to testify. Judge Lopez described the aggravators in Mr. Taylor's case as being pretty strong. He recalled the aggravators as being heinous, atrocious, and cruel; committed during the course of a sexual battery; and previous commission of a sexual battery. He described the injuries to the victim as pretty overwhelming. He agreed that part of his approach was to have the jury develop some degree of sympathy for Mr. Taylor's upbringing given the conditions of being in a foster home, not having his family around, and other evidence that might engender some compassion. He testified that he had the Defendant's brother, Stanley Graham testify regarding the Defendant's deprived childhood. He also called Alvin Thomas, who had been in the same foster home as Mr. Taylor, to testify. He testified that he would have thought Dr. Berland would have told him if he believed Mr. Taylor's condition rose to the level of a statutory mitigator. Judge Lopez agreed with the statement made by the State that if he had called a neuropsychologist the only thing he would have been able to testify to was that he had performed testing and that in his opinion the Defendant was brain damaged. Judge Lopez also agreed that that was exactly the same testimony that Dr. Berland gave. Judge Lopez testified that he did not know if further neuropsychological testing might have revealed the existence of statutory mental mitigation, but it could have.

Mr. Nick Sinardi – Pages 56 - 140, Transcript of Evidentiary Hearing on October 8, 2003.

The defense call Nick Sinardi, an attorney in private practice in Tampa, FL, as a witness. Mr. Sinardi, was Mr. Taylor's trial attorney at his trial in 1989. Mr. Sinardi testified that his overall plan for defense of Mr. Taylor was a second-degree murder defense. In addition, he testified that his plan to

defend the sexual battery charge was that it was consensual. Mr. Sinardi testified that he had no reason to believe that Mr. Taylor suffered from any kind of mental or neurological problems. Mr. Sinardi was asked if he spoke with Dr. Mussington who was hired to examine Mr. Taylor before undertaking the guilt phase of the trial. Mr. Sinardi testified that he had no independent recollection of that. Mr. Sinardi was asked if that was part of his normal preparation. He testified, "I would have – think I would have spoken with the second phase attorney and/or see Dr. Mussington's report. Again, I had no basis to believe that there was any competency issues or insanity issues for purposes of a defense and/or competency issue." Page 61, Transcript of Evidentiary Hearing on October 8, 2003.

Mr. Sinardi testified that involuntary intoxication is a defense he would have explored at the time if applicable, but that his recollection was that Mr. Taylor has a memory of what transpired. Mr. Sinardi testified about this as follows: "I'm sure it's something we would have explored. Again, I think that we had to make a decision on the best available defense. And based on the discovery, based on my conversations with Mr. Taylor, and in light of the statement that were were [sic] dealing with, it appeared that the best defense obviously was that it was not premeditated or felony murder, but it was in fact depraved mind and consensual sex, second-degree murder." Page 63, Transcript of Evidentiary Hearing on October 8, 2003. Mr. Sinardi testified that he is confident he had conversations with Mr. Taylor about this plan of action. Mr. Sinardi testified, "I'm sure – my best recollection would have been that based on his statement and confession, that were were [sic] going to have a difficult time negating his involvement. So the issue became what was the degree of his involvement." Page 64, Transcript of Evidentiary Hearing on October 8, 2003. Mr. Sinardi testified that they vigorously tried to get witnesses to substantiate the issue of consent because the victim had a history of drugs and prostitution, but the Court excluded the witnesses from coming before the jury. Mr. Sinardi testified that this weakened his defense with aspect to consent to the sexual battery. Mr. Sinardi testified that he did not seek

an expert pathologist to assist him in preparation of the case.

Mr. Sinardi was asked by defense counsel about a bite mark that had been excised and why he decided not to have it examined. Mr. Sinardi testified he didn't see how it would have affected the defense because it wasn't an identity issue. He testified that he had no recollection of consulting an expert to see if the bite mark could be aged and he did not recall noticing that an odontology report was available. Mr. Sinardi testified that he did not know if a reasonable degree of medical probability was quantifiable when the defense asked him if it would mean 51 percent. Mr. Sinardi testified that he did not recall ever having a discussion with Dr. Miller about what a reasonable degree of medical probability meant. Mr. Sinardi was asked if it would have affected anything he had done, if he had known that Dr. Miller thought the standard was far more than 51 percent, and he replied that he didn't think so.

Mr. Sinardi was asked about a report from Dr. Miller that described radial injuries in the labia minora area, and he was asked if he would have objected to testimony from Dr. Miller regarding injury to the vagina, if he had known that the labia minora was not part of the vagina. Mr. Sinardi testified that he possibly might have objected. Defense counsel asked Mr. Sinardi if he agreed that the autopsy report did not specifically note any injuries inside the vagina and he replied that his recollection is that the report said no injuries to three quarters of the vaginal area. Mr. Sinardi agreed that if he had had a better understanding of the definitions of the parts of the female anatomy, it might have helped him with his motion for judgment of acquittal. Mr. Sinardi testified that he did not recall if there was any testimony in the record from Dr. Miller that exluded [sic] to any degree of medical probability that the injuries to the genital area occurred after death. Mr. Sinardi testified that his understanding of what negative acid phosphatase case levels meant was that there was no evidence of acid phosphatase. Mr. Sinardi said he had no independent recollection of having seen a Tampa pathology report indicating a phosphatase level in the vagina of 264. Mr. Sinardi testified that knowledge of this fact would have been

more consistent with their claim of consensual sex. Mr. Sinardi testified that he had no independent recollection that Dr. Miller had found anything beyond zero on acid phosphatase. Mr. Sinardi testified that had he known it was not zero this would have reinforced the consensual sex theory.

Mr. Sinardi testified that he had no specific recollection of discussing with Mr. Taylor whether Mr. Taylor should demonstrate anything about his physique to the jury. Mr. Sinardi testified that he wanted the jury to see a side of Mr. Taylor that showed he was a soft spoken individual and that it was an aspect of trial strategy to show the Defendants physical strength in contrast to the frail nature of the victim. Mr. Sinardi testified that he wanted to demonstrate to the jury that this was a big powerful man that became enraged and did not have the intent to kill the victim. Mr. Sinardi was asked if there was anything he wished he had done. Mr. Sinardi testified: "No. Obviously, I would have liked to have been aware of the results of the acid phosphatase. That may have been some benefit in the consent issue and also possibly to the introduction of the witnesses as to the victim's history of drug and prostitution -- drug usage and prostitution." P 102, Transcript of Evidentiary Hearing on October 8, 2003. Mr. Sinardi testified that he had no reason to believe Dr. Miller was not telling the truth in the autopsy report and he saw no reason to hire an independent medical examiner in light of the facts and the defense. Mr. Sinardi testified that during the course of his representation of the defendant he saw no reason to suspect that he had psychological problems. Mr. Sinardi agreed that most of the motions he submitted were boiler plate and part of normal representation.

Mr. Bill Brown – Pages 141 - 147, Transcript of Evidentiary Hearing on October 8, 2003.

The defense called Bill Brown, who works for Allied Security, as a witness. Mr. Brown was a private investigator in 1989 and he was hired to investigate Mr. Taylor's case. Mr. Brown testified that he met with Mr. Taylor in excess of four or five times for more than five hours. Mr. Brown said that his initial impression of Mr. Taylor, regarding his mental abilities, was that he was slow. He testified

that it appeared Mr. Taylor had attention deficit disorder, or possibly an auditory processing disorder. He testified that Mr. Taylor would have a blank look on his face like he just couldn't comprehend what they were trying to convey to him. Mr. Brown testified that he discussed his concerns about Mr. Taylor's demeanor and mental abilities with Mr. Sinardi, and it was his impression that Mr. Sinardi would pursue it. Mr. Brown was asked about the fact that he was married to Diana Allen who had prosecuted Mr. Taylor six or seven years earlier in a 1982 sexual battery case. He testified that this was explained to Mr. Taylor and Mr. Taylor expressed no reservations about the situation.

Evidentiary Hearing June 7, 2004

Dr. Frank Wood — Pages 6—68, Transcript of Evidentiary Hearing on June 7, 2004, Volume I.

The defense call Dr. Frank Wood, a Doctor of Psychology and head of the section of neuropsychology at Wake Forest University School of Medicine as a witness. Dr. Wood has a Ph.D. from Duke University in natural sciences psychology. Dr. Wood testified that he had done 20 years of research on functional brain imaging, including Positron Emission Tomography (PET). Dr. Wood testified that he and his colleagues built what was at one time the largest data base of truly normal PET scans. The defense proferred Dr. Wood as an expert in neuropsychology and PET imaging and he was accepted as an expert by the Court in these areas. Dr. Wood reviewed a PET Scan of Perry Taylor and a report about the PET scan of Mr. Taylor done by Dr. Kotler, the director of a PET scan facility in Boca Raton, FL. Dr. Wood testified that he discovered left inferior dorsolateral frontal hypometabolism, and this meant a metabolism value lower than normal in the PET scan of Mr. Taylor. He testified that the left hemisphere is abnormal in two ways. One with respect to the whole brain maximum and two with respect to asymmetry. He testified that asymmetry meant the left hemisphere is significantly less active in this region than the right hemisphere is in that region. Dr. Wood was asked how the abnormalities he found relate to behavior. Dr. Wood testified that the abnormalities would be related to cognitive or judgment disinhibition and verbal memory problems. Dr. Wood

also testified that there are studies that relate brain damage to violent behavior. Dr. Wood testified that he is corroborating Dr. Dee's statements and narrowing their scope that said certain data indicated frontal lobe dysfunction, and that he considered it more likely to be left frontal lobe dysfunction. Dr. Dee said he reviewed Mr. Taylor's social history. This included a violent outburst against a principal when he was seven years old and testimony that he had a head injury at about that time from falling off a banister on to a cement floor for which he had to spend the night in the hospital. Dr. Wood testified that both of these might be related, but he did not have enough history to know if they were. Dr. Wood also testified that the history of Mr. Taylor's test scores suggested to him that Mr. Taylor was recovering from an injury, and he was getting better as he grew older in his youth.

Dr. William Mosman - Pages 69 – 101, Transcript of Evidentiary Hearing on June 7, 2004, Volume 1.

The defense called Dr. William Mosman, a licensed psychologist in the State of Florida as a witness. Dr. Mosman was described as a forensic psychologist able to review matters involving mental mitigation, and he was admitted without objection by the state as an expert witness in this area. Dr. Mosman said he reviewed the original attorney notes, clinical notes from Dr. Dee, all the testing that goes back to 1982, the criminal investigative reports, the arrest affidavits, police reports, the mental health and clinical reports from various placements Mr. Perry was in, jail records, all of the sentencing orders, court findings, and Pet [sic] scans. He also personally evaluated Mr. Taylor and administered some tests to him. Dr. Mosman testified that the results of his testing were consistent with the results obtained by Dr. Dee. Dr. Mosman was asked by the defense whether he thought a full picture of Mr. Taylor's brain damage was presented in the 1992 penalty phase. Dr. Mosman testified that he did not feel a minimally adequate summary was given of the brain damage. He testified that there was absolutely no discussion of the brain damage and its relationship to how if might or might not affect behavior, thinking analysis, judgment and impulse control. Dr. Mosman testified about

integrating the PET findings into the data available. He testified that Mr. Taylor's mother had a brain hemorrage [sic] that had a significant effect on her function. He testified that Mr. Taylor's older sister has a long history of seizure disorders. And that Mr. Taylor's brother had a brain tumor at age 7. Dr. Mosman described this as genetic loading that's abnormal. Dr. Mosman also mentioned Mr. Taylor's head injury to the left front part of his head when he was about five and that Mr. Taylor suffered from migraine headaches after returning home from hospitalization. Dr. Mosman noted an aggressive confrontation with a principal within 24 months of the injury. Dr. Mosman testified that Mr. Taylor's testing as a minor was indicative of some abnormal unusual findings. Dr. Mosman testified that the findings of Dr. Kotler, Dr. Wood, Dr. Dee and his own findings relate directly to a frontal lobe issue. Dr Mosman testified that when you have problems with that area you have impulse control problems that appear to be triggered off by situational issues. The State asked Dr. Mosman about some tests he had given Mr. Taylor. Dr. Mosman testified that his tests showed that Mr. Taylor had a verbal IQ of 112, a performance IQ of 97, and a full IQ of 105. The State asked Dr. Mosman if 100 was viewed as normal, and he agreed that it was. Dr. Mosman admitted in his testimony that no hospital records existed to document the injury suffered by Mr. Taylor as a boy. Dr. Mosman was asked about Dr. Berland's testimony at the 1992 penalty phase. Dr. Mosman read some testimony from Dr Berland that indicated Dr. Berland did not know how much Mr. Taylor's behavior was based on his being a sociopath, or because of his manic condition. Dr. Mosman noted that Dr. Berland testified that the WAIS-R profiles suggested damage in both the right and left hemisphere and some frontal lobe damage. Dr. Mosman testified that Dr. Berland did not have access and did not have the data on brain damage that he wanted. Dr. Mosman testified that a suggestion of brain damage based on the WAIS was no substitute for doing a full battery of neuropsychological tests. Dr. Mosman testified that further neurological testing would have clarified that Mr. Taylor has no more sociopathic tendencies that [sic] the average person and would have clarified the ambiguities Dr. Berland testified to regarding Mr.

Taylor's behavior.

Dr. Lee Miller - Pages 106 – 169, Transcript of Evidentiary Hearing on June 7, 2004, Volume 2.

The defense called Dr. Lee Miller, a retired former associate medical examiner in Hillsborough County. Dr. Miller was asked about any specific training he had had in forensic pathology. He testified that during his residency he had a 3 – 5 week rotation at the medical examiner's office in Dade County. He also testified that he had some forensic pathology training during his four years of training as a resident in anatomic and clinical pathology. Dr. Miller testified that he was board certified in forensic pathology in 1983. Dr. Miller was asked about a bite mark he found on the inner arm of the victim and testified about at the guilt phase of the original trial. Dr. Miller said that he excised the bite mark, and it was preserved for a couple of years, but ultimately discarded. Dr. Miller called upon a forensic pathologist, Dr. Lonmeir to examine the bite mark. Dr. Miller testified that he did not recall if he ever told the defense about Dr. Lonmeir and does not know what became of Dr. Lonmier's report or if he ever saw it. Dr. Miller answered affirmatively, when defense counsel asked if he had said at a deposition, taken on October 3, 2003, that he wished he had followed up on the request for Dr. Lonmeir to examine the bite mark.

Dr. Miller testified that when he used the words medical probability sometimes its [sic] better than 51 percent and sometimes it's almost a certainty. Dr. Miller agreed with the defense attorney's statement that when he testified in 1989 he said that within a reasonable degree of medical probability the perineal and the labia minor lacerations on the victim were caused by stretching. Dr. Miller agreed with the defense attorney, that when he was asked about his testimony in 1992 concerning a large tear on the victim that he didn't have any degree of certainty about what caused the tear. Dr. Miller testified that the ten radial lacerations in the labia minor could have been the result of a kick if the toe of the shoe actually went into the vagina. However, he described this as kind of a one-in-a-million shot. The Court asked Dr. Miller if generally speaking the lacerations

he found would involve penetration and he said that they would. Dr. Miller testified that he did not remember if he had ever looked at Mr. Taylor's shoes and he did not know if any testing was done on them. Dr. Miller testified that any shoe, including the defendant's would be capable of penetrating the victim's vagina, because she had a very large vagina and it was pouching to the outside. Dr. Miller agreed that in his final report he considered the acid phosphatase results to be negative. He testified that this does not mean there was absolutely no acid phophatase, Dr. Miller testified at the hearing that the tears on the victim were definitely caused by stretching and not by direct impact.

Evidentiary Hearing June 8, 2004

Robert Norgard, Esq. – Pages 182 – 202, Transcript of Evidentiary Hearing, June 8, 2004, Volume III.

The defense called Robert Norgard, Esq., and he was accepted by the court as an expert in the area of generic standards for defense counsel in presenting mitigation in death penalty cases. Mr. Norgard testified that you would want your mental health professional in place before jury selection begins because these same jurors may ultimately be in the penalty phase as well, and you need a grasp of what mitigation you're going to present. Mr. Norgard was asked about the importance of using a neuropsychologist in presenting brain damage testimony. He testified that neither a psychiatrist nor a psychologist have the expertise to diagnose organic brain damage. Mr. Norgard was asked about the defense attorney being limited to one mental health expert. Mr. Norgard testified that in 1992 it was recognized that an attorney in a capital case may need a multidisciplinary untilization [sic] of mental health experts and that reasonably competent counsel were being trained on how to get the resources needed.

Dr. Jon Kotler – Pages 203 – 279, Transcript of Evidentiary Hearing, Volume III, and Pages 283 – 335, Transcript of Evidentiary Hearing, June 8, 2004, Volume IV.

The State called Dr. Jon Kotler as a witness. Dr. Kotler is the chief of nuclear medicine at Holy Cross Hospital and the owner of a nuclear medicine PET

facility. Dr. Kotler is licenced [sic] to practice medicine in Florida and is board certified in nuclear medicine. Dr. Kotler testified that he did not have any experience in behavioral association of PET scanning with criminal behavior or impulsive behavior. The Court accepted Dr. Kotler as an expert in the administration and interpretation of PETs. Dr. Kotler was asked about the use of PET scans in terms of diagnosis of behavioral conditions. Dr. Kotler said brain imaging has not advanced rapidly because they do not yet have a good normal database. Dr. Kotler was asked if Dr. Wood had a database of 60 normal subjects if that would be an adequate database to compare the defendant's scan to for diagnosis corroboration of normality or abnormality. Dr. Wood said it would be totally inappropriate. Dr. Wood agreed that the most important way to make a determination of abnormality is to visually look at the images. He said statistical measurement even in published articles significantly varies. He testified that it is too easy to manipulate data. Dr. Kotler discussed a PET done of Mr. Taylor on August 24, 2000. He testified that on the quantitative analysis there was an area of mild reduction in metabolic activities relative to the contralateral side which corresponded with the left frontal cortex. He described the gentle borderline reduction as slightly greater than a 20 percent variance. Based on his experience he did not think this reduction in the left frontal lobe was significant at all. He testified that he saw no deviations on the scan that were significant. Dr. Kotler described the 20 percent value as arbitrary because it is not based on any normal database. Dr. Kotler testified that he did not do a psychiatric or behavioral interpretation of the PET scan of Mr. Taylor and that it's not his job to do neurologic behavioral psychiatric interpretations of PET scans.

Dr. Helen Mayberg – Pages 335 – 402, Transcript of Evidentiary Hearing, June 8, 2004, Volume IV.

The State called Dr. Helen Mayberg, a professor of psychiatry and neurology at Emory University School of Medicine, as a witness. Dr. Mayberg testified that she did a post-doctoral fellowship in nuclear medicine, in particular PET imaging, at John Hopkins. The court accepted Dr. Mayberg as an expert in the

field of neurology and PET scan imaging. Dr. Mayberg was asked about the photographs of Mr. Taylor's PET scan and if she thought it was an abnormal or normal scan. Dr. Mayberg said her impression was one could see some areas of asymmetry, but overall there were no findings not consistent with any known diagnostic entity. Dr. Mayberg testified that there is tremendous variability in healthy people that have been screened. Dr, [sic] Mayberg was asked by the state if PET scan was being used in 1988 to diagnose or corrorborate [sic] or confirm behavioral conditions. She responded, "Well, when you put it that way, no. I mean in '88 there weren't even statements yet by the Academy of Neurology summarizing the primary uses." Page 372. Transcript of Evidentiary Hearing, Volume IV. Defense counsel asked Dr. Mayberg about an article she had written titled, "Commentary, Functional Brain Scans as Evidence In Criminal Court: An Argument For Caution." In the article, Dr. Mayberg said, "Although not surprising, it is deeply disturbing that society is so willing to embrace the use of functional brain imaging to explain human violence." Pages 392 – 393, Transcript of Evidentiary Hearing, June 8, 2004, Volume IV. Dr. Mayberg testified she would not describe her present state as being disturbed but rather cynical about the use of PET scans in the courtroom.

Evidentiary Hearing March 3, 2005

Dr. Ronald Keith Wright – Pages 6 – 61, Transcript of Evidentiary Hearing on March 3, 2005.

The defense called Dr. Ronald Keith Wright, a forensic pathologist in the private practice of forensic pathology as a witness. Dr. Wright is also a faculty member at the University of Miami and is licensed to practice medicine in Florida and Tennessee. The defense proferred the witness as an expert in pathology and forensic pathology and the State had no objection. The Court admitted Dr. Wright as an expert in these areas. The Defense asked Dr. Wright what materials he had examined in preparing for his testimony. Dr. Wright testified that he examined the autopsy report, both the draft and final versions, on Geraldine Johnson; the laboratory testing, including toxicology testing; various testimony by Dr. Miller; a deposition from May of 1989 and a trial and

trial testimony from 1989; trial testimony from 1992; depositions from 2003, a copy of his own deposition from 2004; a deposition of Dr. Lynch in 2005; a number of photographs of the scene and autopsy; and a number of police reports. The defense asked Dr. Wright if he could state to a reasonable degree of medical probability when Geraldine Johnson died, and Dr. Wright testified that he believed Ms. Johnson died around the morning of the 23rd. Dr. Wright testified that he was not able to narrow the time down any further without more facts. The defense asked Dr. Wright if Ms. Johnson was alive when the injuries to her genital area were inflicted. Dr. Wright testified that they appeared to be postmortem because there was minimal or no bruising associated with the lacerations in the photographs he had seen. He testified that the lacerations would produce swelling if there was a heartbeat and because he could discern no swelling it would suggest Ms. Johnson had very little or she lost her blood pressure immediately after the lacerations were received.

The defense showed Dr. Wright two photographs identified as Defense Exhibits 9 and 10 and asked him if all of the injuries noted in Dr. Miller's autopsy report were shown in the photographs. Dr. Wright responded affirmatively. The defense asked Dr. Wright what the standard practice in forensic pathology, particularly in 1988, was in the examination of the genital area of a deceased suspected rape victim. Dr. Wright testified that the general accepted approach to examining a female victim suspected of rape was to remove the vagina, the rectum, and the bladder as a block. He testified that this allows a doctor to obtain specimens for the purposes of testing for the presence of seminal fluid and also testing for D.N.A; it allows the doctor to take microscopic sections of the injuries to look for evidence of vital reaction, which is hemorrage [sic] into the tissue, and also for any evidence of early healing, or later healing. He testified that this was difficult to do if that area of the body is not removed from the body. The defense asked Dr. Wright if Dr. Miller did that, and Dr. Wright replied in the negative. The defense asked Dr. Wright if there was any reason a competent Medical Examiner would not do that and Dr. Wright replied that some people don't do that primarily because they

weren't trained to do the examination that way. The defense asked Dr. Wright how the microscopic exam would have assisted in determining the time of injuries. Dr. Wright testified that the examiner would be looking for evidence of red cells outside of blood vessels which indicates that there was blood pressure after the injury occurred. Dr. Wright testified that there was a substantial likelihood that this would have nailed down how long the victim was alive or if she was alive when the injury occurred.

Dr. Wright testified that the exam Dr. Miller conducted could easily miss sperm cells. Dr. Wright testified that a big advantage to removing the vagina, rectum, and bladder is that it allows you to more carefully pick the areas that fluoresce with a Wood's lamp. Dr. Wright testified that you can get a near 100 percent collection if done this way, but the collection can probably drop as low a 50 percent if not done that way. The defense asked Dr. Wright if he thought the exam that had been done was adequate for an examination of a deceased suspected rape victim. Dr. Wright testified that there was nothing that he had heard indicating that Dr. Miller used a Wood's lamp. He further testified that if you don't remove the vagina, rectum, and bladder, which he is relatively confident was not done by Dr. Miller, then using the Wood's lamp would probably have been a waste of time.

Dr. Wright testified that the standard used in defining reasonable degree of medical probability is 90 percent or better as the probability, but he said that some people use 51 percent as the test for reasonable medical probability. The defense asked Dr. Wright if he could state to a reasonable degree of medical probability what caused the injuries to Ms. Johnson. Dr. Wright testified that the injuries in the genital area were caused by being kicked. The defense showed Dr. Wright, State exhibits 26A and 26B from the trial, a right and left shoe, admitted into evidence May 9, 1989, and asked him if the shoes were capable of inflicting the injuries that he saw in the photographs and in the autopsy. Dr. Wright testified that practically any shoe in the world could have caused the injuries. He testified that even though a toe of the shoe is rounded, if the wearer kicked somebody between their legs they could get caught up

in the pelvic bones and tend to compress and produce the kinds of injuries the victim had. Dr. Wright referred to photographic exhibits 9 and 10 and testified that the inner most injuries were to the introitus and he pointed out some lacerations on the exhibits. The defense showed Dr. Wright a diagram marked as exhibit 3-A drawn by Dr. Miller, and it refers to what appear to be the innermost lacerations. Dr. Wright testified that the lacerations on the diagram were not those he indicated on the pictures. Dr. Wright testified that if Dr. Miller's diagram was correct then Dr. Miller would have been incorrect if he testified that everything he observed was in the pictures. Dr. Wright testified that the shoe could have caused the innermost injures, which were caused by stretching.

The defense asked Dr. Wright if he could state with a reasonable degree of medical probability that Ms. Johnson suffered a sexual battery in the sense of an intrusion by an object penetrating the vagina, and Dr. Wright testified that based on his examination of the autopsy and photographs from the autopsy she did not. He testified that she was kicked. The defense asked Dr. Wright about the acid phosphatase results and asked him to refer to Defense Exhibit Number 2. Dr. Wright testified that the acid phosphatase results were inconclusive. He testified that generally speaking values above 300 of the prostatic portion of acid phosphatiase are considered diagnostic of recent intercourse with ejaculation by a male. He testified that values under 100 are considered to be evidence of the absence of that. The defense referred Dr. Wright to a treatise titled, "Quantification of Vaginal Acid Phosphatase and its Relationship to the time of Coitus". Dr. Wright interpreted one portion of the article as saying that you can't definitively say that a level 300 eliminates possibility of recent coitus. The defense asked about another sentence in the article that said that when lower levels are found under 300 the techniques of identifying semen by protein or isonenzyme electorphoretic patterns by classification of sperm diaphorase may prove useful. Mr. Wright testified that the article was received in 1976 and that the tests were available and used in 1988. The defense referred to the article as recommending that below 300, further chemical testing

or enzymatic testing would be necessary to confirm or refute the presence of semen, and asked Dr. Wright if that was the standard any reasonable Medical examiner would have worked to in 1988. Dr. Wright replied affirmatively. Mr. Wright testified that this article was probably the leading article on this matter, and the defense introduced the article into evidence without objection. The Court admitted the article into evidence as Defendant's exhibit No. 4.

Dr. Wright testified that his opinion as to the presence of acid phosphatase in the vagina was equivocal. He testified acid phosphatase was present at a level of 237. Dr. Wright testified that a reasonable forensic pathologist in a murder case in 1988 would follow up a 264 or 237 phosphatase result with additional recommended tests. Dr. Wright testified that the level was consistent with consensual sexual intercourse within 24 hours before death. Dr. Wright also testified that the level in this case was consistent with a consensual vaginal sexual intercourse about the time of death pre-ejaculation and that could have raised a negative or very low level to the 267 or 234 level. The defense asked Dr. Wright about a bite mark on the right arm of the victim. Dr. Wright indicated that he believed that Dr. Miller had excised the bite. However, there was no odontology report. Dr. Wright testified that a reasonable standard of care in 1988 would have been to have the medical examiner ask an odontologist for a report on the bite mark which could have indicated how soon before death the bite was received, and a report from an odontologist could sometimes help with showing the bite mark could or could not have been caused by a specific individual. Dr. Wright testified that the evidence investigation done by Dr. Miller makes it impossible to put the bite mark anywhere closer than two or three days before the time of death. Dr. Wright testified that assuming he had been retained by the defense in 1988 and the excised material was preserved until the first trial in 1989, he would have wanted to take microscopic sections of it to at least tell how soon before death the bite was received. He testified that this was apparently not done by Dr. Miller. Dr. Wright also testified that there was no indication that swabs were taken from the bite mark for D.N.A. analysis, which he testified should have

been done within a reasonable standard of care in 1988. Dr. Wright testified it was outside the standard of care in 1988 to fail to take swabs of vaginal samples for slides, acid phosphatase, and D.N.A. analysis. Dr. Wright testified that he had been hired to assist the defense in 1988-1989, he could have testified to the jury as to the failures of standard of care on the bite mark issue, the vaginal D.N.A. issue, and the acid phosphatase issue.

Dr. Wright testified that to a reasonable degree of medical probability the inner most genital injuries were inflicted by a kick. Dr. Wright testified that the victim had a large number of kicking type or stomping type injuries and that death occurred at the barest minimum in a minute and probably over many minutes. The state asked Dr. Wright about blood in the pictures and he testified that this did not mean there was blood flow because you can get that postmortem. The State directed Dr. Wright to a report by Dr. Donald Taylor which contained defendant's account of the alleged offense in which he told the victim he wanted straight intercourse and she straddled him on a bench and they began to have intercourse. Dr. Wright testified that the low level of acid phosphatase was consistent with intercourse where there isn't ejaculation but there is a release of pre-ejaculate, but it is also consistent with ejaculation by a male 12 to 24 hours before. Dr. Wright testified that the victims blood flow was not the result of blood pressure but from gravity. Dr. Wright testified that the type of injuries suffered by the victim were consistent with the Defendant, if he was the one who kicked the victim, being in a rage.

Dr. Catherine Lynch – Pages 72 – 111, Transcript of Evidentiary Hearing on March 3, 2005.

The State called Dr. Catherine Lynch, an Associate Professor and Director of the Division of General Obstetrics and Gynecology at the University of South Florida College of Medicine as a witness. Dr. Lynch is licensed to practice in Florida and is board certified in obstetrics and gynecology. Dr. Lynch testified that her area of expertise is urogynecology, pelvic reconstructive surgery for the treatment of incontinence and prolapse. She testified that in the past she has examined six to eight women who have been

victims of sexual battery or sexual assault. Dr. Lynch testified that she reviewed photographs and the autopsy report and the corresponding diagrams in this case and that she was asked to review the photographs initially to see if there was injury to the vaginal tissues. The State asked Dr. Lynch to refer to Defense Exhibit 3, the typed autopsy report and Defense Exhibit 3A, page 1, which was a diagram used by the Medical Examiner, Dr. Miller. Dr. Lynch was asked to note where the injuries had occurred to the victim. Dr. Lynch noted that there were 12 actual lacerations or indications on the diagram. Dr. Lynch said that the narrative by Dr. Miller in Exhibit 3 corresponded with the diagram. Dr. Lynch testified that after she reviewed the autopsy report and the Medical Examiner's diagram, she looked at pictures of the victim's body to see if she could see in the pictures the injuries that were denoted by Dr. Miller on his autopsy report and diagram. Dr. Lynch reviewed State Exhibit Seven and in that picture she could see four of the injuries Dr. Miller showed on his diagram. Dr. Lynch also reviewed State Exhibit 6 and testified that she could see 4 of the lacerations on that picture. In State Exhibit Number 24, Dr. Lynch testified that she could see 3 clearly demarcated lacerations. She testified that she could more clearly see on State Exhibit 24 the perianal laceration and two lacerations near that laceration. On State Exhibit 10, Dr. Lynch testified that she could see the laceration that is just above the uretha and one towards the victims left. In addition, on State Exhibit 10, Dr. Lynch testified that she could see discoloration and bruising toward the victim's right. In total, Dr. Lynch, testified that she could see 10 of the 12 injuries. Dr. Lynch testified that State Exhibit 7 showed injury to the anterior vaginal wall and that State Exhibit 6 showed the anterior injury as well as a 5:00 o'clock posterior vaginal wall injury. She testified that she could see 3 of the 4 vaginal injuries marked by Dr. Miller on his diagram. Dr. Lynch testified that the injury to the vagina would indicate some sort of penetration that caused that injury.

Dr. Lynch testified that in her expert medical opinion something large was put into the vagina that caused the tearing and ripping. Dr. Lynch testified

that the tearing and stretching of the tissues she saw were similar to the type of injuries she saw in normal childbirth and she had seem this type of injury from sexual trauma. She testified that she has seen similar type of injuries in normal childbirth and from sexual trauma. Dr. Lynch testified that the victim has injuries to her perineum, most likely caused by the same mechanism that caused the vaginal injuries. Dr. Lynch testified that she did not believe that a kick could have caused the type of injury that could be seen on the perineum because with a kick she would expect to see a lot of bruising around the area and not just torn tissue. Dr. Lynch was asked by the State about blood flow and she testified that she could see evidence of red blood around the large anal laceration and some of the perineal lacerations and the labial laceration. She testified that she did not think the injury was postmortem because of evidence of blood flow to the tissue and some bruising changes. Dr. Lynch testified that had the victim sustained these injuries sometime prior to the incident she would have been in pain. Dr. Lynch was asked to quantify the pain and she testified that the victim would have had difficulty walking, a difficult time sitting down, and a difficult time having intercourse until the injuries healed. Dr. Lynch testified that she did not have any special training in pathology or forensic medicine. Dr. Lynch testified that you can have bruising or swelling in the perineal area within five to ten minutes of the injury. Dr. Lynch testified that it is possible for a kick to have caused the perineal injuries but not the vaginal injuries unless the foot was able to fit into the vagina. She did not think it likely that Defendant's shoes, exhibits 26A and 26 B, were able to fit into the vagina.

Dr. Donald R. Taylor, Jr. – Pages 111 – 167, Transcript of Evidentiary Hearing on March 3, 2005.

The State called Dr. Donald R. Taylor, Jr., M.D., a Psychiatrist in private practice, as a witness. Dr. Taylor testified that he specialized in adult psychiatry and forensic psychiatry and is licenced [sic] to practice medicine in Florida. Dr. Taylor testified that he was contacted by the State in March 2004, and he was asked to evaluate the Defendant

regarding whether he suffered from brain damage or any other mental disorder. Dr. Taylor testified that he has testified as an expert in psychiatry in criminal court approximately ten times a year for the past eight years. The State tendered the witness as an expert in psychiatry and forensic psychiatry and he was accepted by the court as an expert in these areas. Dr. Taylor testified that he reviewed records and examined the Defendant on June 3, 2004. Dr. Taylor subsequently prepared a report that was marked as State Exhibit 8 and received into evidence. In his report Dr. Taylor outlined documents he reviewed including a transcript of the Dr. Berland's testimony at a prior trial, Dr. Dee's psychometric testing, a report by Dr. Wood and a transcript of Dr. Wood's deposition testimony, and testimony of Dr. Mosman including the results of psychometric testing administered by Dr. Mosman.

Dr. Taylor testified that after he reviewed the documents and testimony of the various witnesses in the case and that he knew that three opinions has been rendered that the defendant was brain damaged. Dr. Taylor testified that in addition to reviewing the records he conducted a clinical interview which consisted of a history and mental status examination. Dr. Taylor testified that when he interviewed the Defendant, the Defendant indicated that he went off on the victim and kneed her and pushed her. Dr. Taylor testified that the Defendant indicated that he had attempted to have sexual intercourse with the victim. Dr. Taylor testified that the Defendant had told him that he had been convicted of sexual battery of a twelve year old, and that the Defendant told him that his encounter with the victim was consensual. Dr. Taylor testified that the Defendant told him that he would become aggressive and ready to fight if he consumed alcohol. Dr. Taylor testified that the evaluation of the Defendant was largely verbal. Dr. Taylor described the questions he asked as being a fairly standard set of questions to test an individual's cognitive functioning very similar to an instrument called the Mini Mental State Examination, which is a screening instrument for cognitive impairment. Dr. Taylor testified that the Defendant made only a few errors in answering the questions and that considering his education level his performance

was within normal limits. He described it as average. Dr. Taylor testified that if somebody's performance is average or significantly above average then there's no suggestion of any pathology. Dr. Taylor defined brain damage as some type of trauma or insult to the brain that results in some type of impaired brain functioning. Dr. Taylor testified that based on his examination of the Defendant he sees no evidence that he suffers from brain damage. Dr. Taylor testified that part of the basis of his opinion is that he saw no evidence of any severe or significant head injury. Dr. Taylor also testified that part of the basis of his opinion was that there is no diagnostic study to document any structural abnormality of the defendant's brain.

Dr. Taylor also testified that the fact that two doctors interpreted the PET scan as normal formed part of the basis of his opinion although it is not an instrument used to determine brain damage. Dr. Taylor also testified that Defendant's numerous I-Q tests taken in 1981, 1989, 2000, and 2001 were a basis of his opinion that the defendant does not suffer from any brain damage. Dr. Taylor testified that he reviewed a transcript where an older half brother of the Defendant indicated that the Defendant had struck his head on a banister at age five. He testified that the Defendant did not report or recall anything along these lines nor did a transcript from the Defendant's mother indicate anything about this incident. Dr. Taylor did indicate that the Defendant told him that he lost consciousness after being hit on the head while playing football at age 18 or 19. Dr. Taylor was asked to comment on some neuropsychological tests done by Dr. Dee and Dr. Mosman of the Defendant, some of which were interpreted to be abnormal and some which were interpreted as normal. Dr. Taylor testified that people can have variable scores on neurological tests without being brain damaged and that different individuals function better in some areas of the brain than others. Dr. Taylor testified that it was possible to score high in one area of neuropschological testing and low in another, and that is not in and of itself enough to make a diagnosis of brain damage.

Dr. Taylor testified that with most sorts of brain damage you are going to be able to see some type of

structural abnormality on an instrument such as a M.R.I. scan or a C-T scan. Dr. Taylor testified that neuropsychological testing is not usually used an an [sic] instrument to make the diagnosis of brain damage, but is helpful in assessing the effect of cognitive functioning once brain damage has been diagnosed. On cross examination, Dr. Taylor stated that he had testified at sentencing hearings in six capital cases in the last eight years, five times for the State, and once for the defense. Dr. Taylor stated that he had not testified that a criminal defendant suffered from brain damage in the six capital cases. Dr. Taylor testified that he was qualified to comment on the results of neuropsychological tests but he was not trained to administer or score them. Dr. Taylor testified that his practice was 90 percent forensic evaluations for attorneys, judges and insurance companies. He testified that 10 percent of his practice consists of outpatient clinical psychiatry.

Dr. Taylor testified that in most cases a physical exam is unnecessary in a psychiatric examination and that he did not conduct a physical exam on the Defendant. Dr. Taylor testified that he interviewed the Defendant for about 2 hours. Dr. Taylor testified that when he interviewed the Defendant regarding the present offenses, Mr. Taylor did not make any statements indicating that the sexual episode with the victim was anything but consensual. Dr. Taylor testified that he was aware that Dr. Wood had found abnormalities to the left frontal lobe of the Defendant in a PET scan. He testified that he gave have little weight to this because he believes the way Dr. Wood interprets PET scans and correlates them to behavioral issues was beyond where most physicians in the field have gone, and because two other physicians read the PET scan as being within normal limits. Dr. Taylor testified that you can have brain damage without it showing up in current imaging technology.

Dr. Henry Dee – Pages 170 - 177, Transcript of Evidentiary Hearing on March 3, 2005.

The defense called Dr. Henry Dee, a clinical psychologist and clinical neuropsychologist as a witness. Dr. Dee testified that a mental status exam would not be sufficient by itself to establish brain

> damage but was mostly used as a screening instrument to indicate whether more needed to be done. Dr Dee talked about Dr. Taylor's comments on variable test scores. Dr. Dee testified that when he says an individual fails a test, he means that the only people who have ever scored in that range are people who are brain damaged. He did not believe Dr. Taylor grasped this when mentioning variable test scores. Defense counsel asked Dr. Dee about testimony from Dr. Taylor that indicates a fundamental distinction between brain damage and impairment. Dr. Dee indicated he did not see a substantive difference between those two things as far as the behaviorial issues in the case were concerned.

(PCR5/724-61)

Following the evidentiary hearings held on October 7–8, 2003, April 8, 2004, June 7-8, 2004 and March 3, 2005, post-conviction relief was denied on February 1, 2006. Taylor's notice of appeal was filed on February 27, 2006.

SUMMARY OF THE ARGUMENT

Issue I: Sufficiency of the Evidence (Sexual Battery), IAC/Guilt Phase, Brady/Giglio, and Newly Discovered Evidence

Taylor's challenge to the sufficiency of evidence of felony murder/sexual battery is procedurally barred in post-conviction. Moreover, Taylor failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland. Taylor's claim of "newly discovered" evidence is predicated on Taylor's flawed interpretation of Dr. Miller's post-conviction testimony, and the evidence continues to support a finding of sexual

battery. Further, the mere fact that various post-conviction experts may disagree does not constitute any Brady/Giglio claim.

Issue II: The IAC/Penalty Phase Claim

The Circuit Court correctly denied Taylor's IAC/penalty phase claim. During the 1992 penalty phase, defense counsel presented evidence of Taylor's remorse and his deprived family background, including abuse he suffered as a child in foster care. Defense counsel also presented evidence of Taylor's good conduct in custody and psychological testimony that while Taylor had above-average intelligence, he suffered from an organic brain injury. See, Taylor II, 638 So. 2d at 31-32. Taylor failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland.

Issue III: The "Newly Discovered" Evidence Claim / Sonya Davis

The Circuit Court correctly denied Taylor's 11th hour motion to amend his previously amended post-conviction motion and admit the post-conviction deposition of the victim's daughter, Sonya Davis. First, Taylor's motion was untimely under Rule 3.850/3.851. Second, Taylor's alleged "newly discovered" witness, Sonya Davis, would not have been willing to testify on Taylor's behalf at trial. Third, Davis' proffered deposition was inadmissible as substantive evidence. Fourth, Taylor failed to demonstrate that the facts on which his "newly discovered"

evidence claim is predicated were unknown and could not have been ascertained by the exercise of due diligence. Finally, not only did Taylor fail to meet the "due diligence" requirement, but he also failed to show that any alleged "newly discovered" evidence is of such nature that it would probably produce an acquittal on retrial.

ARGUMENT

ISSUE I

THE INTERMINGLED (1) PROCEDURALLY-BARRED "SUFFICIENCY OF THE EVIDENCE" OF SEXUAL BATTERY CLAIM, (2) IAC/GUILT PHASE CLAIM, (3) BRADY/GIGLIO CLAIM, and (4) "NEWLY DISCOVERED" EVIDENCE CLAIM.

On direct appeal, Taylor v. State, 583 So. 2d 323 (Fla. 1991), this Court rejected Taylor's dual challenges to the sufficiency of the evidence supporting his convictions (premeditated murder and felony murder/sexual battery). In his first issue on this post-conviction appeal, Taylor now attempts to resurrect a procedurally-barred challenge to the sufficiency of the evidence of sexual battery. Taylor's post-conviction challenge to the sexual battery is now asserted under the guise of (1) IAC/guilt phase, (2) Brady/Giglio, and (3) "newly discovered" evidence claims. Taylor intermingles these independent legal claims in an apparent attempt to disguise the undeniable fact that his sufficiency of the evidence challenge to sexual battery was previously rejected on direct appeal and

is procedurally barred in post-conviction.[5]

Standards of Review

In Dillbeck v. State, 2007 Fla. LEXIS 845 (Fla. 2007), this Court recently reiterated the following standards of review applicable to IAC claims:

> We review claims of ineffective assistance of counsel under the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As we stated in Wike v. State, 813 So. 2d 12, 17 (Fla. 2002), this standard requires a defendant to establish two prongs:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. (quoting Strickland, 466 U.S. at 687); see also Rutherford v. State, 727 So. 2d 216 (Fla. 1998).
>
> Failure to establish either prong results in a denial of the claim. See Ferrell v. State, 918 So. 2d 163, 170 (Fla. 2005) (quoting Strickland, 466 U.S. at 687).
>
> To establish deficient performance under Strickland, "the defendant must show that counsel's

[5] See, Garcia v. State, 949 So. 2d 980, 990 (Fla. 2006) (affirming trial court's summary denial of post-conviction claims as procedurally barred because they were or could have been raised on direct appeal, including Garcia's claims that the State presented insufficient evidence of burglary and sexual battery).

representation fell below an objective standard of reasonableness" based on "prevailing professional norms." 466 U.S. at 688; Wike, 813 So. 2d at 17. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; see also Wike, 813 So. 2d at 17.

Finally, as to our standard of review, we defer to the trial court's findings of fact regarding the credibility of witnesses and the weight assigned to the evidence but review the deficiency and prejudice prongs de novo. Windom v. State, 886 So. 2d 915, 921 (Fla. 2004) (citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)).

2007 Fla. LEXIS 845, at 6-8.

Brady & Giglio Standards

In Lamarca v. State, 931 So. 2d 838, 852 (Fla. 2006), this Court emphasized the following standards applicable to Brady and Giglio claims:

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that a prosecutor's suppression of evidence favorable to the accused "violates due process where the evidence is material either to guilt or to punishment." To establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). In Giglio v. United

> States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court extended Brady to claims that a key state witness gave false testimony that was material to the trial. To establish a claim under Giglio, a defendant must prove (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Suggs v. State, 923 So. 2d 419 (Fla. 2005). When reviewing these claims on appeal, our standard of review is similar to that employed in ineffective assistance of counsel claims. We defer to the trial court's findings of fact but independently determine whether the facts are sufficient to establish the elements required in each claim. Id.
>
> Lamarca, 931 So. 2d at 852.

Newly Discovered Evidence

In Jones v. State, 709 So. 2d 512 (Fla. 1998), this Court articulated a two-part test for newly discovered evidence:

> (1) The evidence must have existed but have been unknown by the trial court, the party, or counsel at the time of trial, and must not have been discoverable through the use of due diligence, and
>
> (2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.
>
> Jones, 709 So. 2d at 521.

Procedural Bar

Post-conviction proceedings cannot be used as a second appeal, and any collateral challenge to the sufficiency of the evidence is procedurally barred in post-conviction. See, Howell v. State, 877 So. 2d 697, n.3 (Fla. 2004) (noting that to the extent that Howell questions the sufficiency of the evidence to establish either premeditation or felony-murder, these issues

are procedurally barred on collateral review); See also Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that were raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel).

Circuit Court's Ruling

In denying Taylor's intertwined (1) IAC/guilt phase, (2) Brady/Giglio, and (3) newly discovered evidence claims, the Circuit Court painstakingly set forth the following cogent analysis:

> CLAIM V
>
> MR. TAYLOR WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT - INNOCENCE PHASE OF HIS CAPITAL TRIAL DUE TO THE STATE'S SUPPRESSION OF CRITICAL, EXCULPATORY AND IMPEACHMENT EVIDENCE; THE TRIAL COURT'S ERRONEOUS RULINGS; AND DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE, ALL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> Mr. Taylor alleges that trial counsel failed to investigate the facts surrounding the offense and the state's theory of the case, and unreasonably failed to present an adequate defense. Mr. Taylor alleges that his counsel rendered prejudicially ineffective assistance when he stipulated to the finding of the crime scene analyst regarding shoe pattern evidence. Mr. Taylor alleges that hair and fiber analysis by the FDLE was cursory, but counsel made no efforts to investigate and challenge the State's case. Mr. Taylor complains that there was no comparison of his known pubic hairs against hair found in the deceased's panties. Mr. Taylor argues that counsel for the defense failed to investigate the injuries caused to the deceased and thus failed to challenge the State's allegations of premeditated murder and of sexual battery/felony murder. The defense also claims that

defense counsel failed to investigate and present evidence which might have shown that the deceased has various pre-existing injuries sustained prior to the night of the alleged homicide. Mr. Taylor alleges that counsel did not request or was denied the assistance of an independent pathologist who could have investigated the timing of the injuries and could have shown that the injuries occurred prior to death or substantially after death, and that the Defendant was not the responsible party. Mr. Taylor claims that failure to pursue this avenue allowed the State to argue premeditated murder and the aggravating factors of heinous, atrocious and cruel, and committed while engaged in the commission of a sexual battery.

Mr. Taylor alleges counsel failed to investigate medical evidence that would have refuted the State's theory of sexual battery. The defense claims that counsel failed to obtain the assistance of a qualified odontologist who could have compared Mr. Taylor's dental records with marks on the body and shown that Mr. Taylor did not cause the marks. Mr. Taylor alleges that counsel failed to request a judgment of acquittal on the ground that there was no evidence before the jury concerning the age of the victim. Mr. Taylor alleges that counsel failed to present an intelligent and knowledgeable defense. Mr. Taylor argues that counsel's theory of the case was that Mr. Taylor killed the decedent after she bit his penis during consensual sexual relations and that counsel did not present evidence to support his theory. Mr. Taylor alleges that counsel failed to pursue or convey a plea offer of life imprisonment with the Assistant State Attorney. Mr. Taylor argues that counsel failed to counter the States' arguments regarding injuries to Mr. Taylor's penis indicating sexual activity with the deceased was not consensual. The defense argues that counsel failed to effectively investigate and present evidence regarding the severity of the injury sustained by Mr. Taylor when his penis was bitten. Mr. Taylor alleges that counsel did not produce medical evidence to explain the injuries to Mr. Taylor's penis which were misleading in the photographs shown with his penis in a flaccid state.

Mr. Taylor alleges that defense counsel provided ineffective assistance when he had the defendant demonstrate his physique to show his physical strength

and had him demonstrate how he choked the decedent. Mr. Taylor alleges that defense counsel was ineffective when he failed to request a pre-trial in camera proceeding to ensure that the court would permit testimony regarding the deceased's drug usage and sexual conduct. Mr. Taylor also alleges that defense counsel was ineffective for putting his client on the stand without adequate preparation. The defense alleges that counsel failed to have Mr. Taylor adequately evaluated by a competent mental health professional who could have testified that Mr. Taylor's mental condition, organic brain damage, and intoxication precluded premeditation. Mr. Taylor claims that this omission deprived the jury of information that would have supported a verdict of second degree murder and/or a sentence of less than death. The defense alleges that counsel failed to object to the prosecutor asking improper questions and engaging in blatant and pervasive misconduct. The defense also claims defense counsel was ineffective for allowing witnesses to testify to inadmissible hearsay in violation of Mr. Taylor's rights. In addition, Mr. Taylor alleges counsel was ineffective in not assuring Mr. Taylor's jury consisted of a fair cross section of the community. Mr. Taylor also alleges that he did not receive a fair trial because of the cumulative effect of counsel's errors.

The Court finds that the defense has failed to demonstrate any deficiency or resulting prejudice from the performance of guilt phase attorney Nick Sinardi, Esq. Mr. Sinardi hired investigator, Bill Brown, who spent many hours investigating Mr. Taylor's case. Mr. Sinardi testified at the evidentiary hearing that the case didn't involve an identity issue. He testified that based on Mr. Taylor's statement and confession the issue became the degree of his involvement. The Defendant agreed that he had sex with the victim. Mr. Sinardi had no reason to believe that the victims vaginal injuries were caused by someone other than Mr. Taylor. The Court finds Mr. Sinardi made a reasonable tactical decision that the best available defense was that it was not premeditated or felony murder but was in fact depraved mind and consensual sex, second-degree murder. Mr. Sinardi testified at the evidentiary hearing that he vigorously tried to get witnesses to substantiate the issue of consent because

the victim had a history of drugs and prostitution. However, the Court excluded the witnesses from coming before the jury.

Mr. Sinardi testified that he had no reason to believe Dr. Miller was not telling the truth in the autopsy report and he saw no reason to hire a medical examiner in light of the facts and the defense. Although the defense presented testimony from Dr. Wright in an attempt to show deficiencies in Dr. Miller's examination of the victim, the Court does not find that it has shown that Dr. Miller performed his medical examination in an incompetent manner. The Court notes that the testimony of Dr. Lynch substantially supported the findings of Dr. Miller. Although the defense tried hard to show some kind of deficiency in Mr. Sinardi's preparation and questioning regarding injury to the victim's vagina, both Dr. Miller and Dr. Lynch's testimony supported tears in the vaginal area caused by penetration. Mr. Sinardi testified that during the course of his representation of Mr. Taylor, he saw no reason to suspect he had competency issues. The Court finds that counsel made a reasoned strategic decision to have Mr. Taylor take the stand to humanize him to the jury. Mr. Sinardi testified it was part of the defense to show the defendants physical strength in contrast to the frail nature of the victim. He testified it was to show that Mr. Taylor was a big powerful man that became enraged and did not have the intent to kill the victim. The Court does not find any basis for Mr. Taylor's claims that defense counsel failed to pursue or convey a plea offer of life imprisonment, that witnesses were allowed to testify to inadmissible hearsay, and that counsel was ineffective in not assuring Mr. Taylor's jury consisted of a fair cross section of the community. The Court finds that any deficiencies that might have existed in counsel's representations of Mr. Taylor do not have the cumulative effect of denying him a fair trial.

The Court finds defense claims of newly discovered evidence based on a supposed recantation by Dr. Miller of what caused the victim's vaginal injuries are not an accurate statement of his testimony. Dr. Miller concluded that the chances of the victim's vaginal

injuries coming from a kick were kind of a one-in-a-million shot. The Court asked Dr. Miller if generally speaking the lacerations he found would involve penetration and he said that they would. Dr. Lynch testified that the injury to the vagina would indicate some sort of penetration that caused that injury.

The Court notes that Dr. Lynch testified that in her expert medical opinion something large was put into the vagina that caused the tearing and ripping and that she did not believe a kick caused the injury. The defense argues that the victim did not suffer a sexual battery by intrusion of an object penetrating the vagina and that her injuries were caused by being kicked. The Court finds the testimony of Dr. Lynch to be highly credible and agrees with her conclusion that there was penetration of the vagina and the damage to the vagina was not caused by a kick. The court finds that the evidence supports the finding of sexual battery and that trial counsel was not deficient in his defense of Mr. Taylor in this regard. Claim V of Defendant's Motion is denied.

(PCR5/765-771) (e.s.)

Analysis

For the following reasons, the Circuit Court correctly denied Taylor's intertwined claims of IAC/guilt phase, sufficiency of the evidence (sexual battery), Brady/Giglio, and "newly discovered" evidence. In 1988, Perry Taylor was charged with the "murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field."[6] Taylor I, 583 So. 2d at 325. "Shoe prints

[6] Count One of the Supersedeas Indictment, filed November 16, 1988, set forth the following charge of first degree murder:

The Grand Jurors of the County of Hillsborough,

matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation." Id., at 325 (e.s.).

Count II of the Supersedes Indictment charged:

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that PERRY ALEXANDER TAYLOR, on the 24th day of October, 1988, in the County and State aforesaid, did unlawfully and feloniously commit sexual battery upon GERALDING BIRCH, a person twelve (12) years of age or older, without the consent of the said GERALDING BIRCH, by vaginal penetration and/or oral penetration by or union with his sexual organ, and/or by vaginal penetration with an object, and in the process thereof used actual physical force likely to cause serious personal injury, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 794.011(3).
>
> (R9/1057-1058) (e.s.)

In post-conviction, Taylor alleged: (1) IAC/guilt phase

> State of Florida, charge that PERRY ALEXANDER TAYLOR, on the 24th day of October, 1988, in the County and State aforesaid, from a premeditated design to effect the death of GERALDINE BIRCH, a human being, and/or while the said PERRY ALEXANDER TAYLOR was engaged in the perpetration of, or an attempt to perpetrate, the felony of Sexual Battery, did murder the said GERALDINE BIRCH by beating her with his hands and/or feet, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04 (R9/1057) (e.s.)

Attempted sexual battery also would support both the felony murder and the aggravating factor that the crime was committed during the commission of or attempt to commit a sexual battery. See, Mansfield v. State, 758 So. 2d 636, 642, 647 (Fla. 2000).

[failure to present an alleged defense to felony murder/sexual battery based on purported lack of penetration/sexual battery], (2) that the State violated Brady/Giglio [prosecutor allegedly "should have known" kick was "probable mechanism" for injury to victim's vagina] and (3) that the evidence presented at trial was insufficient to support both his sexual battery conviction and the State's alternate theory of felony murder, based on the sexual battery or attempted sexual battery.

Procedurally-Barred Challenges to Sufficiency of the Evidence of Sexual Battery and Felony Murder/Sexual Battery

Perry Taylor was charged by Indictment with first-degree murder and sexual battery. (R9/1057) The State's murder theory was predicated on both premeditated murder and felony murder/sexual battery. Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991). At trial, Taylor claimed that the victim, Geraldine Birch, agreed to have sex with him in exchange for money and/or cocaine. Thus, Taylor's defense at trial to the sexual battery was consent. Taylor, 583 So. 2d at 328. On direct appeal, Taylor challenged his convictions for first-degree murder and sexual battery. Id. at 325. Taylor claimed that the State's circumstantial evidence was legally insufficient to prove (1) premeditation and (2) lack of consent to the sexual battery. This Court explicitly rejected Taylor's claims and emphasized:

The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). However, the jury need not believe the defense version of facts on which the state has produced conflicting evidence. Id. On the question of lack of consent, even accepting Taylor's assertion that the victim initially agreed to have sex with him, the medical examiner's testimony contradicted Taylor's version of what happened in the dugout. According to Taylor, he had vaginal intercourse with the victim for less than a minute without full penetration. He testified that she then indicated that she did not want to have intercourse and began performing oral sex on him. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina. Given the evidence conflicting with Taylor's version of events, the jury reasonably could have rejected his testimony as untruthful. Cochran, 547 So. 2d at 930.

Further, the jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury. See Heiney v. State, 447 So. 2d 210, 215

> (Fla.) (premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

Taylor I, 583 So. 2d at 328-329 (e.s.)

As confirmed by the foregoing, this Court, on direct appeal, concluded that the evidence presented was sufficient to support the jury's verdicts. Now, Taylor argues that he allegedly had "multiple theories of innocence," specifically, that a "kick was the probable mechanism for the injury" to the victim's vagina, that "there is no evidence of non-consensual sex," and that Taylor's post-conviction interpretation of the "truth" allegedly now "raises a total defense." (Initial Brief of Appellant at 69-71). Taylor's post-conviction attempts to challenge the sufficiency of felony murder/sexual battery are procedurally barred. This Court previously affirmed Taylor's judgments of conviction, finding the evidence sufficient to support the jury's verdicts, and rejecting Taylor's claims that the victim consented to the sexual battery. Taylor's post-conviction attempt to resurrect a "sufficiency of the evidence" challenge to his convictions is procedurally barred. See, Howell v. State, 877 So. 2d 697, 704, fn. 3 (Fla. 2004) ("to the extent that Howell questions the sufficiency of the evidence to establish either premeditation or felony-murder . . ., these issues are procedurally barred on collateral review"). Taylor's

self-serving claim that there is "no evidence of non-consensual sex" is strongly disputed and meritless in light of the damage to the victim's vagina. See, Everett v. State, 893 So. 2d 1278, 1280 (Fla. 2004) (noting that victim's vaginal abrasion evidenced the use of force and was consistent with non-consensual sexual intercourse). At trial, the State also argued that Taylor forced the victim to perform oral sex. (R2/18-19) During surrebuttal, the prosecutor argued that the victim's biting of Taylor's penis indicated that the sex was non-consensual. The resentencing order also noted that initial consent to a sexual act does not preclude a subsequent sexual battery. (RS5/817). Taylor's alleged lack of vaginal penetration is procedurally barred, irrelevant to any oral sexual battery, and also without merit given the magnitude of injuries. (PCR5/770-771).

IAC/guilt phase

Taylor failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland, and the Circuit Court's order is supported by competent, substantial evidence. The defendant's attorney for the 1989 guilt-phase was Nick Sinardi. (PCR4/620). This case did not involve an identity issue; it was not a question of who killed Geraldine Birch [Johnson]. (PCR4/630; 670). Sinardi's trial strategy was to seek a

conviction for a lesser offense for the homicide charge (second degree murder) and argue that the sexual encounter was consensual. (PCR4/621). At the time of trial, Sinardi discussed the issue of voluntary intoxication with the defendant, but the major problem facing Sinardi was Taylor's lengthy statements/confession to law enforcement. (PCR4/626; 627). Sinardi moved to suppress statements made by the defendant to law enforcement on two different dates. (PCR4/674). Sinardi also filed numerous pre-trial motions, the majority of which were denied by the trial court. (PCR4/674-76). Sinardi also hired an investigator, Bill Brown, to assist the defense. (PCR4/671). Brown spent 106+ hours on this case, which included, among other things, obtaining background information, researching court records, checking criminal histories, and interviewing 68 potential witnesses. (PCR4/672). The best available defense was "depraved mind" and consensual sex, second-degree murder. (PCR4/627). Sinardi tried to introduce witnesses to substantiate the issue of consent, based on the alleged history of drug use and prostitution, but the trial court excluded these witnesses. (PCR4/628). Sinardi would not be surprised if Dr. Miller's "reasonable degree of medical probability" meant to be almost a certainty. (PCR4/632). At the time of trial, Sinardi understood that the

victim's genital injuries were caused by tearing from insertion of a large object. (PCR4/634; 635-36). Sinardi also understood that a "negative" result for acid phosphatase meant that there was none found. (PCR4/656). Elevated levels of acid phosphatase might have supported the consent defense theory. (PCR4/660).

Sinardi confirmed that the decision to take the stand is not the attorney's decision, but the defendant's decision. (PCR4/661). Sinardi discussed whether Taylor wanted to testify and would have told the defendant to testify truthfully. (PCR4/664; 677). Taylor was very mild-mannered, cooperative, and soft spoken; Taylor's demeanor does not match his physical presence. (PCR4/676). Sinardi felt that it was imperative that the jury hear the defendant speak, rather than just see his physical presence in the courtroom. (PCR4/677). Sinardi wanted to help the jury understand that when the defendant suddenly became enraged, because of the defendant's size, the violence was "over before it started." (PCR4/678). As a former prosecutor and defense attorney, Sinardi previously had worked with Dr. Miller. (PCR4/679; 703). Dr. Miller was well-regarded and Sinardi had no reason to doubt Dr. Miller's report or hire an independent medical examiner. (PCR4/680). Cause of death was not an issue in this case. (PCR4/680). Taylor agreed that he'd

had sex with the victim. (PCR4/680). Sinardi had no reason to believe that the vaginal injuries to the victim were caused by someone other than the defendant. (PCR4/681). In Sinardi's experience, it is better to focus on one theory of defense, rather than a shotgun approach. (PCR4/681). Sinardi had no reason to suspect the defendant had any psychological problems. (PCR4/682). Sinardi did not doubt the defendant's competency. The defendant was able to assist the defense with names of witnesses, he seemed rational, he was able to communicate and understand, he was never hostile, he did not appear to be either delusional or psychotic. (PCR4/682-83). Taylor never indicated that he was intoxicated by drugs or alcohol at the time of the crime. (PCR4/683-84). Sinardi had no evidence to substantiate a voluntary intoxication defense, and Sinardi was unaware of any voluntary intoxication defense to murder actually succeeding. (PCR4/697-98).

Sinardi's defense strategy included showing that Taylor was a big, powerful man who became enraged when the victim bit his penis and he did not have the intent to kill the victim. (PCR4/684). The presence of acid phosphatase would have reinforced both the allegation of consensual sex and non-consensual sex. (PCR4/687). If acid phosphatase readings under 300 are considered "negative," then results under 300 would not

have impacted Sinardi's presentation of his case. (PCR4/687-88; 691; 694).

The prosecutor during the 1989 guilt phase was attorney Mike Benito, who was a prosecutor in the Hillsborough County State Attorney's Office for 13 years and had tried over 40 first-degree murder cases. (PCR4/575-76). Benito confirmed that the only viable defense strategy was to try for a lesser offense. (PCR4/577). In light of Taylor's prior conviction and the victim's injuries, the State would not offer any plea negotiations. (PCR4/578). Therefore, if the defense was going for a lesser offense, Taylor had to testify. (PCR4/578). The presence of any positive acid phosphatase results would not have affected the State's case because the defendant admitted that he had engaged in vaginal sex with the victim and she subsequently angered him by biting his penis. (PCR4/579). This was not a case about identity or DNA. (PCR4/579). In addition, the State also argued that Taylor forced the victim to perform oral sex. (PCR4/582-83). Benito confirmed that when Taylor testified at trial, he came across as very quiet, subdued, and soft spoken. (PCR4/580-81).

Taylor also argues that his trial counsel, Nick Sinardi, was ineffective in calling Taylor to testify during the guilt phase. (Initial Brief of Appellant at 71). Sinardi confirmed that the

decision to take the stand is not the attorney's decision, but the defendant's decision. (PCR4/661). Sinardi discussed whether Taylor wanted to testify and would have told the defendant to testify truthfully. (PCR4/664; 677). Taylor cannot prevail on this claim inasmuch as (1) this was an especially brutal murder and the State had a strong case against Taylor, given his confession; and, therefore, in order for the defense to have any real chance at achieving a lesser degree verdict, the defense had to "humanize" Taylor by having him testify during the guilt phase, (2) Sinardi did discuss this decision with Taylor beforehand, (3) the decision whether to testify is a uniquely "personal" right which belongs, ultimately, only to the defendant,[7] and (4) trial counsel cannot be deemed ineffective merely because post-conviction counsel disagrees with trial counsel's strategic decisions. Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001).

No one ever disputed, nor could anyone seriously dispute, that Mr. Taylor was a big man -- approximately 6'2" tall and 225 pounds; and, in contrast, the deceased victim was very petite. Mr. Taylor's obvious size was readily apparent at trial and

[7]See, Florida v. Nixon, 543 U.S. 175 (2004) ("A criminal defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."

could not be ignored. In calling Taylor as a witness, trial counsel sought to establish that Taylor's quiet, mild-mannered demeanor did not match his imposing physique. (PCR4/662). In addition, trial counsel also attempted to use Mr. Taylor's size to support the defense theory that Taylor was guilty only of a lesser degree of homicide, *i.e.,* because of Taylor's size, he easily could have killed the victim in a sudden rage after she bit his penis. (R5/607-09). See also, Henry v. State, 862 So. 2d 679, 682 (Fla. 2003) (concluding that defendant failed to establish any deficiency of counsel under Strickland where trial counsel relied, in part, on theory of self-defense (despite the fact that victim was stabbed multiple times and police presented evidence contradicting this theory), and trial counsel argued in the alternative for a "depraved mind, second-degree murder conviction").

Attorney Sinardi also had the assistance of an investigator. Taylor was able to communicate with the investigator and attorney Sinardi, and they tried to locate every witness. In this case, as in Gamble v. State, 877 So. 2d 706, 713 (Fla. 2004), defense counsel was faced with undeniable evidence of his client's participation in a brutal criminal episode that resulted in the victim's death. By taking the stand, the defense was able to "humanize" Taylor and attempt to show him as

a “gentle giant” who “snapped” in an uncontrollable rage when the victim bit the defendant’s penis. (PCR4/662)

“A person commits second degree murder by an act imminently dangerous to another and evincing a depraved mind regardless of human life.” Jones v. State, 845 So. 2d 55, 70 (Fla. 2003). Through this defense theory, trial counsel sought to have the jury convict Mr. Taylor only of a lesser offense.[8] Strategic decisions “do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.” Stewart, 801 So. 2d at 65, citing Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). In Gamble, as here, the defendant cannot credibly argue in post-conviction “that his consent is now invalid because he did not understand the consequences of his consent if the strategy did not result in an acquittal of first-degree murder.” Gamble, 877 So. 2d at 715.

To the extent that Taylor argues that trial counsel allegedly failed to “adequately prepare” Taylor to testify at

[8] Second-degree murder is defined as the “unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." § 782.04(2), Fla. Stat. (1993). Cummings v. State, 715 So. 2d 944, 949 (Fla. 1998).

trial, his *pro forma* complaint likewise fails. Sinardi discussed whether Taylor wanted to testify and would have told the defendant to testify truthfully. (PCR4/664; 677). Taylor was very mild-mannered, cooperative, and soft spoken; Taylor's demeanor does not match his physical presence. (PCR4/676). Sinardi felt that it was imperative that the jury hear the defendant speak, rather than just see his physical presence in the courtroom. (PCR4/677). Attorney Sinardi wanted to show the jury the power that defendant's body possessed, inasmuch as they obviously were going to observe him everyday in the courtroom. He wanted the jury to hear defendant speak and see his body and understand that the defendant was a soft-spoken individual who was incredibly large and strong and that it was very easy and not premeditated to inflict the injuries to this petite victim by virtue of his sheer size.

Furthermore, in Zack v. State, 911 So. 2d 1190, 1198-1200 (Fla. 2005), this Court rejected a claim of inadequate client preparation, stating:

> Zack argues that trial counsel failed to adequately prepare him to testify at trial and failed to inform him about what would occur during cross-examination. Zack contends that had he been adequately prepared and informed of the hazards of cross-examination, he would not have testified. Zack stated that trial counsel gave him no choice but to testify, and that he was only told that he was going to testify after trial began.

Trial counsel stated that he fully discussed the procedure of the trial with Zack. According to trial counsel's testimony, he discussed Zack's version of the events, and the fact that Zack would have to take the stand and testify if he wanted to get his story into evidence so that it could be argued to the jury. Prior to trial, he fully informed Zack about the necessity that he testify and that Zack completely understood that the State would cross-examine him. He also advised Zack as to the specifics of what to expect while on the witness stand, and that Zack never indicated that he did not want to testify.

As the trial court found, the trial record supported trial counsel's statement that Zack never conveyed a desire not to testify. In fact, Zack admitted at the postconviction hearing that he wanted the jury to hear his version of the events. At the postconviction hearing, Zack also complained that he was cross-examined about the Rosillo murder. However, there was no cross-examination about the Rosillo murder as trial counsel had successfully argued at trial that such questioning should not be permitted.

The trial court made a specific finding on credibility and chose to accept Killam's sworn testimony over Zack's sworn testimony that he was not prepared to testify or to be cross-examined. The trial court is in a superior position "to evaluate and weigh the testimony and evidence based upon its observation of bearing, demeanor, and credibility of the witnesses." Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976); see Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998), cert. denied, 526 U.S. 1102, 143 L. Ed. 2d 677, 119 S. Ct. 1583 (1999). However, it is our obligation to independently review the record and ensure that the law is applied uniformly in decisions based on similar facts and to ensure that the defendant's representation is within constitutionally acceptable parameters. See State v. Coney, 845 So. 2d 120, 141 (Fla. 2003) (Pariente, J., concurring); Stephens v. State, 748 So. 2d 1028, 1035 (Fla. 1999) ("Based on the trial court's findings of fact and our review of the record, we agree with the trial court's conclusions as to both Strickland prongs and the ultimate finding of ineffective assistance of counsel."). Although Zack cites several cases in support of his claim, none involves a defendant who

claims he or she was inadequately prepared to testify. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986) (addressing the failure of defense counsel to request discovery); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991) (addressing the failure to conduct pretrial investigation), modified on other grounds, 939 F.2d 586 (8th Cir. 1991); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (addressing the failure to interview potential self-defense witnesses); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989) (addressing counsel's failure to obtain a transcript of a witness's testimony at a codefendant's trial); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (addressing the failure to interview potential alibi witnesses).

Furthermore, Zack's own trial testimony does not support this claim. Zack gave his version of the events during direct examination, and although he was argumentative during cross-examination, he did not deviate from his version of the events. He told the jury that he was responsible for Smith's death, but that he did not plan it. He argued with the prosecutor when the prosecutor implied something other than what Zack had already stated. Zack did not always answer "yes" and "no." His answers indicated a desire to explain himself.

We accept the trial court's finding of facts that defense counsel was a more credible witness and that Zack was adequately prepared to testify at trial. We also find that Zack failed to establish that trial counsel was deficient in preparing him to testify at trial. Additionally, even if counsel had inadequately prepared Zack to be cross-examined, Zack suffered no prejudice. Zack complained about being inadequately prepared for cross-examination about the Rosillo murder, but the record indicates that the prosecutor did not cross-examine him about the Rosillo murder. We defer to the factual findings made by the trial court and, based on these facts, conclude that Zack has failed to establish that he is entitled to relief on his claim of ineffective assistance of counsel in preparing him to testify at trial.

Zack, 911 So. 2d 1190, 1198-1200.

Alleged Failure to Develop Mental Health Issues / Guilt Phase

At page 74 of his Initial Brief, Taylor argues that trial counsel allegedly failed to investigate Taylor's competency to stand trial. During the post-conviction evidentiary hearing, Attorney Sinardi reiterated that he "had no basis to believe that there was any competency issues or insanity issues for purposes of a defense and/or a competency issue." (PCR4/625). Taylor's perfunctory complaint fails to establish any deficiency of counsel and resulting prejudice under Strickland. Additionally, in his closing argument below, Taylor argued that trial counsel was ineffective in failing to present a "mental health professional who could have testified . . . that Taylor's mental condition, organic brain damage, and intoxication at the time of the crime precluded premeditation." Now, Taylor alleges that "Mr. Taylor suffered serious brain damage which could have supported a lesser degree of homicide." (Initial Brief of Appellant at 55).

In 1989, the defense presented the testimony of Dr. Gerald Mussenden in the first penalty phase. Although at the time of the defendant's trial, voluntary intoxication was a defense to *specific intent* crimes [premeditated murder], it was not then, and is not now, a defense to sexual battery, or felony murder

based on sexual battery.[9] Therefore, Taylor cannot demonstrate any deficiency of counsel and resulting prejudice under Strickland on either charge. See, Davis v. State, 875 So. 2d 359, 367 (Fla. 2003) [noting that there was a general verdict and the evidence supported an instruction on felony murder based on sexual battery, which is a general intent crime to which voluntary intoxication is not a defense. "Therefore, even if the jury had been instructed on voluntary intoxication as a defense to premeditated murder, because the general verdict did not differentiate between premeditated murder and felony murder, Davis cannot establish prejudice. See Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993) (rejecting claim that trial court committed fundamental error by not instructing the jury on voluntary intoxication as a defense to felony murder based on kidnapping, based in part on the fact that there was sufficient evidence of sexual battery, a general intent crime to which voluntary intoxication is not a defense)."]. Id., at 367. Furthermore, guilt phase counsel, Nick Sinardi, confirmed that the defense had no facts on which to base a voluntary intoxication defense. See also, Stewart v. State, 801 So. 2d

[9] Effective October 1, 1999, the Florida Legislature eliminated the defense of voluntary intoxication. § 775.051, Fla. Stat. (1999); Lewis v. State, 817 So. 2d 933, 933 (Fla. 4th DCA 2002); Gutierrez v. State, 860 So. 2d 1043 (Fla. 5th DCA 2003); See

59, 65-66 (Fla. 2001) (rejecting claim that trial counsel was ineffective for not pursuing a voluntary intoxication defense where trial counsel testified, in part, that the defendant had provided a detailed account of the crime). And, with respect to some unspecified "mental condition," Taylor has not demonstrated the existence of any "mental health" evidence which actually would have been admissible during the guilt phase of his trial. See, Chestnut v. State, 538 So. 2d 820 (Fla. 1989) (holding evidence of an abnormal mental condition not constituting legal insanity was not admissible for the purpose of proving that the defendant could not or did not entertain the specific intent necessary for proof of the offense); Pietri v. State, 885 So. 2d 245, 254 (Fla. 2004) (Pietri essentially asserts that his prior drug abuse resulted in a mental defect—"metabolic intoxication"--a diminished capacity which produced an inability to form the specific intent to commit premeditated murder. Such evidence was inadmissible); Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (evidence of the defendant's "dissociative state" would not have been admissible during the guilt phase of the trial); Dufour v. State, 905 So. 2d 42 (Fla. 2005) (Defendant asserted that, as a result of his longstanding addiction to drugs and alcohol, he could not have formed the requisite specific intent

---

also, Troy v. State, 948 So. 2d 635 (Fla. 2006).

to commit premeditated murder. Dufour's complaints were, in reality, an attempt to impermissibly rely on a hidden diminished capacity defense.)

"Newly Discovered" Evidence / Brady

Taylor's hybrid Brady/Giglio claim alleged that Dr. Miller's testimony was false/misleading and that Dr. Miller's "undisclosed knowledge" was Brady material. Nothing alleged by CCRC in post-conviction changed attorney Sinardi's belief that Dr. Miller was thorough and professional and well-regarded. (PCR4/703). During the post-conviction hearing, Dr. Miller reiterated that the tears in the vaginal area were caused by penetration and not impact. (PCR12/1975-76). Dr. Lynch also corroborated Dr. Miller's trial testimony -- that penetration caused the victim's vaginal injuries. (PCR10/1606-14). The photographs showed lesions inside of the victim's vaginal canal and radiating lacerations from a force being pushed in from an object that is larger than the area which is to accommodate the object.

At page 76 of his Initial Brief, Taylor claims that "Dr. Miller's 180 degree change from battery by object to accidental kick" is newly discovered evidence of recantation. The Circuit Court specifically rejected this 180 degree characterization and found it was "not an accurate statement" of the ME's testimony:

> **The Court finds defense claims of newly discovered evidence based on a supposed recantation by Dr. Miller of what caused the victim's vaginal injuries are not an accurate statement of his testimony. Dr. Miller concluded that the chances of the victim's vaginal injuries coming from a kick were kind of a one-in-a-million shot. The Court asked Dr. Miller if generally speaking the lacerations he found would involve penetration and he said that they would. Dr. Lynch testified that the injury to the vagina would indicate some sort of penetration that caused that injury.**
>
> The Court notes that Dr. Lynch testified that in her expert medical opinion something large was put into the vagina that caused the tearing and ripping and that she did not believe a kick caused the injury. The defense argues that the victim did not suffer a sexual battery by intrusion of an object penetrating the vagina and that her injuries were caused by being kicked. **The Court finds the testimony of Dr. Lynch to be highly credible and agrees with her conclusion that there was penetration of the vagina and the damage to the vagina was not caused by a kick. The court finds that the evidence supports the finding of sexual battery and that trial counsel was not deficient in his defense of Mr. Taylor in this regard. Claim V of Defendant's Motion is denied.**

(PCR5/770) (e.s.)

In evaluating the Circuit Court's order, "this Court will not substitute its judgment for that of the trial court on . . . the credibility of the witnesses and the weight to be given to the evidence," provided its order is supported by competent, substantial evidence. Cherry v. State, 959 So. 2d 702 (Fla. 2007). This Court is highly deferential to circuit court determinations of credibility. Id., citing Archer v. State, 934 So. 2d 1187, 1196 (Fla. 2006).

Dr. Miller concluded that the chances the victim's vaginal injuries came from a kick were "one in a million." Although a kick "may" have caused the large tear to the perineum, Dr. Miller still felt that there was penetration causing the radiating lacerations. Dr. Lynch supported the testimony of Dr. Miller – that penetration occurred by a large object causing the tissue to tear. Dr. Lynch also testified as to injuries clearly inside the victim's vagina, establishing that penetration occurred, and the victim's internal injuries were documented in Dr. Miller's autopsy diagram. The fact that the defendant's post-conviction expert, Dr. Wright, disagreed with the M.E. and Dr. Lynch does not constitute any legitimate Brady/Giglio claim.

ISSUE II

THE IAC – PENALTY PHASE CLAIM.

Application of Strickland to the Penalty Phase

In order to obtain a reversal of a death sentence on the ground of ineffective assistance of counsel at the penalty phase, the defendant must show "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance

of aggravating and mitigating circumstances would have been different." Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000).

The Circuit Court's Post-Conviction Order

> CLAIM XI
>
> DUE TO COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE IN SUPPORT OF MITIGATING CIRCUMSTANCES, MR. TAYLOR WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> Mr. Taylor complains that defense counsel did not fully present his story given the numerous sources of evidence available. Mr. Taylor alleges that his mental condition was substantially impaired at the time the victim was killed but he was denied his right to a competent psychiatrist to conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. Mr. Taylor claims that penalty phase counsel was ineffective in relying on only one mental health expert and failing to present additional mental health evidence. Judge Manuel, Lopez, [sic] who represented Mr. Taylor at the penalty phase in 1992, was asked about two statutory mitigators. Section 921.14l(6)(b), Florida Statutes — "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance", and Section 921.141 (6)(f), Florida Statutes — "The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired." He testified that he did conduct an investigation to see if either of the two statutory mitigators could be presented. He testified that he conducted a background investigation of the Defendant's family, his upbringing, and he retained Dr. Robert Berland, a forensic psychologist to assist him to establish these mitigators. Judge Lopez testified that if Dr. Berland had told him that they

existed, he certainly would have put them on and asked for the instruction. Judge Lopez testified that he was not aware in 1992 of any other neurological – neuropsychological testing that could be conducted on Mr. Taylor that might have elaborated on the extent and nature of the brain damage.

Mr. Taylor alleges counsel failed to adequately provide Dr. Berland with medical records and brief him on the statutory mitigating circumstances that apply to capital cases. Dr. Berland presented testimony that the defendant was brain damaged and the record does not support a conclusion that he gave the defendant deficient mental health assistance. Judge Lopez agreed with the State at the evidentiary hearing that if he had called a neuropsychologist the only thing he would have been able to testify to was that he had performed testing and that in his opinion the defendant was brain damaged. Although the defense may now have mental health witnesses they regard as being more favorable, this does mean mental health investigation conducted by Mr. Taylor's penalty phase counsel was incompetent. See Gaskin v. State, 822 So. 2d 1243 (Fla. 2002). **The Court also finds the testimony of Dr. Taylor presented at the evidentiary hearing, that Mr. Taylor does not suffer from brain damage, highly credible. Additionally, the Court notes that both Dr. Kotler and Dr. Mayberg did not think the PET scan results of Mr. Taylor represented a significant indication of brain damage. It is not a certainty additional mental health experts would have found that Mr. Taylor was brain damaged had they been retained by Judge Lopez.** Mr. Taylor argues that he lived in an abusive foster care situation. Judge Lopez agreed that part of his approach was to have the jury develop some degree of sympathy for Mr. Taylor's upbringing given the conditions of being in a foster home, not having his family around, and other evidence that might engender some compassion. He testified that he had the defendant's brother, Stanley Graham testify regarding the Defendant's deprived childhood. He also called Alvin Thomas, who had been in the same foster home as Mr. Taylor, to testify to the repercussions of bed wetting at the foster home. Mr. Taylor complains that his mother was available to testify and could have provided mitigating

information. However, the record indicates that the defendant left the decision up to the mother who did not want to remain at the courthouse during resentencing due to her health. The court does not find defendant's allegations in Claim XI support a conclusion that counsel provided him with ineffective assistance of counsel or support a reasonable belief that a different handling of these mitigating issues would have resulted in a different outcome. Claim XI of Defendant's Motion is denied.

(PCR5/774-777)

Analysis

The Circuit Court's well-reasoned order is supported by competent, substantial evidence and Taylor's IAC/penalty phase claim must fail for the following reasons.

In this case, the petite 38-year old victim, Geraldine Birch, was brutally murdered by Perry Taylor. "Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. . ." Taylor I, 583 So. 2d at 329.

During the 1992 penalty phase, defense counsel presented evidence of Taylor's remorse and his deprived family background, including abuse he suffered as a child in foster care. Defense counsel also presented evidence of Taylor's good conduct in custody and psychological testimony that while Taylor had above-average intelligence, he suffered from an organic brain injury. See, Taylor II, 638 So. 2d at 31-32.

On resentencing, the trial judge found the following aggravating factors: (1) Taylor had a previous felony

conviction involving the use or threat of violence; (2) the capital felony occurred during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel. The trial court found no statutory mitigators, but did give some weight to Taylor's deprived family background and the abuse he was reported to have suffered as a child. The trial court considered, but gave little weight to Taylor's remorse, to psychological testimony that while Taylor has above-average intelligence, he suffers from an organic brain injury, and to testimony concerning Taylor's good conduct in custody. The trial judge determined that the aggravating circumstances outweighed the mitigating factors and sentenced Taylor to death. Taylor II, 638 So. 2d at 31-32.

Taylor claims that his penalty phase counsel, Manuel Lopez, a former prosecutor who was also experienced in death penalty cases, was ineffective in (1) relying on "only" one mental health expert[10] in 1992, (2) failing to present additional evidence of Taylor's abusive foster home *via* a "more convincing" witness, and (3) failing to present additional mental health evidence (including evidence of a prior head injury, a "newly discovered" PET scan, and a discrepancy in psychological sub-

[10]In 1989, the defense presented the testimony of Dr. Mussenden during the first penalty phase. During the second penalty phase

test scores).

Although, in hindsight, most every trial counsel could have hired more experts and brought in more witnesses, the standard for assessing ineffective assistance claims "is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." Ferrell v. State, 918 So. 2d 163 (Fla. 2005); Strickland, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way.").

Deficiency prong

Taylor failed to establish any deficiency of penalty phase counsel under Strickland. During the 1992 resentencing proceedings, defense counsel not only introduced evidence in mitigation, but also presented arguments against the application of the three strong aggravating factors. (Defense Sentencing Memo dated June 11, 1992, at RS5/818-24). In 1992, penalty phase counsel presented evidence that: (1) Taylor was remorseful; (2) his mother was illiterate; (3) he had been raised in a single-parent household until age 7, when he was placed in foster care, and, thereafter, had limited contact with his birth family; (4) he remained in foster care until he was

---

in 1992, the defense retained Dr. Berland.

14; (5) he received harsh physical punishment in foster care as a consequence for bed wetting; (6) Taylor had been a model prisoner; (7) Otis Allen heard the victim discuss sex for drugs; (8) Dr. Berland administered psychological tests to the Defendant, specifically MMPI and WAIS, and reviewed the tests previously administered by Dr. Mussenden, and (9) Dr. Berland opined that the Defendant had brain damage. In addressing the aggravating factors in 1992, penalty phase counsel emphasized that: (1) Taylor's initial encounter with the victim, Geraldine Birch, was consensual, and the time and location supported the defense theory of a consensual sexual encounter; (2) the defendant was only 16 at the time of the prior sexual battery offense; and (3) the murder victim may have been unconscious when the beating occurred, thus arguably undermining the HAC factor. (See, Defense Sentencing Memo at RS5/819-21).

During the post-conviction hearing, Taylor's penalty phase counsel, Judge Manuel Lopez, confirmed that his job in 1992 was to "try and find as much mitigation as I could, realizing it was a resentencing, and I then couldn't relitigate guilt phase issues." (PCR4/597; 607). In 1984, after six years as a prosecutor, Lopez entered private practice, and almost 90% of his practice from 1984 to 1992 was criminal defense. Lopez had defended several capital cases during that time. (PCR4/595).

Lopez, who was court-appointed, was familiar with the statutory mitigating factors under Florida law. (PCR4/598). In investigating the statutory mental health mitigators, Lopez conducted a background investigation of Taylor's family, his upbringing, and also sought court approval to retain Dr. Robert Berland as a mental health expert. (PCR4/599). Lopez believed that, at that time, a court-appointed attorney would be "hard put" to "get a court to appoint you another mental health expert without showing some extraordinary good cause." (PCR4/600; 616). Looking back, Lopez thought he may have been able to convince the trial court to have "some kind of brain testing" done on the defendant. There was a *possibility* that the trial court may have "appointed a second doctor," although Lopez was "not altogether sure" that he could have "gotten a second expert." (PCR4/600-01; 616). At that time, there generally was only one expert appointed for the defense. In addition, there was a cap for expenditures and you had to request leave of court to exceed the cap. (PCR4/616).

Lopez concluded that it was clear from Dr. Berland's testimony that Taylor had some organic brain damage. (PCR4/601). Lopez could not recall the status of scientific tests in 1992, such as PET scans today. (PCR4/602). In 1992, Lopez did not believe that he'd used any neuropsychologists as witnesses in

death penalty cases. (PCR4/603). If Dr. Berland had found that the statutory mental health mitigating factors existed, Lopez "certainly would have put them on and asked for the instruction." (PCR4/604). Lopez recalled that Taylor's mother was adamant that she didn't want to testify; Lopez followed Taylor's ultimate decision that his mother not testify because Taylor's grandmother testified and Taylor's mother would have been cumulative. (PCR4/605).

Judge Lopez was elected to the bench in 1996. Between 1992 and 1996, Lopez worked at the Public Defender's Office, where he handled some first-degree murder cases and one more capital case. (PCR4/606). At the time that he was appointed to represent Perry Taylor, Lopez previously had handled between 50 and 75 trials. (PCR4/606). This was not his first death penalty case. (PCR4/607). When Lopez was appointed to represent this defendant, Taylor had already been convicted of first-degree murder and sexual battery, and this Court had affirmed Taylor's convictions. (PCR4/607). Under Florida law, Lopez did not have the ability to present [lingering doubt] evidence regarding Taylor's guilt. (PCR4/607).

Judge Lopez agreed that the aggravators in this case were "strong." (PCR4/607). First, Taylor's prior sexual battery conviction involved a 12-year-old girl. The State introduced

evidence of this prior conviction and also had the victim "standing by." (PCR4/609). Second, as to the HAC factor, Lopez recalled that "the injuries to this victim were pretty overwhelming." (PCR4/608). Lopez confirmed that, in support of the HAC aggravator, the State presented evidence that the victim's dentures were broken during the assault, almost every rib was broken, every major organ in her body had been injured to some extent, her brain was hemorrhaging, and her vagina had been lacerated both inside and outside. (PCR4/609). Thus, "it was a very tough case to defend from that perspective." (PCR4/609). The third aggravator –- Taylor's contemporaneous conviction for sexual battery -- was a foregone conclusion because Taylor had been convicted (PCR4/609), and his conviction had been affirmed by this Court. The medical examiner, Dr. Miller, couldn't say that the victim was unconscious through most of the attack. (PCR4/609).

Judge Lopez presented evidence to the jury in an effort to establish some degree of compassion for Taylor's deprived childhood and background. (PCR4/610-11). Lopez called the defendant's mother, Edwina, who asked to be excused (see RS2/249-250); Stanley Graham, the defendant's brother, who established that the defendant had been in a foster home for several years; and Alvin Thomas, who was in the same foster home

as Perry Taylor. During Taylor's resentencing, Alvin Thomas testified that there were only three children in the foster home when he and Mr. Taylor were there together. (RS3/405). Mr. Thomas testified Taylor was punished for bed wetting. During the post-conviction hearing, Edwina Graham, the defendant's mother, confirmed that she was in court, but she didn't want to testify. (PCR11/1765). Stanley Graham, the defendant's brother, previously testified at the 1992 penalty phase. (RS3/419). On post-conviction, Graham added that when Taylor was five years old, Taylor suffered a head injury after falling from a banister. (PCR11/1755-56).

In pursuing the mental mitigation, Lopez hired Dr. Berland. Dr. Berland had been used "pretty extensively" by the Public Defender's Office in the Hillsborough circuit. (PCR4/612). Based on the testing of the defendant and the defendant's behavior, Dr. Berland concluded, and testified, that Taylor was brain damaged. (PCR4/612-13). If Dr. Berland had found that Taylor's condition rose to the level of a statutory mitigator, Lopez believed that Dr. Berland would have told the defense. (PCR4/613). Lopez did not believe that a neuropsychologist's test, alone, could conclusively establish either where any brain damage might exist or quantify the amount of brain damage. (PCR4/614). Judge Lopez agreed that if he had called a

neuropsychologist to testify in 1992, the only thing that the neuropsychologist would have been able to testify to was that he had performed testing and that, in his opinion, the defendant was brain damaged. (PCR4/615). This is the same testimony which was presented by Dr. Berland in 1992. (PCR4/615).

On redirect examination, Lopez agreed that further neuropsychological testing *might* have been helpful in 1992 and might have revealed the existence of statutory mental health mitigation. (PCR4/617). However, under Strickland, 466 U.S. at 689, a "fair assessment of attorney performance requires that every effort be made to *eliminate the distorting effects of hindsight*, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Robinson v. State, 913 So. 2d 514, 527 (Fla. 2005) (e.s.).

In this case, Lopez knew there were statutory and non-statutory mitigators to be investigated before presenting the penalty phase. He hired Dr. Berland, a well-respected psychologist who performed testing and who testified that the defendant is brain damaged, even though he had a slightly above-normal IQ score. CCRC's second guessing does not set forth any basis for deficiency nor does it explain how any different handling of these issues would have resulted in a different

outcome. Resentencing counsel also obtained an independent pathologist to review the circumstances of the victim's death. The fact that neither that pathologist nor resentencing counsel could change the facts of this case does not mean that counsel was ineffective.

Here, as in Robinson, *supra*, this is not a case where trial counsel failed to investigate and present available mitigating evidence. Penalty phase counsel was an experienced criminal defense attorney who was faced with the enormity of representing a client who admittedly committed this horrendously brutal crime. Penalty phase counsel sought to both diminish the impact of the strong aggravating circumstances, and counsel also presented multiple witnesses in support of the defense mitigation. "An attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant's advantage." Mansfield v. State, 911 So. 2d 1160 (Fla. 2005), citing Strickland, 466 U.S. at 689. Taylor's post-conviction reliance on additional mental health experts -- Dr. Dee and Dr. Mossman -- is unavailing. "The presentation of testimony during postconviction proceedings of more favorable mental health experts does not automatically establish that the original evaluations were insufficient." Cooper v. State, 856 So. 2d 969, 976 (Fla. 2003), citing Carroll

v. State, 815 So. 2d 601, 618 (Fla. 2002); Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) (holding that "counsel's mental health investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert"). This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. Darling v. State, 2007 Fla. LEXIS 1233 (Fla. 2007).

Prejudice prong

Even if the defendant arguably could demonstrate any deficiency of counsel, which the State strongly disputes, Taylor cannot demonstrate any resulting prejudice under Strickland. In assessing prejudice, this Court reevaluates the evidence in aggravation against the totality of the mitigation presented during the post-conviction evidentiary hearing to determine whether its confidence in the outcome of the penalty phase trial is undermined. See, Cox v. State, 2007 Fla. LEXIS 1188 (Fla. 2007), citing Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (stating that in assessing prejudice "it is important to focus on the nature of the mental mitigation" now presented).

Much of the evidence that Taylor now claims should have been presented by additional witnesses is merely cumulative to that

which was actually presented at the penalty phase. For example, Dr. Dee's post-conviction testimony was cumulative to Dr. Berland's. Both said Taylor had brain damage, and Dr. Dee's testimony would have merely bolstered that of Dr. Berland. See, Gudinas v. State, 816 So. 2d 1095, 1105-06 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present mitigation that was cumulative to evidence presented at penalty phase); Downs v. State, 740 So. 2d 506, 516 (Fla. 1999) (affirming denial of claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); Dufour v. State, 905 So. 2d 42 (Fla. 2005) (same).

During the 1992 penalty phase, trial counsel presented the testimony of Stanley Graham, the defendant's brother, who established that the defendant had been in a foster home for several years; and Alvin Thomas, who was in the same foster home as Perry Taylor. In post-conviction, Taylor called Howard Ury, who also lived in the same foster home as Taylor. (PCR11/1776-77) Mr. Ury testified that he had been employed as a security guard since 1985. Mr. Ury's demonstrated ability to succeed -- despite spending six years in an allegedly abusive foster home -- significantly undermines Taylor's post-conviction claim.

Moreover, even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. See, Darling v. State, 2007 Fla. LEXIS 1233 (Fla. 2007), citing Gudinas v. State, 816 So. 2d 1095, 1106 (Fla. 2002); Sweet v. State, 810 So. 2d 854, 863-64 (Fla. 2002).

Moreover, during the post-conviction hearing, Charles Kelly, the jail deputy attacked by Taylor in 1992 (after the jury's recommendation), confirmed that he never saw the knife in the defendant's hand and Taylor tried to hit the deputy's face and neck. (PCR11/1774). Thus, Taylor secreted the weapon and pretended to cooperate with the process of handcuffing and shackling in a ruse to get the upper hand in order to attack the deputy.

Dr. Donald Taylor, a psychiatrist, also examined Perry Taylor and found no evidence that the defendant suffers from brain damage. (PCR10/1651). Indeed, not all low IQ or difference between verbal and performance IQ is indicative of brain damage. In this case, there was no medical report substantiating the defendant's brain damage claim and Dr. Taylor noted that brain damage requires more than the typical knocks of childhood. The presentation of additional "mental health" evidence and cumulative evidence of Taylor's troubled childhood

and abysmal foster home experience would not have been nearly enough to counterbalance the powerful aggravating factors in this case. See, Arbelaez v. State, 898 So. 2d 25, 37-38 (Fla. 2005), citing Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (finding no prejudice because the case's strong aggravating factors would have "overwhelmed" mitigation evidence of the defendant's history of drug addiction and his troubled childhood); Buenoano v. Dugger, 559 So. 2d 1116, 1119 (Fla. 1990) ("In our opinion the mitigation evidence . . . in no way would be sufficient to overcome the overwhelming evidence presented against [the defendant] at trial. . . . We do not believe the unfortunate circumstances of Buenoano's childhood are so grave nor her emotional problems so extreme as to outweigh, under any view, the four applicable aggravating circumstances."); See also, Damren v. State, 838 So. 2d 512, 517 (Fla. 2003) (concluding that counsel was not ineffective in failing to present evidence of minimal brain damage, "in light of the strong [CCP, HAC, and contemporaneous violent felony] aggravating factors which were present"); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (holding that "in light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified [to his finding of a 'strong

indication of brain damage’], the outcome would have been different”).

PET Scan

Finally, the Circuit Court did not err in ruling that Taylor was not entitled to post-conviction relief based on any claim relating to the PET scan, either on the basis of alleged ineffective assistance of counsel or as alleged “newly discovered” evidence. As the Circuit Court’s cogent order explained:

> PET SCAN CLAIMS
>
> The Court finds that the Mr. Taylor is not entitled to postconviction relief arising from any claim related to a PET scan, either as a basis for ineffective assistance of counsel or as newly discovered evidence claim. The Court considered Defendant’s PET scan results as part of evidentiary hearings held on June 7 and 8, 2004.
>
> Dr. Frank Wood testified at the evidentiary hearing on June 7, 2004, that he discovered left inferior dorsolateral frontal hypometabolism, and this meant a metabolism value lower that normal in the PET scan of Mr. Taylor. Dr. Wood testified that he was corroborating Dr. Dee’s statements and narrowing their scope that said certain data indicated frontal lobe dysfunction and that he considered it more likely that certain data indicated frontal lobe dysfunction and that he considered it more likely to be left frontal lobe dysfunction. Dr. Wood testified that the abnormalities he found would be related to cognitive or judgment disinhibition and verbal memory problems.
>
> Dr. Jon Kotler testified at the evidentiary hearing on June 8, 2004. Dr. Kotler discussed a PET scan done on Mr. Taylor and said that on quantitative analysis there was an area of mild reduction in metabolic activities relative to gentle borderline reduction as slightly greater than a 20 percent variance. He testified that based on his experience he

did not think this reduction in the left frontal lobe was significant at all and that he saw no deviations on the PET scan that were significant.

Dr. Helen Mayberg, testified at the evidentiary hearing on June 8, 2004, about the photographs of Mr. Taylor's PET scan. Dr. Mayberg said her impression was one could see some areas of asymmetry, but overall there were no findings not consistent with any known diagnostic entity. At the evidentiary hearing, Dr. Mayberg was asked by the state if PET scan was being used in 1988 to diagnose or corroborate or confirm behavioral conditions. She responded, "Well, when you put is that way, no. I mean in '88 there weren't even statements yet by the Academy of Neurology summarizing the primary uses." See page 372, Transcript of Evidentiary Hearing, June 8, 2004, Volume IV.

The Court finds failure of counsel to obtain a PET scan either in 1988 or 1992 was not deficient performance. The Supreme Court of Florida recently issued an opinion regarding the use of SPECT scans and PET scans. Ferrell v. State, 2005 WL 1404148 (Fla.), 30 Fla. L. Weekly S451, 30 Fla. L. Weekly S863 (Fla. June 16, 2005). (As revised on denial of Rehearing December 22, 2005). In footnote 11 of the Ferrell case the Florida Supreme Court noted:

In fact, a capital cases defense manual prepared by the Florida Public Defender's Association and distributed in 1992 did not mention either PET or SPECT scans in a list of medical tests used to confirm brain damage. Furthermore, the manual cautioned that even the listed medical tests could be unreliable and did not always indicate organic brain damage. Instead, the manual stated that neuropsychological testing was actually more reliable in showing such deficits.

In addition, the Court does not find that Defendant can establish any resulting prejudice under Strickland. In the present case, as in the Ferrell case, the jury was aware of the defendant's brain damage claim. The PET scan results would have done little more than confirm that there might be some evidence of brain damage, which was open to question depending on the person interpreting the PET scan.

The Court notes that both Dr. Kotler and Dr. Mayberg did not think the PET scan results of Mr. Taylor represented a significant indication of brain damage. The court finds the testimony of Dr. Kotler

> and Dr. Mayberg regarding Mr. Taylor's PET scan results to be highly credible. If the PET scan results were considered under a newly discovered evidence standard the court does not find they would probably produce either an acquittal on retrial or produce a change in Mr. Taylor's death sentence. See Mills v. State, 786 So. 2d 547 (Fla. 2001).
>
> (PCR5/782-785)

In this case, as in Ferrell, trial counsel's failure to obtain a [PET] scan in 1992 was not deficient performance. In fact, as this Court noted in Ferrell, "a capital cases defense manual prepared by the Florida Public Defender's Association and distributed in 1992 did not mention either PET or SPECT scans in a list of medical tests used to confirm brain damage." Id. at fn. 10. Taylor failed to establish any resulting prejudice under Strickland. Here, as in Ferrell, the jury was aware of the defendant's "brain damage" claim; and although scan results might confirm the mental health expert's diagnosis, they were not necessary in "forming that diagnosis." Id.

ISSUE III

THE PROFFERED DEPOSITION OF SONYA DAVIS AND "NEWLY DISCOVERED EVIDENCE" CLAIM.

Standard of Review

In Preston v. State, 2007 Fla. LEXIS 961, 22-23 (Fla. 2007), this Court reiterated the standards of review applicable to a claim of newly discovered evidence:

> The standard of review governing claims of newly

> discovered evidence was first enunciated in Jones v. State, 709 So. 2d at 521. To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones, 709 So. 2d at 521. Newly discovered evidence satisfies the second prong of the Jones test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Jones, 709 So. 2d at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

The Circuit Court's Ruling

The Circuit Court ruled that Taylor's amendment was untimely, that Sonya Davis would not have testified on Taylor's behalf at the time of trial, and that Davis's proffered deposition would not have been inadmissible as substantive evidence.

On February 28, 2005, the Circuit Court ruled:

> Defendant's Motion to Admit Deposition Of Sonya Davis Into Evidence, filed on February 25, 2005, is **DENIED**. **The Deposition would not have been admissible as substantive evidence in the guilt phase of the trial. In addition, the Deposition supports a new claim that is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing.** Defendant's evidentiary hearing is scheduled for March 3, 2005.

(PCR5/723) (e.s.)

The Circuit Court's final order denying Taylor's IAC/guilt phase claim (failure to present Sonya Davis) also noted:

> The Motion is **DENIED** as to Claim XXIV, pages 114 – 115; Defendant's claim that trial counsel was ineffective pursuant to Strickland for failing to present the testimony of the Victim's daughter, Sonya Davis, in the Guilt Phase. **Defendant's proffer of the deposition of Sonya Davis taken on February 24, 2005, clearly shows Ms. Davis would not have been willing to testify in the prior proceedings. In addition, Defendant's addition of Claim XXIV is DENIED as untimely pursuant to Rule 3.851(f)(4), which allows amendments up to 30 days prior to the evidentiary hearing**. Defendant's evidentiary hearing is scheduled for March 3, 2005.

(PCR5/723) (e.s.)

Analysis

In rejecting this post-conviction claim, the Circuit Court did not abuse its discretion in (1) denying Taylor's motion to amend as untimely, (2) finding that Sonya Davis would not have been willing to testify on Taylor's behalf at trial, and (3) concluding that her deposition was inadmissible as substantive evidence.

First, Taylor's attempted 11th-hour amendment of his third post-conviction motion was untimely under Rule 3.850 and Rule 3.851(f)(4). See e.g., Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005); Moore v. State, 820 So. 2d 199, 205 (Fla. 2002) (holding that trial court did not abuse its discretion in

striking third amended 3.850 motion). As this Court explained in Moore,

> This Court has permitted amendments to rule 3.850 motions for postconviction relief upon the receipt of public records to include and new or additional claims in light of information obtained from the furnished documents. See Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996); Reed, 640 So. 2d at 1098; Muehleman v. Dugger, 623 So. 2d 480, 481 (Fla. 1993). However, a second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. See Pope v. State, 702 So. 2d 221, 223 (Fla. 1997).

Moore, 820 So. 2d at 205.

Second, Sonya Davis is not a "newly discovered" witness and her deposition does not constitute "newly discovered" evidence under Florida law. In order to obtain relief on a claim of "newly discovered" evidence, a defendant must show, "first, that the newly discovered evidence was unknown to the defendant or defendant's counsel at the time of trial and could not have been discovered through due diligence and, second, that the evidence is of such a character that it would probably produce an acquittal on retrial." Mills v. State, 786 So. 2d 547, 549 (Fla. 2001) (citing Jones). Taylor did not even attempt to satisfy the "due diligence" requirements under both Rule 3.850(b)(1) and Rule 3.851(d)(2)(A), *i.e.,* that the facts on which his "newly discovered" evidence claim is predicated were unknown and could

not have been ascertained by the exercise of due diligence.

Third, in Vining v. State, 827 So. 2d 201, 211-13 (Fla. 2002), this Court addressed the requirements for a showing of good cause for leave to amend a motion for post-conviction relief under Florida law. This Court stressed that motions for post-conviction relief should be fully pled when filed and that later attempts to amend such motions were improper unless the defendant satisfied the requirement for filing a successive motion. Under Fla. R. Crim. P. 3.851(d)(2)(A), the grounds for filing a successive motion are limited to claims that allege:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, ...

Fourth, not only did Taylor fail to meet the "due diligence" requirement, but he also failed to show that any alleged "newly discovered" evidence is of such nature that it would probably produce an acquittal on retrial. See, Johnson v. State, 904 So. 2d 400 (Fla. 2005). At his jury trial in 1989, Taylor testified that he did not even know the victim, Geraldine Birch, when she allegedly offered to "turn a trick" in exchange for crack cocaine and/or ten dollars. (R4/441-45). According to Sonya Davis, her mother was "no tricker," and, on one occasion, Ms. Davis saw her mother sitting on the front porch with Taylor and Davis was certain they were dating. This visit occurred about a

week before Taylor killed her mother. (SR2/246). Thus, Ms. Davis affirmatively contradicted Taylor's own trial testimony. Ms. Davis also confirmed, *inter alia*, that she didn't want to be a witness, she was "not going to testify against my mom for him," and she would not have been willing to testify for the defendant. (SR2/252; 254-55). See, Ferrell v. State, 918 So. 2d 163 (Fla. 2005) (denying IAC/failure to present witness who were either unable or unwilling to testify at trial). In sum, Taylor failed to establish both "due diligence" and that the testimony of the victim's daughter, Sonya Davis -- who contradicts Taylor's trial testimony, who was not present at the scene of the crime, and who would not have been willing to testify on Taylor's behalf -- is of such nature that it would probably produce an acquittal on retrial.

Finally, this deposition would not have been admissible as substantive evidence. See, Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992) [ruling trial court properly excluded deposition of witness who failed to appear at trial, citing State v. James, 402 So. 2d 1169 (Fla. 1981), which held that discovery depositions were not admissible as substantive evidence in criminal cases absent compliance with Florida Rule of Criminal Procedure 3.190(j)].

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the Circuit Court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished U.S. Regular mail to David R. Gemmer, Assistant CCRC-Middle Region, Office of the Capital Collateral Regional Counsel-Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this 24th day of September, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE