IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-615

PERRY ALEXANDER TAYLOR,
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Taylor has been sentenced to death. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Taylor, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

Mr. Taylor was indicted by the grand jury in Hillsborough County, Florida, on November 2, 1988. 1989ROA Vol. IX 1047-48.[1] He was charged with first degree murder and sexual battery/great force. He pled not guilty. Jury trial commenced on May 8, 1989. The jury found Mr. Taylor guilty of the crimes charged. 1989ROA Vol. IX 1173. The jury rendered a sentencing recommendation of death 1989ROA Vol. IX 1179. On May 12, 1989, the judge sentenced Mr. Taylor to death as to the first degree murder conviction and to life in prison on the sexual battery count. 1989ROA Vol. VI 788, Vol. IX 1182-87 (written findings).

A timely direct appeal was filed and the Supreme Court of Florida affirmed Mr. Taylor's convictions but remanded the case for resentencing before a jury on the first degree murder conviction. *Taylor v. State*, 583 So. 2d 32 (Fla. 1991). The jury rendered a recommendation of death by a vote of eight to four (1992

[1] Citations to records of the three lower court proceedings in this case will be:
1989ROA Vol. # page# -- the 1989 and 1992 trial transcripts are consecutively numbered and were placed at the front of each record on appeal
1992ROA Vol. # page#
2007ROA Vol. # page# -- transcripts were prepared by several reporters using separate pagination, but the transcripts are included within the record consecutively renumbered to provide unambiguous pagination for record reference
2007ROA SUPP Vol. # page # -- pagination restarted at "1," transcripts again consecutively renumbered for unambiguous reference

ROA Vol. IV 598, Vol. V 799). The judge sentenced Mr. Taylor to death. The resentencing court entered written findings of fact (1992 ROA Vol. V 812-817).[2]

A timely direct appeal was filed and the Supreme Court of Florida again affirmed Mr. Taylor's death sentence. *Taylor v. State*, 638 So. 2d 30 (Fla. 1994). Mr. Taylor filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 14, 1994. *Taylor v. Florida*, 115 S. Ct. 518 (1994). Mr. Taylor timely filed his Rule 3.850 motion March 12, 1996.

In 1999, Florida Supreme Court Chief Judge Major B. Harding ordered the special appointment of Judge Robert A. Young of the Tenth Judicial Circuit to the Thirteenth Circuit because two of Mr. Taylor's trial attorneys had become circuit court judges in Hillsborough County. 2007ROA Vol. III 550. Ultimately, the Honorable J. Michael McCarthy of the Tenth Circuit presided over the evidentiary hearing in this case. A preliminary order after hearing before a predecessor post-conviction judge had limited evidentiary proceedings to Claims V and XI of the Third Amended Motion. The lower court held evidentiary hearings on October 7,

[2] 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.
Taylor v. State,, 638 So.2d 30, 31-32 (Fla. 1994).

2003, June 6-7, 2004, and March 3, 2005. The court also heard and considered a Fourth Amended Motion To Vacate Judgments Of Conviction And Sentence, granting the motion to amend in part, denying the motion in part. 2007ROA SUPP. Vol. I 95-212 (Fourth Amended Motion);[3] 2007ROA Vol. 5 787 (order).

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[3] The issues raised in the Fourth Amended Motion, all raised as violations of state and federal constitutional protections, were:

I. The transcripts of the trials were so inaccurate they deprived the defendant of the ability to adequately appeal or seek postconviction relief.

II. Mr. Taylor's inculpatory statements to police were not knowing and voluntary due to mental impairment.

III. Prosecutorial misconduct in the guilt phase of trial.

IV. Mr. Taylor was absent from critical stages of trial.

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.

VI. The state failed to prove corpus delicti to allow the use of Mr. Taylor's inculpatory statements as to the death and sexual battery allegations.

VII. Ineffective mental health assistance as to guilt issues.

VIII. Ineffective assistance and deprivation of due process when the defense was prevented from presenting evidence of the victim's alleged drug abuse and prostitution, relevant to consent.

IX. Prosecutorial misconduct at resentencing.

X. Ineffective assistance of mental health experts as to mitigation issues.

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.

XII. Innocent of the death penalty.

XIII. Automatic aggravator of sexual battery.

XIV. Prior felony conviction, an aggravator, was wrongfully obtained.

XV. Facial vagueness of aggravator statue/

XVI. Resentencing jury confused by instructions and comments diluting its sense of responsibility.

XVII. Burden of proof at sentencing unconstitutionally shifted to defendant.

The trial court denied all claims. 2007ROA Vol. 5 717-85.

STATEMENT OF THE FACTS

TESTIMONY AND EVIDENCE IN GUILT AND PENALTY TRIALS

Mr. Taylor is on death row for the death of Geraldine Birch. When police first spoke with Mr. Taylor, he denied involvement. After volunteering to give the police the sneakers he wore the night of the death, police matched the shoes prints to prints found at the scene. Confronted with this evidence, Mr. Taylor ultimately confessed to kicking the victim. He told police the victim took him to the baseball dugout where her body was later found, and they attempted vaginal intercourse for about a half minute. The victim stopped the attempt and began to perform fellatio. Mr. Taylor told police she was nicking his penis and he repeatedly asked her to

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XVIII. Death penalty statute is unconstitutional.
XIX. Defense pathology investigation for resentencing was deficient.
XX. Cumulative error.
XXI. Nixon Claim.
XXII. Mr. Taylor is wrongfully convicted of sexual battery, the result of *Brady* and G*iglio* violations by the state, ineffective assistance of trial counsel, and demonstrated by newly discovered evidence. The court denied the motion to amend to add this claim because it was "already adequately raised in the existing pleadings." 2007ROA Vol. V 787.
XXIII. Ineffective assistance for failure to present testimony of victim's sister regarding penalty. Waived by defendant.
XXIV. Ineffective assistance of counsel for failure to present testimony of the victim's daughter at the guilt phase as to the victim's pre-existing friendship with the defendant. Denied as untimely and because the daughter said she would not have testified in 1989. Also subject to ore tenus motion for continuance to develop the claim as newly discovered evidence, denied by the court.

stop, until he suddenly went off in a rage and first choked her, then kicked her. He did not know she was dead when he left.

The state made much of the fact that Mr. Taylor originally denied having vaginal intercourse with the victim, but he shortly thereafter mentioned the fact to another detective assigned to take hair samples and pictures. Detective George McNamara testified in the first trial that Mr. Taylor denied having vaginal sex during his interrogation. 1989ROA Vol. II 164. Mr. Taylor denied he concealed the vaginal sex. He testified that the police never asked him about it. He didn't mention it because it was never asked and the police questioning constantly interrupted him so he could not give full answers. 1989ROA Vol. IV 503-04. In rebuttal at the 1989 trial, Detective McNamara testified that he specifically asked Mr. Taylor if he had vaginal sex and the defendant denied it. 1989ROA Vol. IV 531. At the 1992 retrial on the penalty phase, Detective McNamara testified that when he asked Mr. Taylor about vaginal sex, Mr. Taylor told him instead about the oral sex. 1992ROA Vol. II 259.

At the first trial, Associate Medical Examiner Dr. Lee Miller testified that the victim was dead before the final blows were administered and that all of the injuries in the genital area were, to a reasonable degree of medical probability, caused by the insertion of a large object which distended the area and cause both the "inside" and "outside" lacerations. 1989ROA Vol. I 82-87. He also said that,

to a reasonable degree of pathological probability, the genital injuries were not caused by blows. 1989ROA Vol. I 98-100.

At the penalty retrial, Dr. Miller's testimony changed as to the cause of lacerations in the victim's perineal area. In 1989 he testified that, to a reasonable degree of medical probability, the perineal lacerations were from distention by an inserted large object. He had no opinion in 1992, to a reasonable degree of medical probability, but opined "I'm not really sure how that larger tear on the outside was sustained. It's not really typical of something large being inserted into the vagina, although that is a possibility. It's too far away." 1992ROA Vol. II 313. He testified the perineal wounds could have been caused by a kick. 1992ROA Vol. II 321.

In the 1992 penalty trial, Mr. Taylor's grandmother testified that Mr. Taylor's mother was about 50-52 years of age at the time of the 1992 trial, that she could not read or write, and that she had suffered a brain hemorrhage as a child. 1992ROA Vol. III 409.

TESTIMONY AND EVIDENCE IN POST-CONVICTION EVIDENTIARY PROCEEDINGS

I. Medical Examiner and Autopsy

A. Dr. Lee Miller

Dr. Miller was an associate medical examiner for Hillsborough County from 1974 through 2002. He had training in pathology and incidental training in

forensic pathology and was board certified in forensic pathology. He had no special expertise in gynecology or toxicology.

Dr. Miller performed the autopsy on the victim, Geraldine Birch, the afternoon of October 25, 1988, 30 to 40 hours after the body was discovered. 2007ROA Vol. XII 1921. Dr. Miller identified Defense Exhibit 2 as a draft autopsy report he prepared. At first he thought he had prepared a prior draft autopsy report, but he could find no such prior draft in his file and assumed Defense Exhibit 2 was the only draft. 2007ROA VOL. XII 1922. He testified that he made the changes on the draft to delete the actual lab reports of acid phosphatase levels so that the final report indicated that acid phosphatase levels were "negative." 2007ROA 1923. The only microscopic examination he did was on slides of bodily fluids which were negative for spermatozoa. Dr. Miller said there might be some slides with these sample still kept at the Medical Examiner's Office. 2007ROA Vol. XII 1923.

Dr. Miller testified that he excised an apparent bite mark from the victim's arm. He said he preserved it for a couple years, but the specimen was discarded after the first trial – specimens are routinely discarded after trial. 2007ROA 1924-25. Dr. Miller had no training in forensic odontology (mis-transcribed in the transcript as "autology."). He called in a forensic odontologist, Dr. Longmire of Tampa (mistranscribed as "Lonmeir"). 2007ROA Vol. XII 1925. Although his draft report indicated there was a report by Dr. Longmire, that assertion was

deleted from the final report. Dr. Miller could not recall if he ever saw a report from the odontologist. He admitted he was remiss in failing to follow up with the odontologist and wished he had done so. Dr. Miller could not recall telling defense counsel about Dr. Longmire. 2007ROA Vol. XII 1926.

Dr. Miller testified that State Exhibit 24 from the 1992 trial (and also introduced in the 1989 trial), a photograph of some of the injuries to the victim, accurately showed a one half inch perineal laceration, 2007ROA 1928-30, and two smaller lacerations closer to the victim's external genital area, but still in the perineum, 2007ROA Vol. XII 1932. However, Exhibit 24 did not show all of the genital injuries. 2007ROA Vol. XII 1933.

At the evidentiary hearing, the defense introduced Defense Exhibits 9 and 10, prints of slides taken by Dr. Miller during the autopsy. 2007ROA Vol. XII 1935. Dr. Miller testified that Defense Exhibit 9 best showed the victim's genital injuries. 2007ROA Vol. XII 1936. He said that the victim "had a very patulous, meaning loose or floppy, vagina, and you can't see a clear cut canal." 2007ROA Vol. XII 1937. The autopsy report indicated "On the inside of the labia minora, the ventral 180 degrees, are parallel or radial lacerations extending just through the mucosa measuring to one-third inch, approximately ten in all." 2007ROA Vol. XII 1940. Dr. Miller testified that regardless of his writing, the photograph (Def. Exh. 9), showed some of the ten radial lacerations "inside the labia minora in which I think anybody would describe as the vaginal canal." 2007ROA Vol. XII 1941.

Dr. Miller testified that he did not have to use a speculum to review or reveal the interior of the vagina for the autopsy photographs. All of the injuries he observed during the autopsy in the genital area were shown in the photograph introduced as Defense Exhibit 9. 2007ROA Vol. XII 1940-42.

Dr. Miller testified that when he uses the word "probably" in rendering opinions "to a reasonable degree of medical probability," "it's much better than 51 percent, which I'm told is the legal term for probably. I don't use probably if I think something's a coin flip. I have to be pretty sure." 2007ROA Vol. XII 1944. Dr. Miller claimed that he told attorneys that his standard differed from theirs when they asked him about a reasonable degree of pathological probability. 2007ROA Vol. XII 1944. Asked whether he volunteered the distinction or made the distinction when asked, Dr. Miller said "Sometimes I – sometimes it just, it just comes out, I don't know. It's come up dozens and dozens of times and everybody disagrees on that point. And so I usually try to make it clear, but I can't guarantee that." 2007ROA Vol. XII 1944-45. "Probably gives you a little room to wiggle, I would think." 2007ROA Vol. XII 1946.

Dr. Miller then agreed that his testimony during the guilt phase of the 1989 trial was that, to a reasonable degree of medical probability, using Dr. Miller's "almost to a certainty" standard, the perineal and ten redial injuries were all caused by stretching from insertion of a large object. 2007ROA Vol. XII 1948. Dr. Miller also agreed that he testified in 1989 that the injuries, to an unspecified reasonable

degree of medical probability, were not caused by blows to the external perineal area, but he couldn't rule out the possibility. 2007ROA Vol. XII 1947. 1989ROA Vol. I 98-100.

Dr. Miller also agreed that he testified in the 1992 resentencing proceeding, regarding the lacerations in the perineal area, "I'm not really sure how that larger tear on the outside was sustained. It's not really typical of something being inserted in the vagina, although that's a possibility. It's too far away. . . . There are any number of possibilities [how the larger perineal tear was inflicted]. I don't really have any degree of certainty about that, about that one." 2007ROA Vol. XII 1948-49 (quoting from 1992ROA Vol. II 313).

Dr. Miller then volunteered that his opinion of what caused the genital injuries had changed, based on the conclusions of Dr. Wright, a witness for the defense in this post conviction proceeding (testimony summarized after this section):

> **[T]here was something that wasn't brought up by any of the attorneys in any of those depositions you referred to and perhaps I should have brought it up myself. It was brought up by a subsequent witness whose deposition I read.**
>
> . . . .
>
> . . . .Dr. Wright said that the injuries to the inside of the vagina were sustained – probably sustained by a kick or a blow. Whereas, I had said they were sustained by a stretch injury. . . . **I agree that if a blow had been struck where the toe of the shoe actually went, went into the vagina stretching the vagina it would have introduced the injuries that I've described.**
>
> . . . . I did not describe originally the inserting of an object and the attorneys didn't bring it out that it could have been a hard blow

from a shoe going directly in. That didn't come up and it certainly seems **a reasonable possibility, maybe even a probability**, in reading Dr. Wright's testimony.

. . . .

I'm saying that [the ten radial lacerations] could have been the result of a kick. One of many scenarios where something went in there that was wider than the vagina and stretched it. We talked about kicks and blows earlier on. But the subject of the shoe or the foot actually entering the vaginal canal didn't come up. That was – it's a one-in-a-million shot.

Q What do you mean a one-in-a-million shot?

A Well, it's you can kick somebody an awful lot in that area and not have your tow actually go up into that narrow vaginal canal.

2007ROA Vol. XII 1949-51.

Dr. Miller examined the defendant's shoes which were identified in the 1989 trial as the shoes the defendant wore at the time of the homicide. Dr. Miller agreed that

A **Any shoe, including a shoe of that size, would be capable of penetrating this lady's vagina. She had a very large vagina and it was kind of pouching to the outside.**

Q Is there a specific medical term for that, that pouching and largeness?

A Extraversion.

Q Extraversion?

A Extraversion. Protrusion.

2007ROA Vol. XII 1955.

Dr. Miller next explained why he altered a draft autopsy report to delete a lab report of actual levels of acid phosphatase ("AP," a chemical marker for semen) found in samples from the victim. He said that "negative" did not mean the complete absence of AP. 2007ROA Vol. XII 1959. Dr. Miller testified that

when he gave a deposition in 1989 in which he stated that there was no acid phosphatase found, he mentally defined AP as "the presence of seminal acid phosphatase." 2007ROA Vol. XII 1965. He also affirmed that he testified in the 1989 discovery deposition that his report that the victim was negative for AP "are the results of the laboratory's analysis . . . ." 2007ROA Vol. XII 1965.

Dr. Miller admitted that he had no recollection of ever telling the attorneys involved in Mr. Taylor's case what he meant by "negative" when reporting on acid phosphatase test results. 2007ROA Vol. XII 1968. He said he would not be surprised if one of the attorneys on the case did not understand that tests could show the presence of acid phosphatase but still be "negative" for acid phosphatase. 2007ROA Vol. XII 1967. Then he said he would be a little surprised, even though he knew one of the attorneys in this case did not understand that lab results showing the presence of acid phosphatase could still be reported as "negative." 2007ROA Vol. XII 1947-48. He could not recall which attorney believed "negative" meant "zero," but he said he had to explain the matter to the attorney, but he wasn't really 100 percent sure. He did recall that he had to explain that "negative" did not mean "zero" to many attorneys. Dr. Miller didn't think such an explanation had been given in any deposition or at trial in this case. "But probably in previous cases at one time or another it was." 2007ROA Vol. XII 1968.

Dr. Miller testified that acid phosphatase deteriorated rapidly after death, half gone in 24 hours, almost all gone in 48 hours, most of the time. 2007ROA

Vol. XII 1970. Pressed to apply this principle to the instant case, when the autopsy was not performed and the samples taken until a day and a half after the body was found, suggesting an AP level at time of death of 700 or more, Dr. Miller said the half-life rule only applied to high levels of AP, and that the levels in this case were low. 2007ROA Vol. XII 1972. He could not recall how he preserved the fluid samples sent to the lab for AP measurement, and believed he might have used a technique which would have allowed the AP level to continue to deteriorate until tested. The sample was received by the lab at 1:32 a.m. on the 26th, or almost 48 hours after the victim died. V3-167. The results were signed-off at the lab on the 28th, no time specified, or four days after the homicide. 2007ROA Vol. XII 1973-74.

On cross-examination, Dr. Miller said he still believed the radial lacerations were caused by "an object large enough to stretch enough to produce those tears." V3-168. On redirect, he said it would be from stretching, not direct impact. V3-169.

B. Dr. Ronald Wright

Dr. Wright, a defense witness, is a forensic pathologist, an associate professor of Pathology at the University of Miami Medical School for more than 27 years, board certified in anatomic, clinical and forensic pathology and a Diplomate of the National Board of Medical Examiners. 2007ROA Vol. X 1526-28. He was a medical examiner in various jurisdictions from 1972, and Chief

Medical Examiner in Broward County, Florida from 1980 through 1994. 2007ROA Vol. X 1529.

Dr. Wright testified that the genital injuries were caused by kicking. He said that, to a reasonable degree of medical probability, "She was kicked." 2007ROA Vol. X 1537. Dr. Wright specifically testified that, to a reasonable degree of medical probability, the victim did not suffer a sexual battery by intrusion of an object penetrating the vagina. 2007ROA Vol. X 1544-45. She was kicked. 2007ROA Vol. X 1545.

The defendant's tennis shoes, 1989 Trial Exhibit 26, were capable of inflicting the injuries to the area in question. 2007ROA Vol. X 1538.

Dr. Wright testified that the lacerations in the genital area could have been caused either by an oblique strike of the shoe, stretching and tearing the skin, or by stretching by a shoe in a kick. 2007ROA Vol. X 1542-44. The victim's lacerations were immediately next to the pelvic bone toward the front, and against the coccyx to the back, which is the way an oblique kick would have caused the lacerations – "What produces lacerations is being close to the bone. So part of it is held down and the other part isn't." 2007ROA Vol. X 1543.

Dr. Wright said the genital injuries were inflicted after the victim died, to a reasonable degree of medical probability. 2007ROA Vol. X 1531. The injuries showed no swelling, and swelling would have been apparent even if the victim had survived only seconds. 2007ROA Vol. X 1532. He also testified, consistently

with Dr. Miller, the medical examiner (and only eyewitness to the victim's injuries), that Defense Exhibits 9 and 10, photographs of the victim's injuries, showed every injury to the genital and perineal area noted in Dr. Miller's autopsy report. 2007ROA Vol. X 1532.

Dr. Wright said the pattern of kicking injuries to the victim was always associated with someone who is in a rage. In the instant case, to a reasonable degree of medical probability, the injuries were consistent with Mr. Taylor, if he were the one who kicked the victim to death, being in a rage. 2007ROA Vol. X 1581.

Dr. Wright then explained how Dr. Miller's autopsy was below standards deemed acceptable in 1988.

A microscopic examination of the wounds would have allowed an examiner to definitively know whether the victim was alive when the injury occurred. 2007ROA Vol. X 1534. Excision would have also allowed a more thorough search for evidence of semen with an ultraviolet lamp. Apparently, failure to look for semen in this manner reduces the accuracy of determining the presence of semen from 100 percent to 50 percent. 2007ROA Vol. X 1535. In fact, failure to excise the critical organs for a closer examination for semen means "doing the Wood's lamp examination [which Dr. Miller says he did] is kind of a waste of time." 2007ROA Vol. X 1535.

The generally accepted approach in 1988 to examining a deceased female victim when rape is suspected is to remove the vagina, rectum and bladder as a block to test for seminal fluid and DNA. The procedure also permits microscopic examination of the injuries for any evidence of "vital reaction" such as hemorrhage into the tissue and for evidence of healing. The only reason a medical examiner would not do such a procedure would be if he wasn't trained to do the examination that way. 2007ROA Vol. X 1533.

Dr. Wright teaches his students that "to a reasonable degree of medical probability" means 90% or better, and that is the standard generally taught to medical examiners. 2007ROA Vol. X 1536. Anyone using a 51% standard should disclose the variant definition voluntarily, without prompting or questioning. 2007ROA Vol. X 1536.

Dr. Wright testified that, when Dr. Miller was asked in the 1989 trial, 1989ROA Vol. I 104, "What is your opinion within a reasonable degree of medical probability as to the presence of acid phosphatase in the vagina in this case," the correct answer would have been "It's present. Prostatic acid phosphatase is present at a level of . . . . 237, yes." 2007ROA Vol. X 1552. The testimony by Dr. Miller in 1989 that "I was able to detect neither acid phosphatase or spermatozoa . . . ." is false.

A reasonable forensic pathologist in 1988 would have followed up test results for acid phosphatase of 264 or 237 with additional tests as recommended in

a journal article available to any pathologist in 1988.[4] 2007ROA Vol. X 1552. The level of acid phosphatase found in the victim was consistent with consensual sexual intercourse within 24 hours of her death. The journal study indicated that if the semen donor were older than 50 years of age, the levels in the test results in this case would have indicated consensual sexual intercourse within 8 hours. The level would also "certainly" be consistent with pre-ejaculate deposited in consensual sexual intercourse near the time of death. 2007ROA Vol. X 1553.

As to the bite mark excised by Dr. Miller, Dr. Wright testified that a reasonable standard of care for a medical examiner in 1988 would have been to follow up with the forensic odontologist and obtain a copy of the report. 2007ROA Vol. X 1554. The bite mark in this case showed bruising, which meant it was inflicted some time before the victim died. 2007ROA Vol. X 1554. Without a microscopic examination of the bite mark, however, it is impossible to narrow the time of the bite any better than within two or three days before death. 2007ROA Vol. X 1555-56. Dr. Wright testified the appropriate way to process the bite mark, pursuant to the reasonable standard of care, would have been to

[4] Dr. Wright testified that the leading study on levels of acid phosphatase was published in 1977, 11 years prior to the autopsy in this case, in a journal received by virtually all pathologists. 2007ROA Vol. X 1549-50. Defendant's Exhibit 4. The study established that acid phosphatase levels below 100 indicated an absence of semen, levels above 300 indicated almost certainly the presence of semen, while levels below 300 could not preclude more recent coitus. 2007ROA Vol. X 1546-47. The article recommended that samples with levels below 300 should undergo further testing to confirm or refute the presence of semen. 2007ROA Vol. X 1549.

photograph the bite mark with rulers to establish directionality in two directions, take swabs of the area for DNA analysis (which medical examiners started to collect routinely in 1986 or 1987, 2007ROA Vol. X 1559), take microscopic sections to determine the age of the bite, and then, if a forensic pathologist cannot come to the morgue, to excise the bite, carefully pin it to a wax structure to keep it undistorted, and then preserve it in formaldehyde. 2007ROA Vol. X 1556-57.

If Dr. Wright had been retained by the defense in 1989, he would have been able to obtain microscopic sections from the bite mark and could have established to a much closer approximation when the bite mark was inflicted in relation to the death of the victim. 2007ROA Vol. X 1558. He also would have followed up on the forensic odontologist's report to find out what that expert had to say. 2007ROA Vol. X 1558.

A reasonable standard of care in 1988 would have required a medical examiner to have taken three separate samples from a victim for testing for rape – one for slides, one for the acid phosphatase test, and one for DNA analysis. 2007ROA Vol. X 1559. It should have been done and was absolutely outside the standard of care. 2007ROA Vol. X 1559-60. Dr. Wright would have been able to testify in 1989 as to the failure in the standard of care relating to the bite mark, the DNA, and the acid phosphatase issues. 2007ROA Vol. X 1560.

The evidence indicates to a reasonable degree of medical probability that the victim's genital injuries were inflicted by a kick, because every other injury was

inflicted by a kick, and because no objects were found nearby that could have been used, and such objects usually remain at the scene. 2007ROA Vol. X 1561.

On cross examination, Dr. Wright said that while blood may have been present in the external perineal wounds, it was from postmortem leakage. The absence of swelling indicated the wounds were inflicted after death. 2007ROA Vol. X 1566. The wound could have occurred, for example, in the moment after breathing has stopped but before the heart ceases. 2007ROA Vol. X 1567. He testified that the fact Mr. Taylor confessed did not eliminate the need to process the bite mark. Dr. Wright testified that he had cases with a confession where he later established the suspect did not produce the bite mark. 2007ROA Vol. X 1575.

Dr. Wright said that the fact that the state's psychiatrist (Dr. Taylor, testimony summarized below) reported that Mr. Taylor told him he started to have consensual intercourse with the victim, and the trial evidence which showed Mr. Taylor admitted he partially inserted his penis during an initial effort at intercourse, were consistent with the level of acid phosphatase found in the victim. The level of prostatic acid phosphatase, 237, was consistent with a pre-ejaculate deposit near the time of death, and also with full intercourse within 24 hours of her death. 2007ROA Vol. X 1573-74.

On redirect, Dr. Wright testified that, although the state's psychiatrist reported that Mr. Taylor "began to have intercourse" with the victim, 2007ROA Vol. X 1573, the statement could mean a lot of things, and that Mr. Taylor's

testimony at trial and his confession to the police, that he began to have intercourse with partial insertion, but that the victim stopped and began oral sex, in no way indicated any of the acts were non-consensual. 2007ROA Vol. X 1576.

The only blood shown in the photographs emanating from the kick wounds in the genital area came from the large gash which was on the upper thigh and extended to the perineum. None of the blood whatsoever came from the inner areas of the genitals, such as the labia minora. 2007ROA Vol. X 1577-78. He further testified that the photograph clearly showed that the blood flow from the perineal/thigh gash was postmortem. 2007ROA Vol. X 1579. Dr. Wright was adamant that the blood on the external gash was from postmortem draining from gravity acting on her body as she lay face up: "Absolutely. There – there's no evidence of any blood pressure after those wounds were received." 2007ROA Vol. X 1580.

C. Dr. Catherine Lynch

Dr. Lynch was called by the state as an expert in obstetrics and gynecology. 2007ROA Vol. X 1593. The defendant objected that Dr. Lynch was not qualified because she did not have any forensic medical training and had a practice limited to the clinical treatment of live patients, but the court permitted her to testify.

Dr. Lynch testified that the victim suffered injuries within the vagina indicating "some sort of penetration." 2007ROA Vol. X 1605-06. Dr. Lynch testified that the injuries to the tissue were visible because the victim had "a child

or two or however many." 2007ROA Vol. X 1610. However, she claimed that the visible injuries were not external, despite the fact they were readily visible in the photographs. 2007ROA Vol. X 1611. She said the victim had a gaping introitus (the opening to the vagina, 2007ROA Vol. X 1620), a perineal defect, and a cystocele prolapse difficult to gauge without having the patient bear down. 2007ROA Vol. X 1612-13. Even though the injuries she said were within the vagina probably were visible without a speculum, she would still consider them within the vagina such that touching those injuries "would be a penetration of the vagina." 2007ROA Vol. X 1625.

Dr. Lynch said it was impossible for a kick to cause the vaginal injuries unless the foot was able to fit into the vagina. 2007ROA Vol. X 1630. She said the photographs showed the opening of the vagina was only one inch. 2007ROA Vol. X 1631. She denied the defendant's shoes, in evidence from the 1989 trial, could have penetrated a couple of centimeters. 2007ROA Vol. X 1631. However, she agreed a baby's head is larger than an inch. 2007ROA Vol. X 1631.

II. Mental Health Mitigation

A. Dr. Henry Dee

This witness established that two statutory mental health mitigators exist in this case. Dr. Henry Dee presented critical neurological mitigation evidence which was not presented at either of Mr. Taylor's sentencing hearings. Dr. Dee is a clinical neuropsychologist, accepted by the court in this case as an expert witness

in forensic neuropsychology. 2007ROA Vol. XI 1712. He conducted neuropsychological tests on Mr. Taylor, 2007ROA Vol. XI 1713-15, and reviewed the results of other experts, material from the trials and other documentation. 2007ROA Vol. XI 1715-16.

Dr. Dee testified that the testing performed by defense expert Dr. Berland for Mr. Taylor's 1992 penalty phase retrial strongly suggested brain damage and should have triggered the more complete battery of tests Dr. Dee administered. 2007ROA Vol. XI 1717. The tests Dr. Dee gave were readily available in 1992 and were relied upon by Dr. Dee in 1992 to determine the extent and nature of brain damage in other patients. 2007ROA Vol. XI 1717. The tests were all available and commonly used in forensic neuropsychology in 1992. 2007ROA Vol. XI 1731.

Dr. Dee testified that his tests showed Mr. Taylor had a verbal IQ of 102 and a performance IQ of 111. A 10-11 point difference is considered to be per se significant. Mr. Taylor's 9-point differential suggested significant problems. 2007ROA Vol. XI 1718-19. Mr. Taylor's results on the Denman memory tests were more remarkable -- memory tests should track the IQ scores, but in Mr. Taylor's case the verbal memory quotient was 86, the performance memory quotient was 117. 2007ROA Vol. XI 1718. This discrepancy is a reliable and clinically significant difference which would indicate to most neuropsychologists that the left hemisphere is relatively more impaired in functioning than the right.

2007ROA Vol. XI 1720. The testing showed evidence of brain damage, with behavioral disorganization, i.e. problem solving, more in the left hemisphere than the right, frontal lobe dysfunction, and bilateral involvement of the medial temporal lobes. 2007ROA Vol. XI 1721. Dr. Dee testified Mr. Taylor suffered from brain damage, to a reasonable degree of neuropsychological probability. 2007ROA Vol. XI 1722.

Mr. Taylor's brain damage constituted a major mental or emotional disturbance resulting in cognitive dysfunctioning, which substantially increased impulsivity and memory impairment. This established the statutory mental health mitigator that the brain damage substantially impaired Mr. Taylor's ability to conform his conduct to the dictates of the law. 2007ROA Vol. XI 1723-24. The facts of the case support the conclusion. The homicide was unusually violent, and the intensity of the attack and inexplicable rage is consistent with the behavior of others with frontal lobe injury or dysfunction. 2007ROA Vol. XI 1724-25.

Dr. Dee also testified that he reviewed the June 21, 1973, report of Mr. Taylor's altercation with a school principal when he was seven years old. That report indicated that Mr. Taylor was essentially nonverbal at that age which was most unusual, probably explained by the brain damage, 2007ROA Vol. XI 1726. The incident also showed Mr. Taylor at seven years of age over-responded to provocation. Mr. Taylor's history of violence was consistent with the findings of

the type and location of brain damage. 2007ROA Vol. XI 1727. The 1973 report was introduced as Defense Exhibit 1.

Dr. Dee described an incident he personally observed which confirmed the diagnosis of frontal lobe and medial brain damage. Dr. Dee said Mr. Taylor agreed at the start of the day of testing to work through lunch time. Despite the agreement, when lunch time came and it was apparent lunch was going to be skipped, Mr. Taylor became incredibly, inexplicably, and frighteningly angry and rageful. The demeanor was the kind seen in patients with frontal lobe injuries. 2007ROA Vol. XI 1729. Dr. Dee testified this was the only time he had ever seen a non-psychotic subject completely disintegrate behaviorally in just a second or two and become intensely angry and potentially aggressive over something so trivial. 2007ROA Vol. XI 1729.

Dr. Dee also discussed an episode when Mr. Taylor attacked a jail guard in 1992 (the guard's testimony is addressed below). The sudden, unprovoked attack and the fact that Mr. Taylor made the attack even though he had absolutely no hope of getting away with it supported the diagnosis of frontal lobe damage. 2007ROA Vol. XI 1730-31. 2007ROA Vol. XI 1749-50.

Dr. Dee said there was nothing which would have prevented any forensic neuropsychologist from developing the diagnosis and testifying about it in 1992. 2007ROA Vol. XI 1731.

Dr. Dee testified that two statutory mental health mitigators existed, based on his testing and evaluation:

> [C]erebral damage certainly constitutes, in my opinion **a major mental or emotional disturbance**.
>
> . . . .
>
> [T]he nature of the brain damage would suggest that **it would be very difficult for him to conform his conduct to the dictates of the law . . . I think the legal language is substantially impaired**, yeah.
>
> Q And you believe that aspect of it, he was substantially impaired?
>
> A I do.

2007ROA Vol. XI 1722-24 (emphasis added)

Dr. Dee testified that the brain damage exhibited by Mr. Taylor impaired his ability to control his conduct. Persons with brain damage in the frontal lobe have a lower capacity to control their impulses and are less able to dismiss them as normal people would. 2007ROA Vol. XI 1745. Dr. Dee said the brain damage in Mr. Taylor's case explained why Mr. Taylor committed the violent acts he did. 2007ROA Vol. XI 1747.

B. Stanley Graham

Mr. Graham testified to several severe head injuries suffered by Perry Taylor as a child. Mr. Graham was Perry Taylor's brother, seven years older than Mr. Taylor. 2007ROA Vol. XI 1752-53. He worked as a social service aid with the Hillsborough school system. 2007ROA Vol. XI 1753. He became a Pentecostal

minister when he was a teenager, under the mentoring of another Pentecostal minister. 2007ROA Vol. XI 1759.

Edwina Graham, Mr. Taylor's mother, had sickness, illness, problems, and no education all of her adult life. Because of her problems, Mr. Graham had to look after Mr. Taylor, and all of the siblings had to help out with each other. 2007ROA Vol. XI 1754. Mr. Graham suffered a head injury when he was thirteen years old while playing with a sister, striking his head on cement and causing learning disabilities. 2007ROA Vol. XI 1760. A sister suffers from epilepsy. 2007ROA Vol. XI 1760.

When Perry Taylor was five years old, Mr. Graham saw Mr. Taylor fall and strike his head on a bare cement floor while sliding down the banister in their home in the College Hill public housing projects in Tampa. 2007ROA Vol. XI 1755. Perry spent the night at the Hillsborough County Hospital. 2007ROA Vol. XI 1756. When he came home, Graham saw a lot of swelling on the front of Perry Taylor's head, and the defendant immediately began suffering from chronic migraine headaches. 2007ROA Vol. XI 1756. Mr. Graham saw Perry suffer the same head injury on at least one other occasion, and heard about other times he suffered the same injury on the cement floor. 2007ROA Vol. XI 1757.

Mr. Graham said when Perry returned home eight years after he went to foster care, Perry got angry and upset "quite a few times." When Perry got angry, his face swelled up, and "he have the look when he get angry." When Perry got

angry, he would go outside and be cooled down and back to normal within 30 minutes. 2007ROA Vol. XI 1758.

C. Edwina Graham

Perry Taylor's mother suffers severe intellectual impairment. Edwina Graham, testified that her son was born at the house of "a lady [who] deliver babies." 2007ROA Vol. XI 1762. She said she could not remember when Perry Taylor began to talk, he didn't say "momma," he just crawled and fussed. 2007ROA Vol. XI 1763. Mrs. Graham was so mentally impaired she did not know her own age -- she said she was 82 at the 2003 evidentiary hearing, 2007ROA Vol. XI 1762. Her mother testified at the 1992 trial that Edwina was 50-52 years of age in that year, 1992ROA Vol. III 409, which would have made her about 63-65 years of age at the 2003 hearing. It was readily apparent from Mrs. Graham's demeanor that she suffers severe neurological impairments, as testified to by other witnesses.

D. Charles Kelly

Charles Kelly was the jail deputy injured by Mr. Taylor in 1992. 2007ROA Vol. XI 1767. He had never had a problem before with Mr. Taylor. 2007ROA Vol. XI 1768. One evening, Mr. Taylor wanted to use the telephone but there was a 15 minute delay. 2007ROA Vol. XI 1768. When the deputy came to take Mr. Taylor to the phone, Mr. Taylor came at Deputy Kelly with a razor. Mr. Taylor displayed no emotion during the attack. 2007ROA Vol. XI 1769. Deputy Kelly

said Mr. Taylor was quiet and just stared at him when they went to the jail clinic. 2007ROA Vol. XI 1770.

The attack occurred in the heart of the jail with no chance for escape. 2007ROA Vol. XI 1770-71. Mr. Kelly knew that it's fairly routine for prisoners to have something with a sharp edge, a shank, a prison knife. 2007ROA Vol. XI 1772.

E. Howard C. Ury

Howard Ury testified about the abusive, Dickensian conditions he and Mr. Taylor suffered in a foster home.

Mr. Ury had worked as a security officer since 1985, working at the Media General facility (WFLA and Tampa Tribune) at the time he testified at the evidentiary hearing. 2007ROA Vol. XI 1776-77. He was in Tampa and available at the time of Mr. Taylor's trials. 2007ROA Vol. XI 1777.

Mr. Ury lived in two or three foster homes and three group homes during his youth. 2007ROA Vol. XI 1777. He lived at Mrs. Rutledge's foster home from 1970-76. 2007ROA Vol. XI 1777. Of all the homes where he was placed, the only place he was ever spanked or whipped was at the Rutledge home. 2007ROA Vol. XI 1778.

Mrs. Rutledge ran the home while her husband assisted and did her bidding. 2007ROA Vol. XI 1779. When Mr. Taylor arrived, Mrs. Rutledge announced to

all the children in her foster care that Perry had pushed a teacher and broken a rib, "and basically, she wasn't going to have these problems." 2007ROA Vol. XI 1780. Mrs. Rutledge "ruled with an iron fist," so the children knew what she meant. 2007ROA Vol. XI 1780.

Mrs. Rutledge kept the foster children in the back of the house. She and her husband lived in the middle. Mrs. Rutledge's children lived in the front of the house, which had nicer furniture and was generally more attractive. "[T]hey had all the good toys, of course." 2007ROA Vol. XI 1781.

About five foster children were living in the back of the house when Mr. Taylor arrived. One child, Jimmy, suffered from retardation and physical disabilities, but one of the other foster children was forced to care for Jimmy until he died while in Rutledge foster care. 2007ROA Vol. XI 1782.

Mrs. Rutledge kept the foster children isolated. She didn't allow the foster children to play with other children in the neighborhood unless one of Mrs. Rutledge's own children chaperoned. 2007ROA Vol. XI 1784.

Mr. Ury said that when no one admitted to some misdeed in the house, Mrs. Rutledge beat the children with an old water hose with a rubber core. She lined them up, bent them over the bathtub kept in their living area and whipped them on their bare buttocks until someone confessed. 2007ROA Vol. XI 1785-86. "If you beat someone long enough, they'll say anything." 2007ROA Vol. XI 1787-88.

Mrs. Rutledge sucker-punched Mr. Ury one time. 2007ROA Vol. XI 1789. On another occasion, she beat another child and banged his head against the wall.

Although social workers investigated, none of the children would tell the authorities about the conditions at the house because "if they don't believe us, we're going to get killed." 2007ROA Vol. XI 1789.

All of the children were abused, including Perry Taylor. 2007ROA Vol. XI 1797. Mr. Ury recalled that Perry Taylor got repeated spankings. 2007ROA Vol. XI 1790. Mr. Ury said he was delegated to check Mr. Taylor regularly to see if he had wet the bed. Every time he reported that Perry had done so, Mrs. Rutledge spanked Perry. Mr. Ury said after a while, he started lying that Perry had not wet the bed to stop the senseless whippings. 2007ROA Vol. XI 1791.

Mrs. Rutledge stole the money HRS allocated as allowance for the children. Mr. Ury said he didn't even know he was supposed to get an allowance until outside sources told him. He only received an allowance on one occasion. 2007ROA Vol. XI 1793. Mrs. Rutledge also stole the money Mr. Ury's grandmother mailed to him until his family gave him money directly when they visited. 2007ROA Vol. XI 1794. Near the end of Mr. Ury's stay there, Mrs. Rutledge confiscated most of the proceeds of his paychecks from a summer job and never returned the funds. 2007ROA Vol. XI 1795. The Rutledges always drove nice cars, and their natural children had better clothes and were treated better. 2007ROA Vol. XI 1797.

Mrs. Rutledge rationed out the notebook paper – the children lined up once a week to receive eight sheets of paper to place in their notebooks. Eight sheets was not enough, so children at school would share. Also, when Mr. Ury got money directly from family, he would buy a package of notebook paper to share with the other foster kids. 2007ROA Vol. XI 1793-94.

Mrs. Rutledge had to let up on the beatings one time when a medical problem caused her to tire before she could finish the whipping. 2007ROA Vol. XI 1800. Her husband took over the beatings until her condition improved. He beat the children only when Mrs. Rutledge ordered him. "But the problem was once he got started he went into a frenzy, he couldn't stop. That was the problem." 2007ROA Vol. XI 1799.

Howard Ury finally led an escape. He, Perry Taylor, the boy whose head had been beaten against the wall, and a fourth boy went from school to the home of Mr. Ury's grandmother. 2007ROA Vol. XI 1801. When social workers questioned the kids, "it was a retrieval mission, basically," designed to return the children to the Rutledge back room. 2007ROA Vol. XI 1802. That was the last time Mr. Ury saw Perry Taylor. 2007ROA Vol. XI 1796.

The first time he was ever contacted on behalf of Mr. Taylor was when someone from the Capital Collateral Representative Counsel office spoke to him in early 2000.

F. James McNally

James McNally was the program director, clinical social worker, and psychotherapist for the Mendez Center, a Tampa facility to treat elementary school children for mental health and behavioral problems. 2007ROA Vol. IV 587. Perry Taylor was treated there in the 1970's after the incident with the principal. He was negative, hostile, and acted out. 2007ROA Vol. IV 592. Mr. McNally recalled that he would see Mr. Taylor only minutes after an anger episode in the classroom, yet he would have already subsided to a quiet, peaceful mode. 2007ROA Vol. IV 592.

No one contacted Mr. McNally until he was contacted by post-conviction investigators about 2001. He was employed in Hillsborough County in 1992. 2007ROA Vol. IV 593.

G. Dr. Donald Taylor

Dr. Taylor was a state expert in adult psychiatry and forensic psychiatry. 2007ROA Vol. X 1632. In the three capital sentencing hearings where he testified, he always testified for the state and he always found that the defendant did not suffer from brain damage. 2007ROA Vol. X 1639. He never found brain damage in a capital defendant in the total of six capital cases he could recall. 2007ROA Vol. X 1640.

Dr. Taylor admitted he has no training in the administration or interpretation of neuropsychological testing. 2007ROA Vol. X 1640. The state submitted Dr.

Taylor's written evaluation of Perry Taylor over defense objection that Dr. Taylor was not qualified to render the opinions in the report and that the report contained hearsay. 2007ROA Vol. X 1641.

Despite the fact that Dr. Taylor was not trained to administer or interpret neuropsychological tests, and over defense objection based on this absence of expertise, Dr. Taylor was allowed to testify that neuropsychological tests can yield abnormal results even without brain damage. 2007ROA Vol. X 1655. He said neurological impairment is not necessarily the same as brain damage. 2007ROA Vol. X 1656. He also said neuropsychological testing is "not usually used as an instrument to make the diagnosis of brain damage." 2007ROA Vol. X 1657.

Dr. Taylor claimed he was qualified to comment on the results of neuropsychological testing, but admitted that he was not qualified to administer, score, or interpret neuropsychological testing. 2007ROA Vol. X 1661-62. Dr. Taylor said he had treated only two or three brain damaged patients out of less than a hundred private patients in the past decade. He defined brain damage as injury from mechanical or chemical insult to the brain, tumor, hemorrhage, or stroke. 2007ROA Vol. X 1665.

Dr. Taylor said he interviewed Mr. Taylor for two hours and ten minutes. 2007ROA Vol. X 1667. The interview was videotaped and made available to the parties, allowing the defense to cross examine the witness about conflicts between his report and the video.

Dr. Taylor said Mr. Taylor cooperated and there were no time constraints limiting the interview. 2007ROA Vol. X 1677. The only formal testing he administered was an oral mental status exam which took seven minutes to perform. 2007ROA Vol. X 1667. In the written report, Dr. Taylor indicated Mr. Taylor successfully named the past two United States Presidents. However, Dr. Taylor admitted he omitted from the report the fact that Mr. Taylor failed the test because he could name only two of the last four Presidents. 2007ROA Vol. X 1669. He also reported the successful completion of at least one other task when, in fact, Mr. Taylor failed some elements of the brief exam which were not recorded in the written report. 2007ROA Vol. X 1669. The seven-minute mental status exam was not a neuropsychological test. Someone with brain damage could "pass" the exam. 2007ROA Vol. X 1670.

Dr. Taylor reviewed Stanley Graham's testimony that Mr. Taylor suffered a concussion at age five and began to have migraine headaches after the head injury. 2007ROA Vol. X 1671. In his written report, Dr. Taylor only noted that Mr. Taylor had "a headache," not chronic migraines, after the head injury. 2007ROA Vol. X 1671. Dr. Taylor admitted he never asked Mr. Taylor about the head injuries reported by his brother. 2007ROA Vol. X 1671. This is directly contrary to Dr. Taylor's testimony on direct examination by the state when he claimed "When I asked Mr. Taylor about it he did not report or recall anything along those lines happened." 2007ROA Vol. X 1672. Dr. Taylor had asked only a very

general question, whether Mr. Taylor had any accidents or injuries, and he dismissed Mr. Taylor's report of head injuries from high school football. 2007ROA Vol. X 1672. Dr. Taylor admitted that failure to recollect the injuries reported by Stanley Graham could be an indicator of brain damage. 2007ROA Vol. X 1673.

Dr. Taylor admitted he only spent four minutes in the 130 minute interview inquiring about possible head injury. 2007ROA Vol. X 1673. The total time spent on the mental status exam and soliciting general reports of head injury totaled eleven minutes. 2007ROA Vol. X 1673. In contrast, Dr. Taylor conducted much lengthier inquiries about Mr. Taylor's criminal history. 2007ROA Vol. X 1674. He conceded that he spent 23 minutes inquiring about the facts of the homicide. 2007ROA Vol. X 1674.

Dr. Taylor conceded that nothing in the examination or discussion gave him any basis to believe the sexual episode involving the victim in this case was anything other than consensual. 2007ROA Vol. X 1677.

Dr. Taylor said that, although he had reviewed Dr. Wood’s testimony about the PET scan (summarized below), he gave little weight to it because two physicians found the PET scan within normal limits. 2007ROA Vol. X 1679. To the contrary, both Drs. Kotler and Mayberg conceded that the PET scan show abnormalities, and only disputed the conclusions from the abnormal results. He

could not render any opinion on whether their interpretations were correct because he was not qualified to read PET scans. 2007ROA Vol. X 1680.

Dr. Taylor agreed with Dr. Mayberg that neuropsychological testing was a Gold Standard because of the peer review validation. 2007ROA Vol. X 1681. Neuropsychological testing is useful for determining impairment. 2007ROA Vol. X 1682.

H. Dr. Henry Dee (in rebuttal to Dr. Taylor)

Dr. Dee said Dr. Taylor's brief mental status exam was a common test but not a valid test for brain damage. 2007ROA Vol. X 1691.

Dr. Taylor had testified that neuropsychological tests can yield variable scores, but Dr. Dee clarified the issue:

> In other words, **when I say that an individual fails a test, that means that the only people who have ever scored in that range are people who are brain damaged. We've never found a normal individual who scored that way.**

2007ROA Vol. X 1693.

As to a distinction Dr. Taylor made between brain damage and impairment, Dr. Dee testified that there was no substantive difference between those two things as far as the behavioral issues in this case. Dr. Dee said it usually did not matter whether the brain damage was an injury, vascular (e.g. stroke), or neoplastic (e.g. tumor), it was all within the definition of "brain damage," and "brain damage" usually meant one of those three things. 2007ROA Vol. X 1694-95.

In the real world, psychiatrists do not dismiss Dr. Dee's neuropsychological testing and conclusions. 2007ROA Vol. X 1695.

III PET Scan Evidence of Mental Health Mitigation

The state stipulated that Mr. Taylor could undergo a PET scan imaging procedure. While all the experts agreed the scan revealed abnormalities in Mr. Taylor's frontal lobe, they disagreed whether the abnormalities corroborated the neuropsychological evidence of brain damage.

A. Dr. Frank Wood

Dr. Wood testified that the PET scan confirmed the brain damage found by the other defense experts.

Dr. Wood has been affiliated with the Wake Forest Medical School since 1974. He was the head of the medical school's department of neuropsychology. He had a principal appointment in the department of neurology. He also had a cross appointment in radiology because of his work with PET scans. 2007ROA Vol. XI 1815. He has been doing research with PET scans since about 1990. 2007ROA Vol. XI 1816. He was one of the first researchers to develop a large database of normal PET scans for use in diagnosing dyslexia and other psychiatric and neurological conditions. 2007ROA Vol. XI 1817. He has reviewed PET scans in about 25 death penalty cases. Dr. Wood was accepted by the court as an expert in PET scan imaging and neuropsychology. 2007ROA Vol. XI 1819-20.

PET scanning has been available since the 1970's. 2007ROA Vol. XI 1825.

Dr. Wood reviewed a written report by Dr. Jon Kotler, the radiologist who performed Mr. Taylor's PET scan, Defense Exhibit 6, which indicated reduced functioning in the left frontal lobe of Mr. Taylor's brain. Dr. Kotler found an "extremely gentle and borderline reduction in metabolic activity" in the left frontal lobe area, compared to the same region in the right hemisphere. Def. Exh. 6 and 2007ROA Vol. XI 1823.

Dr. Wood went to Dr. Kotler's lab and reviewed the original data. 2007ROA Vol. XI 1833. He found the same thing Dr. Kotler found, "an area of left . . . inferior dorso-lateral frontal hypometabolism . . . ." This disparity placed Mr. Taylor below the first percentile of [Dr. Wood's] normal reference group. 2007ROA Vol. XI 1835. Compared to the normal group, Mr. Taylor is "convincingly outside the normal range." 2007ROA Vol. XI 1836. Dr. Wood said he found a 22% reduced level of functioning compared to the same area in the right hemisphere. 2007ROA Vol. XI 1838. "[I]t is rare almost to the vanishing point for a normal person with normal medical history and so on, normal cognitive test results to score as low in the left frontal area as [Mr. Taylor] did." 2007ROA Vol. XI 1836.

Mr. Taylor's test was beyond any asymmetry found in the "purely normal" subgroup, and was matched at best by only one of the mildly abnormal subgroup. 2007ROA Vol. XI 1865. See also Defense Exhibit 7. Dr. Wood testified that,

while Dr. Kotler used another acceptable method for calculating the asymmetry, the left-right asymmetry results yield "essentially identical" values. 2007ROA Vol. XI 1839.

Dr. Wood testified that the brain dysfunction he found in Mr. Taylor's PET scan would be consistent with poor judgment, failure to think clearly, aggression and outbursts. 2007ROA Vol. XI 1846. PET scan results showing brain damage like Mr. Taylor's are accepted as authoritative in the neuropsychological community as corroborative for a risk of violent behavior. 2007ROA Vol. XI 1850.

The link between Mr. Taylor's PET scan results and violent behavior is more widely accepted than a link between PET scan results and depression. Dr. Wood reviewed medical journal articles submitted as Defense Exhibit 8, and an estimated 100 other authoritative articles, which find a connection between PET imaging showing brain damage, and behavior. 2007ROA Vol. XI 1852-53.

Dr. Wood said his analysis confirmed Dr. Dee's diagnosis of frontal lobe dysfunction. 2007ROA Vol. XI 1721. Dr. Dee's suspicion of left frontal lobe damage was confirmed by the PET scan. Dr. Dee also believed there was temporal lobe involvement, and Dr. Wood was able to narrow the area to the lobe in the left hemisphere, where the functioning was suspiciously low. 2007ROA Vol. XI 1855.

Dr. Wood said the school incident at seven, when Mr. Taylor was nonverbal and could not read, and his head inuries at five, clearly suggested abnormal functioning at a young age. It is well settled that children with left frontal lobe damage are uniformly impaired in language and reading. 2007ROA Vol. XI 1857.

B. Dr. Jon Kotler

The state called Dr. Kotler, who was accepted by the court in the administration and interpretation of PET scans. 2007ROA Vol. XII 2017. He had never testified in a courtroom before, and had no experience with correlating PET scans with criminal or impulsive behavior. 2007ROA Vol. XII 2016-17. The defense objected to Dr. Kotler testifying to any associations between PET scans and criminal or impulsive behavior. The court accepted Dr. Kotler as to the administration and interpretation of PET scans.

Dr. Kotler could not locate Mr. Taylor's chart. 2007ROA Vol. XII 2029. However, he testified that he found a gentle borderline reduction slightly greater than 20 percent in variance in Mr. Taylor's left frontal cortex. 2007ROA Vol. XII 2040.

On cross-examination, Dr. Kotler testified that Dr. Wood's analysis was "fine by me," specifically, Dr. Wood's written report that Mr. Taylor's PET scan showed abnormalities, i.e. reduced functioning in the left inferior dorso-lateral frontal lobe deviating slightly more than two standard deviations. 2007ROA Vol. XII 2057. "I don't have any problem with [Dr. Wood's] numbers." 2007ROA

Vol. XII 2057-58. In fact, Dr. Kotler agreed with Dr. Wood. 2007ROA Vol. XII 2059.

Dr. Kotler conceded he was not qualified to comment on Dr. Wood's report that the damage existed in an area associated with impaired reasoning, judgment, or impulse control. 2007ROA Vol. XII 2058.

Dr. Kotler admitted that he was unable to find his file on Mr. Taylor before his deposition or the evidentiary hearing. He had no personal knowledge of how he came to have a copy of his own report from 2000. 2007ROA Vol. XIII 2098.

Dr. Kotler conceded that Dr. Wood's measurement technique was better than his own. 2007ROA Vol. XIII 2114.

Dr. Kotler's adverse testimony was vitiated by a fatal flaw. He relied upon a printout and testified to its relevance in the evidentiary hearing which was for a patient entirely unrelated to the case. Defendant's Exhibit 12 was a printout Dr. Kotler provided to the defendant in deposition and represented as the printout he relied upon and attached to his original report in 2000. The date of the printout is 6/12/03, almost three years after Mr. Taylor's PET scan on 8/24/00. And, most critically, the name of the subject of the 6/12/03 PET scan is "Perry, Willie." Dr. Kotler confirmed that Exhibit 12 related to patient "Mr. Perry." Dr. Kotler apparently never realized "Mr. Perry" couldn't possibly be "Mr. Taylor," the defendant. 2007ROA Vol. XIII 2129-34.

C. Dr. Helen Mayberg

Dr. Mayberg was called by the State. She was a neurologist working in research at Emory University studying the neurobiology of depression and had done PET scans since 1985. 2007ROA Vol. XIII 2144-46. She was allowed to testify over defense objections that her testimony was cumulative to Dr. Kotler's and that she was not qualified in forensic medicine. 2007ROA Vol. XIII 2147.

Dr. Mayberg said that, without any context or history, a PET scan showing low frontal lobe activity would permit a number of diagnoses – depression, inattention or falling asleep, preexisting anxiety, acute low mood state, schizophrenia, head injury, or frontal temporal dementia. 2007ROA Vol. XIII 2166-67.

Dr. Mayberg said that neuropsychological testing was used in conjunction with PET scans from the late '80's or early '90's. 2007ROA Vol. XIII 2181. She accepted Dr. Wood's and Dr. Kotler's numbers. 2007ROA Vol. XIII 2190. When asked whether she could rule out that the asymmetry she observed in Mr. Taylor's scan had an impact on his behavior during his life, Dr. Mayberg said she had no idea because she didn't know if the asymmetry she saw was there "prior." 2007ROA Vol. XIII 2204-05.

D. Dr. William Mosman

Dr. Mosman is a licensed psychologist specializing in forensic psychology, neuropsychology and developmental psychology, accepted by the court as an

expert. 2007ROA Vol. XI 1876-77. Dr. Mosman tested Mr. Taylor, reviewed the reports of Dr. Dee and Dr. Wood, reviewed Dr. Berland's reports from the 1992 penalty phase retrial, the sentencing order, and other sources of information. 2007ROA Vol. XI 1879-81. The neuropsychological testing performed by Dr. Dee and Dr. Berland was commonly used in 1992 to evaluate death-penalty-qualified defendants for possible mental health mitigation. 2007ROA Vol. XI 1881.

Dr. Mosman noted the neurological problems found in Mr. Taylor's family. His mother suffered a brain hemorrhage at a young age which seriously affected her functioning. An older sister, Lynn, suffered from seizures so severe she had to quit school in seventh grade. Lynn's daughter had to help in prescriptions and health interventions because Lynn was unable to follow through on her own. A brother suffered from a brain tumor at age seven. 2007ROA Vol. XI 1883.

In his teens, every mental test given Mr. Taylor showed problems. 2007ROA Vol. XI 1814. The long history of testing from 1982 and the PET scan show that Mr. Taylor suffers from brain damage. "So it's no longer – if we go back to the June '92 sentencing order, it's no longer a suggestion [of brain damage], it's a clinical fact." 2007ROA Vol. XI 1886. The neuropsychological tests administered by Dr. Dee and Dr. Mosman showed frontal lobe processing impairments that had specific consequences.

The testing, the PET finding of abnormality, and Dr. Dee's and Dr. Mosman's testing, all show problems with the frontal lobe. Frontal lobe

dysfunction gives rise to impulse control problems, out-of-context explosive rage and aggression unrelated to any stressor. Given that Mr. Taylor's history shows him at other times to be a good person and a model prisoner, the anomaly of the sudden violent episodes indicates frontal lobe dysfunction.

Dr. Berland's IQ testing in 1992 was insufficient to give a complete picture of the brain damage. The full battery of neurological testing administered by Dr. Dee and Dr. Mosman was necessary. V3-99. The WAIS-R test given by Dr. Berland in 1992 suggested frontal lobe issues, but it doesn't even begin to be minimally acceptable for evaluation in a school setting or to evaluate the degree of injury to a police officer injured in an accident. 2007ROA Vol. XI 1906-07.

IV. The Attorneys

A. Mike Benito

Attorney Mike Benito prosecuted Perry Taylor at the 1989 guilt phase trial.

Mr. Benito identified the final autopsy report, Defendant's Exhibit 3, as what he would have reviewed for the trial. 2007ROA Vol. IV 571. Attorney Benito said the final autopsy report that acid phosphatase results were "negative," meant to him in 1989 that absolutely no acid phosphatase was found in the tests, the result was "zero." 2007ROA Vol. IV 573. He would have assumed that the autopsy report would have indicated phosphatase levels if any had been found in the lab tests. 2007ROA Vol. IV 574. In his 15 years as a state attorney, prosecuting 40 first degree murder cases, he never saw an autopsy reporting

negative acid phosphatase levels and lab results that were anything other than zero. 2007ROA Vol. IV 581.

Mr. Benito's recollection of the case was that the only question was the degree of culpability -- manslaughter, second degree or first degree murder. Had he been defense counsel, his trial strategy would have been to argue the case only warranted a manslaughter conviction. 2007ROA Vol. IV 577. Attorney Benito's recollection of the facts of the case was that Mr. Taylor had consensual sex with the victim, but was angered when she bit his penis. 2007ROA Vol. IV 579. He recalled that his approach in the prosecution was to argue that the sexual battery was shown by the damage to the genital area of the victim. 2007ROA Vol. IV 583. He agreed that his argument to the court in 1989 was that the sexual battery was based solely on the damage to the genital area. 2007ROA Vol. IV 584.

B. Nick Sinardi

Attorney Nick Sinardi was appointed to represent Mr. Taylor in his 1989 guilt phase trial. 2007ROA Vol. IV 621.

Mr. Sinardi had tried two or three homicide cases as a defense attorney before he took Mr. Taylor's case. 2007ROA Vol. IV 621. His trial strategy was to seek a second degree murder conviction for the homicide, and to avoid a conviction for sexual battery because the sexual encounter was consensual. 2007ROA Vol. IV 621.

Mr. Sinardi had planned to vigorously raise a consent defense to the sexual battery charge, but the court excluded the witnesses he had called to establish the victim's lifestyle as a prostitute and crack addict. The exclusion of those witnesses weakened and damaged the consent defense. 2007ROA Vol. IV 629.

Mr. Sinardi did not recall seeking appointment of an independent pathologist to assist in the defense, although there was no bar to obtaining one. He recalled that there was a bite mark on the victim, but he could not recall why he did not have it examined. Or otherwise investigate the matter. 2007ROA Vol. IV 629-30.

Mr. Sinardi admitted he had no idea what Dr. Miller meant in 1989 when he used the phrase "reasonable degree of medical probability." 2007ROA Vol. IV 632. He did not recall ever discussing the matter with Dr. Miller. 2007ROA Vol. IV 632. He would not be surprised if Dr. Miller meant "reasonable degree of medical probability" as almost to a certainty. 2007ROA Vol. IV 632.

After refreshing his recollection of a deposition he did with Dr. Miller before the 1989 trial, Mr. Sinardi testified that Dr. Miller stated that, to a reasonable degree of pathological probability, the injury to the victim's perineal area was caused by the insertion of a large object. This was, therefore, Mr. Sinardi's understanding of the mechanism of injury to that area when he went to trial in 1989, i.e. tearing from insertion of a large object. 2007ROA Vol. IV 635-36.

Mr. Sinardi was unaware of the medical/anatomical definitions of the various areas of the female anatomy which distinguish between areas internal to

the body and areas external. 2007ROA Vol. IV 636-39. The distinction was important because of the nature of the statutory definitions of sexual battery by sexual organ as opposed to by object. He said his defense of consensual sexual intercourse was based on the argument that any union was consensual.

Mr. Sinardi recalled that the state pursued a sex battery by object theory at trial. 2007ROA Vol. IV 639. However, he did not recall conducting any legal research into the statutory definition of sexual battery by object, which required not merely union, but penetration of the vagina by the object. 2007ROA Vol. IV 639. In fact, under questioning at the evidentiary hearing, he remained unaware that penetration was required:

> Q. Are you aware that the statutory definition of sexual battery by object requires penetration of the vagina?
>
> A. **And/or union with, I would think**, but I'm not certain as to an object as opposed to the sexual organ.

2007ROA Vol. IV 638-39.

Mr. Sinardi said he reviewed the indictment, but did not claim he read the statutory law. 2007ROA Vol. IV 638. He had no copy of the statute or any case law regarding sexual battery in his files, and he had no recollection of there having ever been such research in the file. 2007ROA Vol. IV 690.

Mr. Sinardi reviewed Dr. Miller's trial testimony, that penetration of the vagina caused the genital injuries, to a reasonable degree of medical probability. 2007ROA Vol. IV 640. He also reviewed the autopsy report which reported

injuries only to external parts of the body. Based on that review, Mr. Sinardi stated that he might have objected to Dr. Miller's testimony that there was penetration and internal injury, when the autopsy reported only external injury. 2007ROA Vol. IV 641.

Mr. Sinardi testified that the discrepancy between the autopsy and Dr. Miller's testimony in the 1989 trial would have been highly relevant to a defense to sexual battery when an essential element of the offense required penetration, passing beyond the areas identified as injured in the autopsy to the internal vagina. 2007ROA Vol. IV 647.

Mr. Sinardi agreed that competent counsel would investigate the case law, the definitional law, and the statutory law relating to the crimes with which his client has been charged. 2007ROA Vol. IV 648-49. He also agreed there would then be a duty to clarify the evidence to determine whether the physical evidence reported by the Medical Examiner's office supported the crime of sexual battery. 2007ROA Vol. IV 649. He knew of no evidence other than the injuries which indicated any non-consensual sexual acts. 2007ROA Vol. IV 649. He stated that he had no knowledge that injuries to that area after death would constitute sexual battery. 2007ROA Vol. IV 650.

Mr. Sinardi testified about his understanding of Dr. Miller's assertion in the autopsy that tests for acid phosphatase (AP) were negative. Mr. Sinardi said "not present" meant there was no evidence of acid phosphatase. 2007ROA Vol. IV

652. Mr. Sinardi examined the lab report indicating the presence of AP, and did not recall seeing that report. He said such a report would have been remarkable to him because it would have raised the question why the lab report showed the presence of AP, and the autopsy stated there was no AP. 2007ROA Vol. IV 653. Mr. Sinardi had no recollection of ever seeing Defense Exhibit 4, a draft autopsy report which contained the lab results. The exhibit shows editing indicating that the acid phosphatase results were to be deleted and state, as in the final report, that tests were negative for AP. 2007ROA Vol. IV 653. Mr. Sinardi did not recall ever discussing with Dr. Miller what Dr. Miller meant when he declared tests for AP were "negative." 2007ROA Vol. IV 654.

Mr. Sinardi said that the evidence of acid phosphatase actually reported by the lab would have reinforced the claim that the sexual intercourse was consensual. 2007ROA Vol. IV 653, 2007ROA Vol. IV 659. Assuming the AP levels were consistent with sexual intercourse some time before Mr. Taylor met with the victim, Mr. Sinardi said the evidence would have contributed to his argument that he could introduce evidence that the victim was a prostitute. 2007ROA Vol. IV 659. Assuming the AP level was also consistent with recent unsuccessful intercourse, Mr. Sinardi said the evidence would have contributed to the consensual sex defense. 2007ROA Vol. IV 660.

Mr. Sinardi said he put Mr. Taylor on the stand in the guilt phase because, although Mr. Taylor was physically imposing, his demeanor was mild mannered,

quiet, and not aggressive, and he wanted the jury to observe this. 2007ROA Vol. IV 662. He had no recollection of how he counseled Mr. Taylor on whether to take the stand.

Mr. Sinardi recalled asking Mr. Taylor to get off the stand and remove his sweater. Mr. Taylor was in very good physical shape, as good or better than he was in the post conviction evidentiary hearing. He was not surprised by Mr. Taylor's imposing physique when he asked Mr. Taylor to remove the sweater. He did not observe the reaction of the jury. 2007ROA Vol. IV 663.

Mr. Sinardi had no recollection that he counseled how Mr. Taylor should testify about the incident itself. He recalled no discussion with Mr. Taylor about whether he should act out the murder in front of the jury. He recalls Mr. Taylor made such a demonstration. 2007ROA Vol. IV 664. He recalled no tactical or strategic reason he did not object to any efforts by the state in cross examination to demonstrate the attack. 2007ROA Vol. IV 665.

Mr. Sinardi insisted that it was important for the jury to see Mr. Taylor specifically demonstrate how he killed the victim. 2007ROA Vol. IV 702-03. The jury needed to see that Mr. Taylor's extraordinary strength and size could explain how he could have killed the victim without intending to. 2007ROA Vol. IV 703. His simple presence was not enough. 2007ROA Vol. IV 703.

Mr. Sinardi continued to question whether he would have developed the specific locations of the injuries relating to the sex battery charge, even if it could

have provided an absolute defense to rape. 2007ROA Vol. IV 668. He recalled no evidence that the sexual injuries could have occurred after death,. When asked to assume Dr. Miller was now saying the he could not state to a reasonable degree of medical probability that the injuries were inflicted before death, Mr. Sinardi testified that he had wished he had brought that fact out at trial. 2007ROA Vol. IV 669.

Mr. Sinardi believed Mr. Taylor was enraged at the time of the murder and that he had no time for cool reflection. In other words, the evidence showed Mr. Taylor guilty of second degree murder, not first degree. 2007ROA Vol. IV 699.

C. William Brown

Mr. Brown investigated the case for Mr. Sinardi in 1989. 2007ROA Vol. IV 706. Mr. Brown got the impression in the first interview with Mr.. Taylor that he was slow and acted like an adolescent or pre-adolescent. 2007ROA Vol. IV 707. He recalled that Mr. Taylor had "a blank look on his face when we were trying to talk to him and trying to explain things to him as though he was – he just couldn't comprehend what we were trying to convey. The blank look and apparent lack of comprehension were present more often than not." 2007ROA Vol. IV 709. Mr. Brown said he discussed his concerns Mr. Sinardi, he believed he suggested that Mr. Taylor be evaluated by a psychiatrist, and his impression was that Mr. Sinardi was going to pursue this issue. 2007ROA Vol. IV 709.

D. Manuel Lopez

Judge Manuel Lopez was appointed to represent Mr. Taylor at his 1992 resentencing trial, when Judge Lopez was in private practice. 2007ROA Vol. IV 596. He was aware of the statutory mitigators available to a capital defendant in sentencing, and made no strategic decision to forego any mitigator in Mr. Taylor's case. 2007ROA Vol. IV 598. He obtained court appointment of Dr. Robert Berland to develop the statutory mental health mitigators. 2007ROA Vol. IV 598-99.

Judge Lopez testified that he believed there was an unwritten policy in Hillsborough County in 1992 that the circuit court would appoint no more than one mental health expert, 2007ROA Vol. IV 600 & 2007ROA Vol. IV 615-16, without showing extraordinarily good cause. 2007ROA Vol. IV 600. There was a cap on expenditures. 2007ROA Vol. IV 616. Such good cause in Mr. Taylor's case would have been "some kind of brain testing."

He knew from Dr. Berland that Mr. Taylor suffered from organic brain damage. 2007ROA Vol. IV 601. He did not know of any testing that would have helped in 1992. In hindsight at the evidentiary hearing, he knew that a PET scan would have been useful. In 1992, he did not know that neuropsychological testing was available that would have elaborated on the extent and nature of the brain damage. 2007ROA Vol. IV 602.

Judge Lopez did not recall speaking to anyone about Mr. Taylor's life in the Rutledge foster home other than "the witnesses that I called who had been roommates with Mr. Taylor." 2007ROA Vol. IV 605. Part of his strategy was to inform the jury of Mr. Taylor's childhood in a foster home. 2007ROA Vol. IV 610. To do this, he put on Mr. Taylor's brother, Stanley Graham, who could establish Mr. Taylor went to a foster home, and he put on Alvin Thomas, who lived in the same foster home. 2007ROA Vol. IV 611.

There is no testimony or evidence that Judge Lopez spent a lot of time developing mitigation evidence with Mr. Taylor, despite his knowledge that it took time and effort to get the information. 2007ROA Vol. IV 611.

Judge Lopez said that he had not used a neuropsychologist in any case at the time of the 1992 sentencing. He agreed that neuropsychological testing could have revealed the existence of statutory mental health mitigation in Mr. Taylor's case. 2007ROA Vol. IV 618. The presentation of available mental mitigation in Mr. Taylor's case regarding his brain damage was even more important because of the strength of the aggravating circumstances. 2007ROA Vol. IV 618.

D. Robert Norgard

Attorney Norgard is a local practitioner called by the defendant as an expert in death penalty trial litigation. 2007ROA Vol. XII 1989-90 & Defendant's Exhibit 11 (Mr. Norgard's resume').

Mr. Norgard testified that he was personally familiar with the mental health issues which were addressed in death penalty training seminars from the 1980's, having attended almost every such seminar until the mid 1990's. 2007ROA Vol. XII 2003. He testified that a mental health specialist lectured in the seminars in that time that a neuropsychologist was necessary to investigate and develop any available evidence of organic brain damage. The seminar showed attorneys that half of death row inmates suffered from organic brain damage. 2007ROA Vol. XII 2003. The seminars taught that psychiatrists and psychologists did not have the expertise to diagnose brain damage. Only a neuropsychologist could diagnose a defendant as having organic personality syndrome or other forms of organic brain damage. 2007ROA Vol. XII 2005-06.

Mr. Norgard said the belief that appointed defense counsel only gets one expert was a fallacy. He said that some attorneys think that the confidential expert provided by the rules is the only expert they are allowed. However, defense counsel need only make the request of the court and provide a basis for the need to hire additional experts. If the motion was denied, the issue would be preserved for appeal. 2007ROA Vol. XII 2005-09.

SUMMARY OF THE ARGUMENT

I. A. The medical examiner testified in the 1989 guilt phase trial that kicking could not have been the cause of the injuries which supported a verdict of sexual battery by object. He recanted his testimony in the evidentiary hearing, consistent with the defense forensic pathologist. There is no evidence of sexual battery in this case.

B. Trial counsel in the 1989 trial was ineffective when he had Mr. Taylor demonstrate how he killed the victim, standing mere feet from the jury. The demonstration was not a reasonable tactical decision considering the defendant's size and condition.

C. Trial counsel failed to develop mental health issues for the guilt phase. Mr. Taylor suffered serious brain damage which could have supported a lesser degree of homicide. The failure also prevented trial counsel from effectively dealing with his client.

D. The postconviction court should have allowed amendment of the Motion for Postconviction Relief to address additional claims discovered during the evidentiary hearing.

II. There was substantial evidence of brain damage explaining Mr. Taylor's behavior and establishing statutory mitigators. Penalty phase counsel was ineffective for failing to properly develop and address these facts.

III. The postconviction court erred in refusing to allow amendment to address newly discovered evidence that the victim's daughter could establish that the victim and the defendant were dating, diminishing the trial accusation that the victim went with the defendant against her will. The daughter also could establish the prejudice from trial counsel's error in having Mr. Taylor demonstrate the killing to the jury.

ARGUMENT

ISSUE I

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.[5]

STANDARD OF REVIEW

This claim is a mixed question of law and fact requiring de-novo review. *Stephens v. State*, 748 So.2d 1028 (Fla. 1999) This Court recently applied de novo review in the context of a *Giglio v. United States*, 405 U.S. 150 (1972), claim raised in post-conviction in *Mordenti v. State*, 894 So.2d 161, 173 (Fla. 2005) Newly discovered evidence claims are subject to the standard set out in *Jones v. State*, 591 So.2d 911 (Fla. 1991). Ineffectiveness issues are controlled by *Strickland v. Washington*, 466 U.S. 668 (1984).

IA THE SEXUAL BATTERY

[5] Mr. Taylor pleads *Brady, Giglio,* and ineffective assistance of counsel relating to the guilt phase. Either defense counsel failed to investigate, the State failed to disclose information, or the state failed to correct false information, any of which omissions, if corrected, would have shown that Mr. Taylor did not commit the crimes.

MR. TAYLOR IS WRONGFULLY CONVICTED OF SEXUAL BATTERY, THE RESULT OF BRADY AND GIGLIO VIOLATIONS REVEALED BY THE MEDICAL EXAMINER AT THE EVIDENTIARY HEARING, AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The lower court rejected this claim on all grounds. The court recognized that the claims that Mr. Taylor was wrongfully convicted of sexual battery as the result of *Brady* and G*iglio* violations by the state, ineffective assistance of trial counsel, and as demonstrated by newly discovered evidence, were all "already adequately raised in the existing pleadings." 2007ROA Vol. V 787. The lower court erred in denying relief on these grounds. The state's medical examiner misled the guilt phase jury and recanted his testimony in the evidentiary hearing. The state knew or should have known of the errors by the medical examiner and corrected them when he misled the jury, and concealed the knowledge from the defendant. Guilt phase counsel was ineffective for failing to consult with a forensic pathologist who would have developed the evidence proving innocence of sexual battery, and penalty phase counsel on retrial was equally ineffective for failing to develop the evidence which would have mitigated the offense.

The state=s theory of sexual battery was that Mr. Taylor inserted a large object, not a penis, into the victim=s vagina. Dr. Miller=s 1989 testimony supported this and expressly excluded kicking as a cause of the injuries. At the 1993 penalty retrial, when it was too late to make a difference on the question of guilt, Dr. Miller started to back down from ruling out a kick. In the postconviction proceedings, he

recanted entirely, opening the door to the substantial likelihood that the injuries were caused by a kick, eliminating a necessary element of the crime of sexual battery by object and establishing the affirmative defense of accident.

The evidence at trial did not establish nonconsensual vaginal penetration by sex organ. Mr. Taylor=s testimony established a consensual sexual encounter which ended when Mr. Taylor stopped the encounter and kicked the victim, inflicting fatal injuries. In the motion for judgment of acquittal in the 1989 trial, the defense argued that the only evidence of nonconsensual acts sufficient to sustain a verdict for sexual battery was circumstantial. 1989ROA Vol. II 222-25. The circumstantial evidence did not rule out every reasonable hypothesis of innocence, i.e. the sexual acts were consensual. That motion was denied. 1989ROA Vol. II 225.

However, the court reopened the question, reserving on ruling whether Mr. Taylor=s penis had union with the victim=s mouth. 1989ROA Vol. Vol. II 228. Prosecutor Benito argued that the theory of defense was that any sex acts were consensual and that the genital injury was from a kick, not penetration with an organ or object. He admonished the court for getting hung up on oral penetration. 1989ROA 229-30.

The following morning the judge led off the discussion with his ruling that Athere is substantial competent evidence with regard to vaginal penetration by an object.@ 1989ROA Vol. III 271. The only argument he invited was whether there

was substantial competent evidence penile sexual battery (union of penis to vagina or mouth) to survive the motion for judgment of acquittal.

Prosecutor Benito argued that his indictment survived because he still had large object battery, essentially conceding he had no proof of penile battery. 1989ROA Vol. III 272-79. He suggested that he should prevail because of the violence to the victim and the fact she was undressed, an argument the court found to have little merit. 1989ROA Vol. III 277.

Prosecutor Benito conceded his case was circumstantial. 1989ROA Vol. III 281. The court noted that the state conceded it could prove only battery by object if Mr. Taylor had not told police his story. Mr. Benito conceded even further that absolutely no charges could have been filed but for the confession. But he argued that he should be allowed to proceed on the theory that Mr. Taylor told the truth about the sex acts, but lied about consent. A**If he wouldn=t have made any statements, Judge, I would have had a shoe print in a dugout, I won=t charge him with anything.**@ 1989ROA Vol. III 300 (emphasis added).

The trial court reserved ruling on sexual battery by union of sex organs. 1989ROA Vol. III 300. At the close of the evidentiary phase, the judge denied the motion to acquit, holding that the defense was free to argue that there was a reasonable hypothesis of innocence. 1989ROA Vol. V 549-50. The judge then denied defense counsel's motion to include an instruction on circumstantial evidence to inform the jury of the law controlling the issue. 1989ROA Vol. V 550.

This striking colloquy, in which the state concedes it has no evidence of sexual battery by union except for Mr. Taylor=s admission, flies in the face of the law and common sense. The state conceded it did not have corpus delicti. Mr. Taylor's confession should not have been admitted, and the evidence absent the confession was nil. The colloquy makes it exquisitely clear how and why Dr. Miller=s false and misleading testimony in the 1989 trial prejudiced Mr. Taylor.

The only theory the judge found convincing was sexual battery by penetration by a large object, and he could only have based that finding on Dr. Miller=s testimony. Had the court been properly informed that the injuries likely were from a kick, and further informed by a defense expert that battery by insertion of a large object could not have occurred, to a reasonable degree of medical probability exceeding 90 percent, the judge would have had no basis to find even large object battery sufficiently established to survive the motion to acquit.

Dr. Miller=s testimony has changed over time. His initial testimony purported to establish that the injuries were almost certainly caused by the insertion of a large object. This was the only evidence of sexual battery by object that the jury heard in 1989 and the only evidence the judge had to consider when he relied upon it to allow the theory to survive a motion to acquit. Now, Dr Miller says that all of the injuries were likely caused by a kick.

Dr. Miller=s work on this case is fatally flawed in other matters as well, all of them contributing to the injustice of allowing a conviction for a sexual battery which did not occur.

This Court expressly relied on Dr. Miller's now-recanted testimony to sustain the conviction for sexual battery on the first appeal:

> 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.
>
> *Taylor v. State*, 583 So.2d 323, 329 (Fla. 1991).

The error in 1991 must now be corrected.

Dr. Miller=s autopsy of the victim was unconscionably below the reasonable standard of performance for a medical examiner. He conducted no microscopic examination of the genital injuries or the bite mark to determine their chronology. Dr. Miller failed to retrieve the report from the expert odontologist, and he allowed the tissue to be destroyed. He altered his autopsy report, concealed the true state of affairs regarding a critical lab result, and compounded the concealment by his testimony.

Dr. Miller falsely testified at the original trial that the injuries could not have been inflicted by kicking.

> BY MR. BENITO:
> Q. The injury you observed to the exterior of the vagina, within a reasonable degree of medical probability is that consistent with having been inflicted by **someone kicking** her to that area?
> A. [By Dr. Miller] **No.**
> Q. The injuries you observed to the interior [sic] of the vagina, are those injuries within a reasonable degree of medical probability consistent with having been inflicted by **someone kicking** her in that area?
> A. **No.**
> Q. Within a reasonable degree of medical probability would penetration have been necessary to inflict the injuries to the interior [sic] of the vagina?
> A. Yes.

ROA1989 Vol. I 87 (emphasis added).

Dr. Miller says he uses a personal definition of Areasonable degree of medical probability@ which differs from the legal definition and the definition Dr. Wright says is the accepted standard in the profession (90 percent probability). He also testified in this evidentiary hearing that he actually uses the term variably, sometimes to an almost certainty, other times just better than 50/50. What justice can there be when the state=s star witness expressly says in the evidentiary hearing that he likes the 50/50 standard because it gives him wiggle room?

> Q So every time you gave testimony in deposition or trial in this case when you used a reasonable degree of medical probability you meant almost to a certainty; is that correct?
> A **It depends. Sometimes it's better than 51 percent, sometimes it's almost to a certainty.** I can't delineate it. It's better than a coin flip, but it's not a certainty. There's a gray area there that I use that it's

happened a million times some attorney attempts to be very precise about it. I just can't do it .

Q But, so you're saying that when you use that term sometimes you use a lower standard and sometimes you use the almost certain standard?

A Exactly.

Q And you have explained that when you -- which standard you're using when you give that testimony?

A **It depends how closely I'm questioned.** I usually say it's a gray area and I can't give you an absolute percentage. Sometimes I think things are more probable than other times. **Probable gives you a little room to wiggle in.**

2007ROA 1945-46 (emphasis added). Of course, Dr. Wright testified that a medical examiner using any standard other than the 90% standard was obligated to volunteer that information, not wait for "close questioning." Even in the evidentiary hearing, it took "close questioning" to force Dr. Miller to disclose his "wiggle room." *Id*.

Even if defendants= lives were not at stake, it is terrifying to hear one of the primary witnesses for the state in countless trials admit that he has no set definition of reasonable probability and he keeps that information to himself unless closely questioned.

Dr. Miller also admitted in the postconviction hearing that when he testified in the 1989 guilt phase trial that he either meant all the injuries at issue were caused by stretching to almost a certainty, or he didn=t know what standard he was using .

Q So when you said a reasonable degree of medical probability in 1989 as to the penetration and stretching of the vagina, your testimony

was that almost to a certainty both the perineal and the labia minora lacerations were caused by stretching?
A **I think that's what I said. I don't know**, can we go off the record for a moment?
MR. GEMMER: Your Honor.
THE COURT: If you want to have a private conversation out of my hearing, but I don't want to hear anything off the record here.
A Then let's skip it.

ROA2007 1947.

Defense counsel and the prosecutor testified that they were not aware of Dr. Miller=s idiosyncratic, secret standards. The trial court and trial counsel in 1989 were working in complete ignorance..

Regarding the mechanism of injury which supported a battery-by-object conviction, it was not until this proceeding, when Dr. Miller had the opportunity to read the deposition of Dr. Ronald Wright, that Dr. Miller finally retracted his original opinion and agreed with Dr. Wright that a kick likely caused all of the genital injuries. Dr. Miller tried to excuse his 1989 misrepresentation by claiming in the evidentiary hearing that

> **there was something that wasn=t brought up by any of the attorneys in any of these depositions [and trial testimony]** that you referred to and perhaps I should have brought it up myself. [It was brought up by Dr. Wright in his deposition.] Dr. Wright said the injuries to the inside of the vagina were . . . probably sustained by a kick or a blow. Whereas I said they were sustained by a stretch injury. . . . **I agree that if a blow had been struck where the toe of the shoe actually went, went into the vagina stretching the vagina it would have introduced the injuries that I=ve described.**
>
> . . . **[T]he attorneys didn=t bring it out that it could have been a hard blow from a shoe going directly in. That didn=t come**

up and it certainly seems a reasonable possibility, maybe even a probability, in reading Dr. Wright=s [deposition].

2007ROA Vol. XII 1950-51 (emphasis added).

Dr. Miller establishes that defense counsel in 1989 was ineffective for failing to thread the needle. This supports the claim in the Fourth Amended Motion that counsel was ineffective for failing to employ an independent medical examiner to advise on the case.[6]

Add to this Dr. Wright=s testimony at the evidentiary hearing. Dr. Wright testified that, to a reasonable degree of medical probability (90 percent), the cause of the injuries to genital area of the victim in this case was that AShe was kicked.@ To a reasonable degree of medical probability, the victim **did not** suffer a sexual battery by intrusion of an object penetrating the vagina. **She was kicked.**

2007ROA Vol. X 1544-45.

The evidence now shows that the evidence submitted in the 1989 trial was grossly incorrect. The victim=s injuries were not caused by a large object in a sexual battery. They were the result of an unlikely kick which connected in such a

[6] While the defense apparently sought the advice of a forensic pathologist for the 1992 penalty retrial, the only suggestion of this is found in claim XIX of the amended Motion, and no evidence or testimony was presented in the evidentiary hearing as to this issue. There is no evidence whatsoever that the defense consulted a forensic pathologist for the 1988 guilt phase trial, which resulted in the critical failure to recognize the deficiencies of the medical examiner's evidence suggesting innocence of sexual battery.

manner as to stretch and tear the area in either an oblique or slightly penetrating strike.

The lower court attempts to avoid this conclusion by endorsing the credibility of Dr. Lynch, the ob-gyn with no forensic experience or training, who purported to refute the testimony of both Dr. Miller and Dr. Wright. It is an unreasonable determination of the facts in light of the evidence presented in the postconviction proceeding. Dr. Miller was the eyewitness to the autopsy. Dr. Wright is a highly regarded expert in forensic pathology. It is truly unreasonable to dismiss their opinions, and accept the opinion of the only witness in the history of this case who now says a kick cannot be. The truth now revealed completely exonerates Mr. Taylor of the sexual battery charge.

The well-settled law at the time of trial and today is that penetration of the vagina is necessary to establish sexual battery by an object: Aanal or vaginal penetration of another by any other object.@ ' 794.011(1)(h), Fla. Stat. (1989). *See, e.g., Jaggers v. State*, 536 So.2d 321 (Fla. 2nd DCA 1988) (no evidence of rape when victims testified defendant touched with finger but did not penetrate, and expert testified physical evidence was equally indicative of causes other than child abuse); *Furlow v. State*, 529 So.2d 804 (Fla. 1st DCA 1988) B A the State would have to prove that [the defendant] intended to penetrate the canal between the victim=s vulva and her uterus . . . .@; *Peters* v. State, 861 So.2d 1236, 1238 (Fla. 2nd DCA 2003) (equivocal statement of victim whether defendant touched or

penetrated permitted defense of lack of penetration); *Richards v. State*, 738 So.2d 415, 416 (Fla. 2d DCA 1999): AIf the defendant=s finger does not penetrate the vagina, but only touches the vulva, the crime appears to be a lewd and lascivious act [when the victim is a four year old girl].@

An essential element of the crime of sexual battery by penetration by object requires the perpetrator have a specific criminal intent to obtain sexual gratification from the penetration. *State v. Alonso*, 345 So.2d 740 (Fla. 3d DCA 1977); *Hendricks v. State*, 360 So.2d 1119 (Fla. 3d DCA 1978). In *Aiken v. State*, 390 So.2d 1186 (Fla. 1980), this Court eliminated the element of gratification when the offense is committed by union with the sexual organ. The Court endorsed the lower court=s opinion that the decision was limited only to union with the sexual organ.

The special concurrences to both the lower court decision and this Court's decision addressed the fact that gratification remained an element of sexual battery by penetration by object. Justice McDonald endorsed Judge Dauksch=s special concurrence recognizing the majority opinion did not reach penetration-by-object. Judge Dauksch opposed allowing gratification to remain an element of penetration-by-object. He dismissed the long-standing concern that the gratification element was necessary to avoid unjust convictions for accidental penetration.

> It is my suggestion we step out and say sexual gratification is not a required element of proof in any sexual battery. . . . . **If a defense of ›horseplay= or accident is proffered then the state will be required**

to meet that defense, just as it would when an accused in a non-sexual battery case makes that defense.

State v. Aiken, 370 So.2d 1184 (Fla. 4th DCA 1979) (Dauksch, J., specially concurring) (emphasis added). Judge Dauksch recognizes that the state of mind of the defendant is critical to determining his or her culpability **B A**horseplay or accident@ would remain valid defenses to penetration by object even if the element of sexual gratification were removed.

The truth now raises a total defense. Dr. Miller opines that penetration by kick would be a million to one, and Dr. Wright says penetration was not necessary for the kick to cause the injuries. This establishes there is a reasonable doubt that any penetration occurred. It also raises the additional defense of accident. The lack of any object at the scene which could have caused penetration, combined with Mr. Taylor=s confession and testimony, raise no suggestion of penetration by any other object, and no indication of intentional penetration by kicking.

The prosecution knew or should have known that a kick was the probable mechanism for the injury, yet it elicited and allowed to stand uncorrected Dr. Miller=s false and misleading testimony. This is a clear violation of the state=s duty to not elicit false or misleading testimony, and to correct any such false or misleading testimony if it is introduced, set out in *Giglio v. United States*, 405 U.S. 150 (1972).

Even if the state can claim ignorance and Dr. Miller=s misrepresentations can be said to fall outside the penumbra of protection from *Giglio,* Dr. Miller=s undisclosed exculpatory knowledge is chargeable to the state and requires a new trial pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). Mr. Taylor was prejudiced because he was denied a defense of lack of penetration, lack of intent to obtain sexual gratification, and mistake or accident.

Retrial is necessary on both counts, murder and sexual battery. The false conviction for sexual battery supported the felony murder aspect of the homicide conviction and was a key aggravating factor in the penalty phase.

If Dr. Miller=s testimony in this proceeding is taken as good faith explanations of good faith actions in 1989, then defense counsel was clearly ineffective for failing to elicit the critical testimony, justifying relief under *Strickland.* The prejudice again is the complete denial of a defense to sexual battery and the multiple consequences of the wrongful conviction for sexual battery.

There is no evidence of nonconsensual sex with the victim. Mr. Taylor told police of the consensual acts. There is not one iota of evidence that these acts were nonconsensual. Even the state=s psychiatrist in the postconviction proceeding, eliciting Mr. Taylor=s confession one more time, could find not a single word which indicated the acts were forced.

If the trial court had been fully informed of the complete absence of evidence to support any theory of sexual battery, it would have been compelled to grant the motion for judgment of acquittal. The only evidence of sexual battery before the jury, large object penetration, has now been retracted by the state=s expert and thoroughly refuted by independent forensic testimony which would have and should have been presented at the 1989 trial.

In this case, Mr. Taylor had multiple theories of innocence B no penetration (legally, or mucosal injuries occurred prior to Mr. Taylor=s contact with the victim), no intent of gratification, and accident. None of the state=s evidence refutes any of these theories of innocence B Mr. Taylor should have been acquitted and his conviction for sexual battery now must be overturned.

IB THE DEFENDANT=S TESTIMONY

TRIAL COUNSEL IN THE 1989 GUILT PHASE COMMITTED AN UNCONSCIONABLE TACTICAL ERROR IN PLACING MR. TAYLOR ON THE STAND. COUNSEL DID NOT PREPARE MR. TAYLOR IN SUCH A MANNER TO ALLOW HIS TESTIMONY TO HAVE A BENEFICIAL EFFECT.

Counsel's decision to put Mr. Taylor on the stand was not the product of lengthy debate or long deliberations. Instead, during a brief recess in the trial proceedings, counsel approached Mr. Taylor in the holding cell and announced his decision. Counsel then hurriedly spoke with his client.

Placing a brain-damaged young man, on trial for his life, in the courtroom arena on the spur of the moment without any preparation, rehearsal, or advice other than to tell the truth, cannot be excused by the magic words of "trial tactics" or "strategy."

Counsel presented evidence which was irretrievably damaging to Mr. Taylor's case by persisting in demonstrating to the jury Mr. Taylor's massive physique and great physical strength. At one point, counsel instructed Mr. Taylor to remove his shirt to show the jury his well-developed musculature 1989ROA Vol. IV 454. There can be no strategy or tactic attributable to this bizarre demonstration. The constant emphasis on Mr. Taylor's strength supports the prosecution theory that Mr. Taylor could easily kill a woman with mere hands and feet. It also serves to diminish the defense theory that the killing was accidental. During closing argument defense counsel referred to Mr. Taylor as a "gentle giant." 1989ROA Vol. V 601. The demonstration of naked musculature belied this characterization.

Mr. Sinardi told Mr. Taylor to demonstrate how he had choked the decedent. Mr. Taylor obediently complied, to the shock of the predominantly female jury and those in the courtroom such as Sonya Davis, one of the victim's daughters. This display of brute strength destroyed any hope of convincing the jury Mr. Taylor was a benign Agentle giant."

Mr. Sinardi testified in the evidentiary hearing his purpose for having Mr. Taylor display his physique and act out the murderous attack was to show the jury Mr. Taylor was a gentle giant capable of killing the victim without intending to. However, Mr. Sinardi also testified that he never rehearses and did not do so with Mr. Taylor. Even if Mr. Taylor's remarkable physique needed to be displayed any more than what was readily observable in the courtroom, Mr. Taylor should have been counseled as to how to present this evidence without terrifying the jury. Mr. Taylor should have remained in the witness box or stood at a remove from the jury, rather than directly in front of them. He should have never demonstrated choking when the purpose of the demonstration was to show how the murderous acts could have been done with only accidental lethal effect.

Counsel's "strategy" confounded two defenses - manslaughter by a gentle giant without intent, and second degree depraved mind killing the result of a sudden uncontrolled rage.

Mr. Sinardi's strategy was fatally flawed, unreasonable, and below the standard of competent counsel. He had the viable defense of second degree murder, a sudden rage, In closing, counsel abandoned the manslaughter/lack of intent theory and relied solely upon the second degree murder theory. 1989ROA Vol. V 611. Despite this being the final argument in the close, Mr. Sinardi persisted in having Mr. Taylor once again stand up and pointing out to the jury

AThe man is huge. . . . We=re not talking about fat here, okay? We=re talking muscles. Strength.@ 1989ROA Vol. V 601.

IC FAILURE TO DEVELOP MENTAL HEALTH ISSUES FOR GUILT PHASE

In *Futch v. Dugger*, 874 F.2d 1483, 1486-87 (11th Cir. 1989). the Court considered a claim of ineffective assistance of counsel for failure to investigate the defendant's competency to stand trial. "Competency in this sense means the ability to cooperate with counsel and to participate in his own defense." *Alexander v. Dugger*, 841 F. 2d 371, 375 (11th Cir. 1988). The Eleventh Circuit emphasized that defense counsel did have a duty to investigate petitioner's competency, and that this duty was breached either by failing to make reasonable investigation into petitioner's competency or by failing to make a reasonable decision that such investigation was unnecessary. Futch, 874 F.2d at 1486-87.

This omission by trial counsel is not harmless, and Mr. Taylor is entitled to relief.

ID OTHER MATTERS OF INEFFECTIVE ASSISTANCE

The proceedings and grounds for postconviction relief as provided under Florida Rule of Criminal Procedure 3.850 include, as one of the grounds, the opportunity for a defendant to present newly discovered evidence in accordance with *Scott v. Dugger*, 604 So.2d 465 (Fla.1992), *Jones v. State, 591 So.2d 911*

(Fla.1991), and *Richardson v. State*, 546 So.2d 1037 (Fla.1989). *In re Amendments to the Florida Rules of Criminal Procedure*, 25 Fla. L. Weekly S995 (Fla. Nov. 2, 2000).

The post-conviction court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Jones v. State*, 709 So.2d 512 at 521. (Fla.1998). Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim. *Lightbourne v. State*, 742 So.2d 238, 247-48 (Fla.1999) (requiring cumulative analysis of *Brady* material). When cumulative errors exist, regardless of the nature of each individual error, the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this State and this nation.

Jackson v. State, 575 So.2d 181, 189 (Fla. 1991). In *Jones v. State*, 569 So.2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase."

To the extent that some of the purported newly discovered evidence fails to meet the due diligence requirement, counsel was ineffective for failing to discover it. *See State v. Gunsby*, 670 So.2d 920 (Fla.1996) ("[I]t appears that at least some

of the evidence presented at the Rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).").

A newly discovered evidence claim can encompass evidence that goes only to impeachment, as well as direct, substantive evidence. *McDonald v. Pickens*, 544 So.2d 261 (Fla. 1st DCA 1989) ("[T]here may be cases where newly discovered evidence may warrant a new trial notwithstanding that the evidence goes only to the impeachment of a witness.").

> We also required in Jones II that the trial court undertake a cumulative analysis by evaluating the newly discovered evidence in conjunction with evidence presented at all prior evidentiary hearings and evidence presented at trial. See id. at 522. We agree with the district court that impeachment evidence could be part of this cumulative analysis, as this Court stated in Jones I, Jones II, and Williamson v. Dugger, 651 So.2d 84, 89 (Fla.1994).
>
> Therefore, we determine that this case should be remanded to the trial court for the trial court to reconsider its ruling. Accordingly, we remand . . . with directions for the trial court to conduct a reweighing of the newly discovered impeachment evidence and a cumulative analysis by taking into consideration all the evidence presented at trial and in the evidentiary hearing below.

Robinson v. State, 770 So.2d 1167, 1170-71, (Fla. 2000).

Recanted testimony can constitute newly discovered evidence. *Asay v. State*, 769 So.2d 974, 981 (Fla.2000). Dr. Miller=s 180 degree change from battery by object to accidental kick is such a recantation.

For a *Brady* claim, "the rule encompasses evidence >known only to police investigators and not to the prosecutor.'" *Strickler*, 527 U.S. 280-81.; *Smith v. Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969).

As to the argument that some or all of the claims established and raised in the evidentiary hearing are procedurally barred because they were not added within 30 days of the final evidentiary hearing, capital defendants proceeding under the older versions of Rule 3.850 are permitted to amend their motions to expand the preexisting claims until the court actually issues its order on the motion. Further, it was not until Dr. Miller testified in deposition that the facts regarding his testimony in 1989 and 1992 became apparent. And Dr. Miller=s recantation of his opinion as to the mechanism of injury at issue in this case **did not occur until his testimony in the evidentiary hearing**.

Mr. Taylor is free to amend his petition at any time prior to a decision of this Court to expand any claim timely made in his underlying motion. A[T]he two-year limitation [of Rule 3.850 barring claims filed after two years] does not preclude the enlargement of issues raised in a timely-filed first motion for post-conviction relief.@ *Brown v. State*, 596 So.2d 1026, 1027 (Fla. 1992). *Bulley v. State*, 857 So.2d 237, 240 (Fla. 2nd DCA 2003) (emphasis added).

ISSUE II[7]

[7] This claim was inadvertently mislabeled AClaim XIII@ in the Fourth Amended Motion, but it is Claim XI for which hearing was ordered.

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.

The standard of review set out at Issue I applies to this issue as well.

There was abundant mitigation evidence available that counsel, without tactic or strategy, failed to present. The billing in the court file indicates defense counsel spent a total of only 79.6 hours on Mr. Taylor's resentencing, including court time. This record speaks for itself. Defense counsel barely scratched the surface of the available evidence that could have been presented in support of the case for his client's life.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). *Strickland* requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Taylor has proven both.

In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die

[made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion).

In *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003), the United States Supreme Court found a violation of the Sixth Amendment right to the effective assistance of counsel in a similar breakdown in the preparation of the penalty phase mitigation. The Court held that the investigation supporting counsels= decision not to present mitigation evidence of Wiggins= background was unreasonable, Wiggins was denied the Sixth Amendment right to the effective assistance of counsel, and that the state court decisions were unreasonable applications of *Strickland*. A*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.@ *Wiggins*, 123 S.Ct. 2527, 2538 (2003). "The ABA Guidelines provide that adequate investigations into mitigating evidence include Aefforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989).@ The Court further noted that: AThe record of the actual sentencing proceedings underscores the unreasonableness of counsel=s conduct by suggesting that their failure to investigate resulted thoroughly from inattention, not reasoned strategic judgment.@ *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003).

Counsel in Mr. Taylor=s penalty trial did not meet the rudimentary constitutional standards that are required. Defense counsel utilized the services of Dr. Berland, a forensic psychologist, during Mr. Taylor's resentencing hearing. Counsel failed to provide the expert with adequate background materials to make a reliable judgment. Counsel failed to provide Dr. Berland with medical records of Mr. Taylor or his family members, and failed to adequately brief Dr. Berland as to the statutory mitigating circumstances that apply to capital cases in Florida. Counsel failed to supply Dr. Berland with information relating to Mr. Taylor's experiences in an abusive and violent foster home between the ages of 7 and 14.

Trial counsel testified that he believed he was allowed only one expert to assist him, based on an unwritten rule and practice in Hillsborough County in 1992. Dr. Berland testified testing showed brain damage. 1992ROA 470-72. He knew nothing about what happened to Mr. Taylor during the seven or eight years he was in foster care. 1992ROA 475.

Dr. Berland said he first tested Mr. Taylor with an MMPI February 4, 1992, three and a half months before the penalty trial began May 18, 1992. 1992ROA 443. He administered the second only a few days before he testified May 20, 1992. 1992ROA 456. The MMPI doesn=t measure brain damage, but some of the mental illness it does measure can arise from brain damage. 1992T456. The results suggested a biological disorder, including schizophrenia, manic depression, psychosis, bipolar disorder, paranoia or brain injury. 1992T458.

The best Dr. Berland could say regarding brain damage was that Athe implication [from the IQ tests] is that there=s damage on both sides of the brain, the left and right hemisphere . . . [and] a suggestion that there=s some frontal lobe damage . . . . You can=t get much detail with that with this test.@ 1992ROA 469. But he could go no further than to testify that the impairment he diagnosed@had something to do with [the homicide] though it was not a direct causal factor.@ 1992ROA 474.

Dr. Berland identified neuropsychological testing as the necessary follow up. 1992ROA 479. The state trivialized the testimony when, responding to Dr. Berland=s assertion that the organic damage made Mr. Taylor=s condition worse, the prosecutor testified AWhich was only hinted at, though, on the MMPI in February, correct?@ Dr. Berland had to concede the point. 1992ROA 488. Defense counsel at the penalty retrial agreed at the evidentiary hearing that this line of questioning was a state attempt to diminish Dr. Berland=s testimony.

The impact of Dr. Berland=s testimony was thus reduced because the defense had no response to the state=s implication that the diagnosis of brain damage was insufficient to be a mitigator because no neuropsychological testing had been done, and because there was no medical evidence to back it up.

The neuropsychological testing by Dr. Dee indisputably establishes brain damage in the area of the brain which controls impulsive behavior. Dr. Dee testified Mr. Taylor suffered from brain damage, to a reasonable degree of

neuropsychological probability. Dr. Berland never rendered an opinion to a reasonable degree of psychological probability.

Mr. Taylor=s brain damage constituted a major mental or emotional disturbance resulting in cognitive dysfunctioning, which very much increased impulsivity and memory impairment. Dr. Dee testified that two statutory mental health mitigators existed, based on his testing and evaluation:

> [C]erebral damage certainly constitutes, in my opinion a major mental or emotional disturbance.
>
> . . . .
>
> [T]he nature of the brain damage would suggest that it would be very difficult for him to conform his conduct to the dictates of the law . . . I think the legal language is substantially impaired, yeah.
>
> Q And you believe that aspect of it, he was substantially impaired?
>
> A I do.

2007ROA Vol. XI 1722-24. Dr. Dee said that opinion could have been reached in 1992. Dr. Dee testified that the brain damage exhibited by Mr. Taylor lowered his ability to control his conduct. Dr. Dee said the brain damage in Mr. Taylor=s case explained why Mr. Taylor committed the violent acts he did.

> The question is why did this person, or any person, engage in such a long series of violent acting our. And I think this helps explain that. It=s a step above just saying just mean, you know. Why are they mean? Why is it described as mean? Why is it so senseless? Well, because they have frontal lobe damage. They don=t use their brain B they cannot adequately use their brain to plan and carry out intelligent acts and they also carry out things they wouldn=t do otherwise is that brain damage wasn=t present because it lowers these inhibitions. In face, that=s probably the easiest way to describe what frontal lobe damage does.

2007ROA Vol. XI 1747.

Mental health mitigation is of the weightiest order in a capital case. *Rose v. State*, 675 So.2d 567 (Fla. 1996); *Hildwin v. State*, 654 So.2d 110 (Fla. 1995); *Santos v. State*, 629 So.2d 838, 840, (Fla. 1994).

Judge Lopez knew or should have known that neuropsychological testing should have been done before the 1992 penalty trial. Dr. Berland knew neuropsychological testing was necessary and conceded the same to the state in cross examination. If he knew it then, he surely knew it when he spoke to defense counsel Lopez. But Counsel Lopez testified that he did not know neuropsychological testing was available in 1992, despite the fact Dr. Dee was practicing in the area at that time.

The only mitigation that came of Dr. Berland=s testimony was that the IQ tests suggested brain damage, and the MMPI was not a diagnostic tool for brain damage.

The PET scan corroborates the diagnosis of brain damage. The best the state=s experts could do was to argue that the science was not developed enough to allow the conclusions drawn by Dr. Wood. PET scans were clearly available in 1992, the year Dr. Mayberg started her crusade against the use of PET scans to explain behavior in criminal trials. Dr. Kotler was doing PET scans in Florida well before the trial, and Dr. Mosman was using the scans forensically in that time frame.

The PET scan also constitutes newly discovered evidence which would probably produce acquittal of first degree murder on retrial. *Jones v. State*, 591 So.2d 911 (Fla. 1991). The same standard applies to the penalty phase. *Jones*. Evidence of the brain damage in this case establishes at least two statutory mitigators: the defendant was under the influence if extreme mental or emotional disturbance; and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. It also in itself is a nonstatutory mitigator, i.e. Mr. Taylor suffered from brain damage. Brain damage to the temporal lobes also contributed to his social adjustment problems.

The evidence of life in the foster home in the 1992 trial suggested Mr. Taylor lived in one of the more distant outer rings of hell. The evidentiary hearing in this proceeding moved that location far closer to the center. Howard Ury's description of life in the Rutledge dungeon painted a far more detailed and hellish picture than anything presented in the 1992 trial. Dickens could not have envisioned the conditions at the Rutledge home.

The state=s attempt to rebut Dr. Dee=s neuropsychological findings is beyond unavailing. Dr. Taylor had to concede repeatedly in his testimony that he was not qualified in neuropsychology, that he could not administer the test batteries or interpret them. Dr. Taylor never asked Mr. Taylor about the head injuries reported by the brother, even though he had that information before him. He never asked

about the migraines. The only testing Dr. Taylor administered was the perfunctory mental status exam which Dr. Dee later explained was not a test for brain damage. No one asked Dr. Taylor if Mr. Taylor was crazy. That was the only opinion he might have been qualified to offer.

The prejudice from the failure of sentencing counsel is manifest. The judge in her sentencing memorandum found only two facts from the foster home experience **B** beaten for bedwetting and removed from the family for more than seven years, and she gave only some weight to this and family factors. She characterized Dr. Berland=s testimony as Asuggesting@ Organic Personality Syndrome and evidence Aindicative@ of brain damage. She gave this Avery little weight.@ She rejected any lingering doubt about the sexual battery of the victim in this case because, even though the victim consented to the initial sexual acts, she did not consent to the subsequent sexual battery. This finding can only be based on Dr. Miller=s repeated misguidance that the injuries resulted from the insertion of a large object, an opinion he now recants.

ISSUE III

REFUSAL TO CONSIDER THE TESTIMONY OF SONYA DAVIS AND DENIAL OF A CONTINUANCE TO ALLOW HER NEWLY DISCOVERED EVIDENCE TO BE DEVELOPED DEPRIVED MR. TAYLOR OF HIS RIGHTS PROTECTED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The standard of review is the same as set out in Issue I.

Sonya Davis was one of the victim=s daughters. The state deposed her to respond to a defense motion to amend the Motion for Postconviction Relief.

Ms. Davis was 35 years old at the time of her deposition. 2007ROA SUPP Vol. II 231. The victim, Geraldine Birch, was her mother. 2007ROA SUPP Vol. II 231. She was one of 9 children her mother had. 2007ROA SUPP Vol. II 232.

Ms. Davis said she told a CCRC investigator that Perry Taylor was dating her mother. She said there had been talk that her mother was with Mr. Taylor to do a Atrick,@ an act of prostitution. She said that when the CCRC investigator told her that was one theory of what happened, she told the investigator it wasn=t a trick because they were dating. 2007ROA SUPP Vol. II 243. Ms. Davis said she never knew her mother to offer sexual services in exchange for money or drugs.

Ms. Davis saw Perry Taylor with her mother one time. It was on her sister=s porch in College Hill, a week before she died. 2007ROA SUPP Vol. II 245. They were acting as boyfriend and girlfriend, sitting close and holding hands. 2007ROA SUPP Vol. II 252 & 261. Her mother had told her she was seeing someone and wanted to introduce him. 2007ROA SUPP Vol. II 246.

Ms. Davis saw her mother the Sunday she was killed. Her mother was at a cookout she and her sister threw for her because she was going to check herself into a drug treatment center the following day, Monday. 2007ROA SUPP Vol. II 248-49.

Ms. Davis said she was upset when she found out the investigator was working on behalf of Mr. Taylor. She didn't want to testify for the defendant. She also agreed that the prosecutor told her she did not have to talk to the defendant=s lawyers if she did not want to. 2007ROA SUPP Vol. II 251. Ms. Davis said she was in tears during her conversation with prosecutor Vollrath when she called the state attorney the week of the deposition. 2007ROA SUPP Vol. II 252.

The state attorney then inquired about what Ms. Davis recalled of her mother=s death: ALet=s go back to when your mother was killed . Were you ever interviewed by the police [A No] about your mother=s murder? How did you learn about your mother=s murder? . . . Did you have a funeral for your mother? . . . So how did you know your mother was dead?@ 2007ROA SUPP Vol. II252-53. The state then directed Ms. Davis to relive the moments when she learned of her mother=s death and her viewing of the trial. 2007ROA SUPP Vol. II 253-54. She recalled being at the first trial in 1989 every day of the trial. She said Mr. Taylor=s attorney never talked to her. 2007ROA SUPP Vol. II 254.

Immediately after the state=s litany of Ms. Davis= grief and horror and after reminding her without qualification that she did not have to talk to the defendant=s lawyers, the state attorney inquired whether Ms. Davis wanted to testify. "[W]ould you have been willing to come to court and testify for Mr. Taylor? A No. Q You didn=t want to testify for Mr. Taylor? No.@ 2007ROA SUPP Vol. II 254-55.

On cross-examination, Ms. Davis said her mother talked about Mr. Taylor, saying she was dating him, telling her family his name and saying she wanted them to meet him. 2007ROA SUPP Vol. II 257. Her sister told her before her mother died that Mr. Taylor came to the house all the time. 2007ROA SUPP Vol. II 258-59.

Ms. Davis said she saw Mr. Taylor testify in the 1989 trial. She saw him explain how he killed her. 2007ROA SUPP Vol. II 262. She said the judge (apparently confusing defense counsel or the prosecutor) asked Mr. Taylor to explain how he did it and how much weight he could lift Aand stuff like that.@ 2007ROA SUPP Vol. II 263. She said the testimony about how he killed her mother scared her. 2007ROA SUPP Vol. II 263.

If a defense investigator had approached her before the 1989 trial, she would have told him that her mother was dating Mr. Taylor. 2007ROA SUPP Vol. II 266. She didn=t want to get in court Abecause I know when you get in court, people try to mess your mind up. So, no.@ 2007ROA SUPP Vol. II 268. However, she said unequivocally that she wanted everyone to know for sure her mother was not turning tricks. 2007ROA SUPP Vol. II 268.

Ms. Davis= testimony establishes a number of issues critical to the case, and contributes to a showing of prejudice in several matters. The state vigorously argued that the victim did not go off with Mr. Taylor voluntarily the night of the murder, that she was compelled. The fact that Ms. Davis was in a

boyfriend/girlfriend relationship with Mr. Taylor refutes any claim that she went with Mr. Taylor without consent. The state vigorously argued, and this Court held in the direct appeal, that the evidence established that the sexual encounter was not consensual. The romantic relationship observed by Ms. Davis certainly would contribute to reasonable doubt whether the sexual encounter was consensual.

Ms. Davis said her sister, perhaps other family members, and her sister=s College Hill neighbors all knew Mr. Taylor had been seeing Ms. Birch. The state almost certainly had to have discovered this fact in its investigation, yet there is no evidence that the state ever disclosed this fact to the defense. Collateral counsel asked for a continuance to allow further investigation of the Brady claim, the failure of the state to inform the defense before or during the 1989 trial about Ms. Birch=s relationship with Mr. Taylor, 2007ROA Vol. X 1590-91.

Ms. Davis was present at the 1989 trial when Mr. Taylor testified about the murder, causing fear. No one else has been in a position to testify as to the negative impact Mr. Taylor=s testimony had. The prejudice should be manifest, but the testimony of a lay witness established the prejudice without a doubt.

The lower court denied the motion to continue to allow Ms Davis to be called and for further investigation, because Aher testimony would [not] have made any impact on the ultimate outcome with the Jury consideration of the injuries inflicted whether or not this was a dating situation or it was a rape situation or whatever. The magnitude of the injuries I don=t think would have had any impact

concerning the status of Mr. Taylor on the victim.@ 2007ROA Vol. X 1591.

The lower court erred in ruling that the witness=s professed reluctance to testify on behalf of Mr. Taylor. That reluctance is belied by the fact that Ms. Davis herself testified in the deposition she wanted everyone to know her mother was not a prostitute, which would only be accomplished if she told everyone about the dating relationship. The state skillfully manipulated Ms. Davis= emotions during the deposition. Only after distressing Ms. Davis did she then inquire whether Ms. Davis would testify for Mr. Taylor.

The simple fact that Ms. Davis complied with the subpoena for the deposition establishes that she complies with subpoenas to appear to give testimony about her mother=s relationship with Mr. Taylor.

The state never proved Ms. Davis would have been unavailable to testify in the 1989 or 1992 trials. Mere reluctance of a witness to testify is alone insufficient to establish unavailability under Florida Rule of Evidence 90.804.

> 1) DEFINITION OF UNAVAILABILITY.--"Unavailability as a witness" means that the declarant:
> . . . .
> (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
> . . . .
> (e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.
>
> However, a declarant is not unavailable as a witness if such . . . refusal . . . . or absence is due to the procurement or wrongdoing of the party

> who is the proponent of his or her statement in preventing the witness from attending or testifying.

The case law interpreting the rule requires a showing that the reluctant witness be shown to persist in refusing to testify even under the compulsion of the court and under the compulsion of a subpoena. *Lawrence v. State*, 691 So.2d 1068, 1073 (Fla.), *cert. denied*, 522 U.S. 880 (1997) (court unanimous that witness was unavailable but divided 4-3 whether admission of witness= prior testimony under 90.804(2)(a) was harmless). *McClain v. State*, 411 So.2d 316, 317 (Fla. 3d DCA 1982) (citations deleted).

In the instant case, the state clearly played on Ms. Davis= emotions at the deposition. The entire litany of grief was preceded by the state=s reminder to the witness that she did not have to talk to the defendant=s lawyers. Given the state=s misdirection and deliberate and unconscionable agitation of this witness, the state must be found to have committed wrongdoing and procured her unavailability if, indeed, her stated reluctance could even be deemed to establish that she was unavailable. The state should not, therefore, be allowed to benefit from this unavailability. The lower court's order is essentially a ruling that Ms. Davis is unavailable. The deposition is now admissible under 90.804(2) and it should have been admitted into evidence as the valid testimony of Ms. Davis. Further, if the state is deemed to have established that Ms. Davis would not have cooperated in 1989 or 1992, then her testimony in 2005 should be deemed newly discovered and

the defendant should still be allowed to rely on that information. Treated as newly discovered evidence, and the purported unavailability of Ms. Davis to testify in 2005, her deposition is clearly admissible under Rule 90.804(2)(a).

The testimony of this crucial witness clearly weakens or destroys key elements of the state=s case against Mr. Taylor. Refusal to allow her to testify, and denial of a continuance to allow the defense to develop the leads obtained only in deposition after the state encouraged the witness to cease cooperating with the defense investigator, is a fundamental injustice.

Mr. Taylor has argued both the right to enlarge the issues at any time prior to the disposition of the motion, and that newly discovered evidence must be considered and weighed cumulatively, and he adopts those arguments in regards to Ms. Davis.

CONCLUSION

Based on the evidence adduced at evidentiary hearing, the claims raised herein individually and in cumulation require a new guilt phase trial and/or a new penalty phase trial. Mr. Taylor abandons no claim raised in his post-conviction motions. The evidence adduced at the hearing shows that Mr. Taylor=s trial were totally compromised. A rogue medical examiner now recants the critical testimony supporting the only theory of sexual battery the guilt phase trial court and the prosecutor found viable. The same medical examiner erred at every turn in his autopsy, depositions and testimony in the trials. The law says Mr. Taylor is

innocent of the sexual battery and this undercuts the legitimacy of the entire guilt phase trial.

Counsel was ineffective in developing mental health mitigation. Proper representation would have generated the neuropsychological testing which proved two statutory mental health mitigators. This far exceeds the Asuggestion@ and Aindication@ of some mental health mitigation which the sentencing judge could only find bore Avery little weight.@

The other errors and omissions individually and cumulatively compel new trials. The penalty phase was wholly inadequate, counsel misguided about the extent of his authority to obtain expert witness and even the need for additional expert witnesses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this INITIAL BRIEF OF APPELLANT has been furnished by U.S. Mail to Kay Blanco on this June 21, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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