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

REPLY BRIEF OF APPELLANT

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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.

IA THE SEXUAL BATTERY

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 state begins its argument on the sexual battery issue by alleging that Mr. Taylor has made an improper, procedurally barred argument, on the sufficiency of the evidence. Answer Brief at 57-58. This is completely at odds with both the framing of the issue, as reiterated above, which clearly frames the matter in terms of *Brady, Giglio*, and *Strickland*, and with the argument on the issue, which follows the issue as framed. The factual argument showing how the failures of the state and defense counsel alters the weight and sufficiency analysis is directed to the necessary showing that the failings of the state and defense prejudiced Mr. Taylor in his defense.

The state claims the conviction for sexual battery was settled for all time at the 1989 trial, and that a procedural bar has been erected which cannot be disturbed by any amount of evidence that trial counsel was ineffective, that the key testimony of the medical examiner was, in the best light, incomplete and misleading and the result of sloppy procedures, in the worst light, false, and that the evidence clearly shows the injuries to the victim's genital area were the result of kicking, not of any act of sexual battery.

To the contrary, both the medical examiner who conducted the autopsy and the medical examiner who testified at the post-conviction evidentiary hearing testified that the cause of the victim's genital injuries was from being kicked, an act that is not legally sexual battery.

In arguing that this court has conclusively found that there is sufficient evidence of sexual battery, at page 57 of its Reply Brief, the state highlights language from this court's 1991 decision as to the sufficiency of the evidence of sexual battery:

> 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.**

Taylor v. State, 583 So.2d 323, 329 (Fla. 1991) (emphasis added).

This holding only emphasizes the importance of the medical examiner's testimony in the evidentiary hearing in this post-conviction proceeding. This court's rationale for rejecting consensual intercourse was based on the medical examiner's testimony that a hand or object was inserted into the vagina. Now, the medical examiner has testified that it is "a reasonable possibility, maybe even a probability" that the genital injuries were the result of "a hard blow from a shoe going in . . . ." 2007ROA Vol. XII 1950.

Mr. Taylor's testimony and that of the medical examiner at the first trial were never in conflict – Mr. Taylor testified that there was a consensual sexual encounter, followed by enraged kicking of the victim. The medical examiner's 1989 trial testimony only addressed the injury which he now concedes was probably caused by the kicking. Even the minimal 1989 testimony, that the genital injuries were caused by a hand or object inserted in the vagina is consistent with Mr. Taylor's confession – the object was his foot, which inflicted the injuries during the frenzied kicking. Object insertion of a shoe during kicking is, as argued in the Initial Brief, legally not sexual battery, but accident or lacking the element of gratification.

The medical examiner's testimony has never included any evidence that there was nonconsensual sexual intercourse, and the examiner's false report that there was no acid phosphatase present deprived the defendant of the one piece of evidence which supported his claim that there was brief consensual contact without ejaculation. The medical examiner's false autopsy report that there was no evidence of acid phosphatase contra-indicated any possible brief and partial sexual intercourse. Once the actual lab results were discovered in post-conviction in state files, the presence of a small amount of the enzyme was consistent with Mr. Taylor's claim of brief consensual intercourse without ejaculation. Therefore, the medical examiner's false autopsy report constituted both *Brady* and *Giglio* violations which deprived Mr. Taylor of essential facts which would have satisfied this Court that Mr. Taylor's confession and testimony were consistent with the medical examiner's true findings. The above-quoted conclusion from the 1991 opinion therefore would not have been reached but for the *Brady* and *Giglio* violations committed by the medical examiner and the failure of defense counsel to recognize the defenses raised and discussed in the Initial Brief.

The lower tribunal found that the medical examiner's testimony that the injuries were caused by insertion rebuts any claim that the injuries were caused by a kick. But both Dr. Miller and Dr. Wright testified that the kick penetrated the area

to some extent, causing the injuries found in the autopsy. Dr. Miller's "one-in-a-million" testimony does not refute the fact that the kick caused the injuries, only that such an injury is uncommon.

The state does not have the temerity to actually argue on its own account that Dr. Lynch, the line-level ob-gyn who had no forensic training or skills, could rebut the testimony of two forensic specialists, one of whom was eyewitness to the injuries, that a kick could have and did cause the injuries in question. Instead, the state can only quote the lower tribunal's finding that "The Court finds the testimony of Dr. Lynch to be highly credible and agree with her conclusion that there was penetration of the vagina and the damage to the vagina was not caused by a kick." Answer Brief at 72, quoting 2007 ROA Vol. 5 770.

The lower tribunal had no basis upon which to rely upon Dr. Lynch's opinions as to the causation of the injuries in this case. Dr. Lynch was only qualified as an expert in obstetrics and gynecology. 2007ROA Vol. 10 1605. She was allowed to testify about the causation and timing of the injuries despite the continuing objection that she was not qualified in forensic medicine. 2007ROA Vol. 10 1605, 1609 (objection to opinion as to causation of the injuries), 1610 (continuing objection to opinions on causation), 1615 (objection to opinion whether injuries were post-mortem). Dr. Lynch admitted she had no special training in pathology or forensic medicine. 2007ROA Vol. 10 1617. She was not qualified to

testify to any pathological or forensic issues in this case.

Dr. Lynch testified that the alleged internal injuries she observed are similar to those found after childbirth which show an outward stretching by an overly large head of a baby emerging. 2007ROA Vol. 10 1610, 1625. She testified that the injuries she claimed were inside the vagina could be caused by a shoe if the shoe was able to fit in the vagina. 2007ROA Vol. 10 1630. However, she said the defendant's shoes could not have fit inside the vagina because the exhibits showed an opening of only one inch. But she admitted that a baby's head was larger than an inch. 2007ROA Vol. 10 1631.

The doctor's opinion that a shoe could not have caused the injury is beyond her area of expertise, she was unqualified to render such an opinion, and the opinion is unsupported by the record and by Dr. Lynch's own testimony. She testified that babies' heads can cause the same injuries if overly large, but showing an outward force. She agreed that a baby's head is larger than one inch. Certainly judicial notice can be taken of the fact that babies' heads, larger than one inch, are able to pass through the one inch opening of the vagina during childbirth, refuting any claim that a shoe could not likewise pass into the vagina a short way. Dr. Lynch's conclusion that a kick could not have caused the injuries is not supported by any competent or substantial evidence, as her own testimony refuted the basis for her opinion (the opening was too small).

Dr. Miller, who performed the autopsy and had a first-hand view and recollection of the injuries, testified that "Any shoe, including a shoe of that size [viewing the shoes Mr. Taylor wore when he kicked the victim], would be capable of penetrating this lady's vagina. She had a very large vagina and it was kind of pouching to the outside." 2007ROA Vol. XII 1955.

The deference this court owes to a trial court's finding of fact is earned only if the fact is supported by competent, substantial evidence. *Cherry v. State*, 959 So.2d 702 (Fla. 2007). Dr. Lynch's opinion that the injuries could not have been caused by kicking has no value because she was not qualified to render such an opinion, and more importantly, because the basis for her opinion was refuted by the record and by her own testimony.

> The opinion of an expert is not sufficient to eliminate the necessity of proving the foundation facts necessary to support the opinion. In *Arkin Construction Company v. Simpkins, supra* [*Arkin Construction Company v. Simpkins*, 99 So.2d 557, 561 (Fla. 1957)], it is stated:
>
> > 'It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value. It is equally well settled that the basis for a conclusion cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion.'

Harris v. Josephs of Greater Miami, Inc.,122 So.2d 561, 562-63 (Fla. 1960). *See also Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1111 (Fla. 4th DCA 1995), "[I]t is not enough that the witness be qualified to propound opinions

on a general subject; rather he must be qualified as an expert on the discrete subject on which he is to opine."; *Bertram v. State*, 637 So.2d 258, 260 (Fla. 2nd DCA 1994) (nurse not qualified to testify that genital scar could be consistent with sexual battery, in absence of foundation concerning qualifications to express opinion concerning the cause of the scar).

Further, giving credence to Dr. Lynch's claim that nothing larger than an inch could have caused the injuries refutes the state's theory of the injuries, that it was caused by a hand grabbing at the area.

Dr. Lynch also had to concede that the injuries she observed were all observable in the photographs taken by the medical examiner. "And in these pictures themselves, she's actually got pretty good support and that vaginal tissue is not external. **It's just visible** – probably because she's had a child or two or however many." 2007ROA Vol. 10 1611. If the injured areas are visible without penetrating the area, then they are external and were caused, not by penetration, but in some manner which did not penetrate.

None of the opinions the lower tribunal found to be credible were supported by facts, and therefore it was an abuse of discretion for the court to have relied upon opinions not supported by competent substantial evidence.

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.

The state appears to have overlooked the constitutional presumption of innocence when it argues that "if the defense was going for a lesser offense, Taylor had to testify." Answer Brief at 62. Of course, Mr. Taylor did not have to testify. His version of the incident was already before the jury through the testimony of the state witnesses who testified to Mr. Taylor's confession. That testimony and the forensic facts make out nothing more than second degree murder, as urged throughout all of the proceedings in Mr. Taylor's case.

The state argues against itself, first, that there was no harm in displaying Mr. Taylor's physique to the jury because his "obvious size was readily apparent," Answer Brief at 63, then later argues that defense counsel was justified in having Mr. Taylor testify to show "that it was very easy and not premeditated to inflict the

injuries to this petite victim by virtue of his sheer size," Answer Brief at 66. If his size was readily apparent, as it was, then counsel cannot be excused for his error because he, in part, wanted to show how large the defendant was.

The state also ignores the content of the examination defense counsel conducted, having Mr. Taylor reenact the horror of crime within feet of the jury and display his bulk so close and personal to the jury that the only possible reasonable effect to be expected would be to raise fear and loathing in the minds and hearts of the jurors, not understanding or sympathy engendered by "humanizing" the defendant. While humanizing a defendant is a valid defense tactic, law and common sense dictate that counsel employ means reasonably expected to accomplish that humanization, not means which was guaranteed to offend and intimidate the jury.

ID OTHER MATTERS OF INEFFECTIVE ASSISTANCE [1]

The state appears to argue that because trial attorney Sinardi was unperturbed when he was briefly apprised at the evidentiary hearing of Dr. Miller's false and misleading testimony and his sloppy procedures in 1988, that this somehow proves that the newly discovered evidence is of no moment – attorney Sinardi continued to

[1] Appellant relies on his Initial Brief regarding Issue IC, relating to ineffective assistance in failing to present a mental health defense in the guilt phase.

believe "Dr. Miller was thorough and professional and well-regarded." Answer Brief at 71. This only establishes that trial counsel continued to accept Dr. Miller's assertions of fact without any critical analysis, further evidence of his ineffectiveness by virtue of his blindness to the deficiencies of the problematical Dr. Miller.

As Dr. Lynch's purported refutation of Dr. Miller's new opinion that **it is "a reasonable possibility, maybe even a probability"** that the genital injuries were the result of "a hard blow from a shoe going in . . . ." 2007ROA Vol. XII 1950, the argument above in IA addresses Dr. Lynch's lack of credential or qualification to offer any opinion on the matter, let alone refute Dr. Miller or Dr. Wright.

ISSUE II

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 state argues that their expert's, Dr. Taylor's, testimony established that not all low IQ or differences in verbal and performance IQ indicates brain damage. However, Dr. Henry Dee, a neuropsychologist, testified that the variable

neuropsychological test results he obtained and reviewed, not IQ tests, showed abnormal results which have never been found to be produced by persons without brain damage. In other words, Mr. Taylor's performance on the tests which state expert Dr. Taylor was unqualified to administer or interpret prove the existence of brain damage.

Dr. Taylor made no specific inquiries about the repeated concussions Mr. Taylor suffered as a child, even though he knew about the reports before he conducted his evaluation. He expended far less time and effort seeking out neurological history than he did eliciting Mr. Taylor's rendition of the offense for the obvious benefit and use of the state.

The state's argument that there is no medical report substantiating the brain damage claim is disingenuous. There is no medical record because the racist and segregated health care system in place when Mr. Taylor suffered his repeated concussive head injuries resulted in Mr. Taylor being treated at a segregated black hospital, which no longer exists, and which, to the best of counsel for Mr. Taylor's knowledge after substantial inquiry, failed to preserve its records upon its shutdown as the times became more enlightened.

Dr. Dee's testimony was far more than mere bolstering of Dr. Berland's penalty phase testimony that Mr. Taylor suffered from brain damage. Dr. Dee specifically testified that the brain damage resulted in statutory mental health

mitigation, a substantial factor 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).

Dr. Berland was substantially impeached at trial when the state elicited from Dr. Berland the fact that neuropsychological testing was necessary to confirm the diagnosis of organic brain damage, which was only hinted at in the MMPI results, and that Dr. Berland's finding were, therefore, due no weight in mitigation. The trial court gave only the slightest weight to the mental health evidence. Had penalty phase counsel properly followed up on Dr. Berland's diagnosis with the recommended neuropsychological testing, rather than dismissing the option based on an incorrect belief that no additional experts could be appointed, the trial court would have had the evidence necessary to comply with this court's requirement that mental health mitigation be given the weightiest consideration.

In *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001), this court provided provides significant guidance in determining the issue of whether defense counsel were ineffective at the penalty phase of this case in their investigation and presentation of mitigation evidence.

First, *Ragsdale* points out that the penalty phase of a capital trial must be subject to meaningful adversarial testing to be reliable. Secondly, there is a strict duty on defense counsel to conduct a reasonable investigation of the defendant's

background. The court noted, thirdly and significantly, that Ragsdale's trial had no testimony from mental health experts to explain how the defendant's background factors may have contributed to the defendant's psychological and mental health status at the time of the crime. 798 So.2d at 716-17.

In this case, none of the expert evidence in the penalty phase trial linked the brain damage to the behavior. Dr. Dee's testimony at the post-conviction hearing established the critical link, alone compelling relief under the *Ragsdale* rationale.

The fourth *Ragsdale* criterion is that the court also must consider the reasons why counsel did not investigate or present available evidence and whether counsel made a reasonable tactical (or strategic) decision to forego further investigation of mental health mitigation. 798 So.2d at 718-19. In this case, counsel claimed to have abided by a one-expert rule which never existed, was never proven by the state, and would be objectionable and unconstitutional if imposed. The decision to not seek neuropsychological testing or other expert evaluation was, therefore, not a reasonable tactical decision.

Lastly, the postconviction court must measure the evidence that was available against the evidence presented at the penalty phase; if there is a reasonable probability of a different result, the defendant has proved his ineffective assistance of counsel claim and should be granted relief. 798 So.2d at 720. In Mr. Taylor's case, the pale rendition of testimony at trial that Mr. Taylor lived in a foster home

was developed in post-conviction into a darkly dramatic description of an abusive, Dickensian dungeon. Howard Ury was always available, but instead trial counsel relied on a fellow convict with the attendant impeachment which lessened any impact of his testimony. Testimony of Mr. Ury, rescued by mentoring from a community leader and apparently not suffering from the brain damage which further hampered Mr. Taylor's development, heightens the impact of the testimony by its contrast.

Similarly, Mr. Taylor's mother was so egregiously impaired by her own mental deficiencies, obvious from her inability to give her age and her demeanor in the post-conviction hearing, that a jury and the court would have been strongly affected by seeing for itself the family environment in which Mr. Taylor grew up. The testimony of his grandmother in the penalty hearing could not convey the degree of tragic impairment made real by his mother's appearance in the courtroom. Competent counsel would not have let Mr. Taylor waive this compelling testimony – post-conviction counsel had no trouble counseling Mr. Taylor to allow this evidence to be presented, or in obtaining his mother's cooperation.

These and the other matters raised in the post-conviction hearing and in this appeal make it abundantly clear that the mitigation evidence shown in post-conviction was an order of magnitude greater than the deficient evidence presented at sentencing. The additional evidence which should have been presented was not

cumulative, i.e. merely repeating what was already shown, but advanced the understanding of the causation for Mr. Taylor's behavior well into the area where a jury and court would be compelled to give substantial weight to the evidence, sufficient to change the outcome of the case.

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 state relies on *Ferrell v. State*, 918 So.2d 163 (Fla. 2005), for the proposition that there can be no ineffective asssitance of counsel for failure to present a witness who was unable or unwilling to appear at trial. A review of the facts of the *Ferrell* holding show only that defense counsel had contacted the defendant's mother who was out of state and suffered a heart condition discouraging travel, and an ex-wife who was an amputee and who was reluctant to travel to testify. While the mother eventually appeared at the post-conviciton hearing, the ex-wife never did. The mother's appearance at post-conviction may have been possible because of an improvement in her health, but there is no

explanation in the case how the mother who was unable or unwilling to come to trial was able and willing to appear for the post-conviction hearing. More notably, the ex-wife never appeared.

In the instant case, Ms. Davis lived locally, was always able to appear in court, and has proven herself reliable in appearing upon being subpoenaed. She was also an adverse witness as demonstrated by her testimony, and her unwillingness arose from her adverse status, not some generalized lack of motivation which apparently inflicted witnesses who were sympathetic to Mr. Ferrell's cause. The very purpose of the subpoena power is to, inter alia, enable a party to compel the testimony of a witness whose unwillingness arises from the witness's adverse position, not his or her lack of motivation. Ms. Davis demonstrated her obeisance to the subpoena, and the trial court had no basis to believe that her unwillingness to testify at Mr. Taylor's trial or retrial translated to a prior or anticipatory intent to act in contempt of court and disobey a subpoena when she has no history of such disobedience.

CONCLUSION

As urged in the Initial Brief, this Court should order a new trial to correct the fundamental injustice committed when a rogue medical examiner and ineffective counsel deprived Mr. Taylor of a fair trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this REPLY BRIEF OF APPELLANT has been furnished by U.S. Mail to Kay Blanco on this November 28, 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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