IN THE SUPREME COURT OF FLORIDA

STEPHEN RICHARD TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC09-1382

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Taylor." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following reference conventions are used in this Response, unless otherwise indicated in the discussion:

"Taylor" or "Petitioner"	The Petitioner Steven Richard Taylor in this case;
"Petition"	Taylor's Petition for Writ of Habeas Corpus filed in this Court 1/27/2010;
"Response"	This Response In Opposition To Petition for Writ of Habeas Corpus;
"R"	The pleading-record volumes from the direct appeal of this case;
"TT"	The trial transcript volumes from the direct appeal of this case;
"PCR"	The postconviction record on appeal;
"PCR-Ex"	The three volumes of postconviction exhibits;
"IAC"	Ineffective assistance of counsel.

Any applicable volumes are designated with Roman numerals, and any applicable page numbers are designated with Arabic numbers, for example "R/I 5-6" would designate pages 5-to-6 of volume I of the record on appeal.

Unless the contrary is indicated, **bold-typeface** and any **bold-underlined** emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; case citations within quotations are *italicized*, and other emphases are contained within the original quotations.

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STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts. Where Taylor has argued a disputable fact under his discussion of an issue, the State contests it there.

Case Timeline.

A timeline is provided as an overview of events in the case and as an index of the record on appeal corresponding to those events.

DATE	NATURE OF PLEADING OR EVENT
9/15/1990-9/16/1990	Victim Alice Vest was murdered in her home. (See, e.g., TT/XVII 204-205, 218-47)
3/7/1991 & 9/12/1991	Indictment charging Taylor with the Murder of Ms. Vest and with a Burglary on her dwelling (R/I 5-7) and then a superseding Indictment added Sexual Battery on Ms. Vest(R/I 78-80).
10/7/1991-10/10/1991	Guilt-phase of jury trial (TT/XVII 181-TT/XXI 801), resulting in the jury finding Taylor guilty as charged of the three counts (TT/XXI 797-99; R/II 214-16).
10/17/1991	Penalty-phase of jury trial (TT/XXI 802-879), at which Taylor was represented by Frank Tassone and Refik Eler (See, e.g., R/XVII et seq.; PCR/VIII 211-309, 358-62), resulting in the jury recommending the death penalty by a vote of 10-2 (TT/XXI 879-82; R/II 261).
11/6/1991; 12/9/1991	Sentencing proceedings (TT/XXIII; TT/XXV), resulting in the trial court imposing the death penalty on the murder and prison sentences on the other counts (TT/XXV 903-906; R/II 280-307).
12/16/1993	On direct appeal, this Court in Taylor v. State, 630 So.2d 1038 (Fla. 1993), rejected five guilt-phase and

	three penalty-phase issues.
10/3/1994	United States Supreme Court denied certiorari at Taylor v. Florida, 513 U.S. 832, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994).
11/1/1995	Taylor's initial Motion to Vacate Judgments of Convictions and Sentences with Special request for Leave to Amend. (PCR/I 1-162)
9/25/2001	State proposed various deadlines including a requirement that the Defendant's final Rule 3.850 Motion be filed within 150 days, that is, by 2/22/2002. (PCR/II 303-304)
2001-2003	Public records litigation. (See PCR/II&III)
6/23/2003	Defendant filed a "Supplemental to Motion to Vacate Judgments of Convictions and Sentence," adding arguments pertaining to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). (PCR/III 520-23)
7/15/2003	State responded to the June 2003 "Supplemental" Motion. (PCR/III 531-38)
5/13/2004	Defendant filed an Amended Motion to Vacate Judgments of Convictions and Sentences consisting of 132 pages, raising 34[1] claims, and filed "pursuant to Fla.R.Crim.P. 3.85/3.851." (PCR/IV 557-690)
6/14/2004	The State responded to the May 2004 postconviction motion. (PCR/IV 701-14)
5/23/2005	Motion for Postconviction Relief to Vacate Judg[]ments of Conviction and Sentence …" consisting of 111 pages and 21 claims. (PCR/V 781-892)[2]
6/6/2005	The State responded to the May 2005 postconviction motion. (PCR/IV 701-14)
6/21/2006	Court's Huff[3] order granting an evidentiary hearing on

[1] The claims are numbered only to "XXXII," but there are two claims numbered as "XXX" (PCR/IV 680, 682) and two numbered as "XXXII" (PCR/IV 686).

[2] The State's copy of this volume of the record on appeal is riddled with missing pages, but a complete copy of key parts of it was pieced together through the use of the original service copy of pleadings.

	the following claims: IV; parts of VI; X; parts of XI; and IX.
4/13/2007	Trial court scheduled the evidentiary hearing for June 11, 12, 13, 2007. (PCR/VI 1043-44)
4/2007	Witness lists, exchanged. (PCR/VI 1045-49)
6/6/2007 & 6/19/2007	Defendant's motion for continuance (PCR/VI 1070-72) and Order Rescheduling Evidentiary Hearing for August 6 & 7, 2007 (PCR/VI 1106-1107).
7/18/2007	Defendant's Motion for Leave to Amend (Claim XII, mental retardation claim) (PCR/VI 1108-1114)
7/30/2007	Order granting Defendant's motions for leave to amend and for judicial notice. (PCR/VI 1127-28)
8/6/2007 & 8/7/2007	Postconviction evidentiary hearing at which Defendant withdrew several claims (PCR/VII 1147-48) and at which several witnesses testified (PCR/VII 10-PCR/X 641).
9/10/2007	State's Closing Argument Memorandum. (PCR/X 1782-1841)
9/12/2007	Defendant's Written Closing Argument and Memorandum of Law in Support of His 3.850 and 3.851 Motion. (PCR/X 1842-1911)
10/5/2007	State's Motion to Strike and Objections to Defendant's Written Closing Argument and Memorandum of Law. (PCR/X 1916-22)
10/9/2007	Defendant's Response to State's Motion to Strike … and Defendant's Motion to Amend Pleadings to Conform to Evidence. (PCR/X 1923-27)
10/15/2007	State's Response Opposing Motion to Amend the Pleadings to Conform with the Evidence. (PCR/X 1928-38)
10/17/2007	Defendant's reply to State's opposition to Amend Pleadings to Conform with the Evidence. (PCR/X 1939-45)

[3] Huff v. State, 569 So.2d 1247 (Fla. 1990).

6/30/2008	Second Amended CLAIM XII and accompanying Motion for Leave to Amend. (PCR/XI 1979-2000, 2001-2003)
7/9/2008	State's response Opposing Motion for Leave to Amend Amended CLAIM XII. (PCR/XI 2004-14)
6/22/2009	Order Denying Defendant's Motions for Postconviction Relief Pursuant to Florida Rules of Criminal Procedure 3.850/3.851. (PCR/XI 2024-65)
6/26/2009	Order on Pending Motions granting Defendant's Motion for Leave to Amend CLAIM XII, granting the State's Motion to Strike and Objections to Defendant's Written Closing Argument and memorandum, and denying Defendant's motion to amend pleadings. (PCR/XI 2066-67)
7/14/2009	Notice of Appeal. (PCR/XI 2068-69)
7/31/2009	Motion for Rehearing of order granting the State's motion to strike. (PCR/XI 2072-77)
8/7/2009 & 8/13/2009	State's Suggestion of Lack of Jurisdiction (PCR/XI 2080) and Order Declining Ruling on Motion for Rehearing due to lack of jurisdiction. (PCR/XI 2082-83)
8/13/2009 & 10/09/2009	Defendant/Appellant's Motion to relinquish Jurisdiction filed in this Court, and this Court's Order denying that motion.

The Murder and Sentencing.

This Court's direct-appeal opinion provided a summary of the facts of the murder and the death sentence:

> The record reflects that on September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest, returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend [Gerald

Murray[4]], who was later to become his accomplice, near the victim's neighborhood.

Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.

On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wounds were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.

The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to her head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. Finally, the medical examiner testified that the victim's breasts were bruised, and that the bruises resulted from 'impacting, sucking, or squeezing' while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

The testimony at trial also revealed that the phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January, 1991, while Taylor's former roommate was removing a fence behind the duplex, he discovered a

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[4] The convictions and death sentence of co-perpetrator Murray were affirmed in Murray v. State, 3 So.3d 1108 (Fla. 2009); Murray's case is now at the postconviction stage in the trial court.

small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County sheriff's office executed a search warrant on Taylor which authorized the officers to take blood, saliva, and hair samples from Taylor. Taylor was taken to the nurses' station at the county jail so that the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question, the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and, on March 3, a grand jury returned a two-count indictment against Taylor for first-degree murder and burglary. The indictment was amended on September 12, 1991, to add a third count for sexual battery.

At trial, the State presented the testimony of Timothy Cowart, who had shared a cell with Taylor in the Duval County jail. Cowart testified that, in a jailhouse conversation with Taylor in early April, Taylor stated that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead. Cowart also testified that Taylor said the State could place him, but not his accomplice, at the scene of the crime, and that the State could convict him with the evidence it had. Taylor allegedly asked Cowart to hide a gun and handcuff key in the bathroom at the hospital; Taylor would then feign an illness, get taken to the hospital, and have a chance to escape.

A Florida Department of Law Enforcement lab analyst, who was an expert in serology, testified that semen found on a bed covering and on a vaginal swab taken from the victim could not be tested. However, the analyst testified that semen found in the victim's blouse matched Taylor's DNA profile.

In the guilt phase, Taylor presented only one witness, an agent of the Federal Bureau of Investigation. The agent testified that certain

hairs found on the victim's body and clothing matched the pubic hairs of Taylor's accomplice. On cross-examination, the agent conceded that it is possible to commit a sexual battery and not leave any fibers or hair. Taylor then rested his case and the jury found him guilty as charged.

At the penalty phase proceeding, the State rested without presenting any additional evidence. Taylor presented the testimony of five witnesses. First, Taylor called Charles Miles, who lived next door to Taylor during Taylor's adolescence. Miles stated that Taylor frequently played with Miles' son and that Taylor was always very polite and respectful. Miles testified that on one occasion he and Taylor sat in Miles' garage and talked at length about religion. Taylor's next witness was Lloyd King, his uncle. King testified that Taylor had always been a polite person. The third witness, Judy Rogers, was a friend of the family who testified that she thought Taylor had a learning disability. Taylor's next witness was another uncle, Don King, who testified that, during fifth and sixth grades, Taylor experienced difficulty in reading and that his reading comprehension was poor. King also stated that Taylor was a very passive person. As his last witness, Taylor called his adoptive mother, Lenette Taylor, who testified that Taylor had experienced difficulty concentrating in school and that she had tried unsuccessfully to get him into special education classes. She testified that Taylor's I.Q. had been tested and found to be around 68 to 70, which, according to her, is in the mildly retarded range. On cross-examination, she acknowledged that, in 1979, when he was nine years old, Taylor had tested in a normal intellectual range.[5] The record further reflects that, although defense counsel had Taylor examined by two mental health experts, counsel found it to be in Taylor's best interest not to present the experts' testimony at trial. As an additional mitigating factor, Taylor offered evidence that he was only twenty years old at the time of the murder.

The jury recommended the death sentence by a vote of ten to two. In sentencing Taylor to death, the trial judge found the following aggravating factors: (1) the murder was committed during the course of a burglary and/or sexual battery; (2) the murder was committed for financial gain; and (3) the murder was committed in an especially heinous, atrocious, or cruel manner. As the sole nonstatutory mitigating factor, the trial judge found that Taylor was mildly retarded. The trial judge sentenced Taylor to death for the first-

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[5] On postconviction, Taylor raised a mental retardation claim (See, e.g., PCR/XI 2054-57), but he has not pursued mental retardation as an issue in the pending postconviction appeal in this Court (SC09-1382).

degree murder, to fifteen years' imprisonment for the burglary, and to twenty-seven years' imprisonment for the sexual battery.

Taylor, 630 So.2d at 1039-41.

This Court summarized the direct-appeal issues as follows:

Guilt Phase

In his appeal of the guilt phase of his trial, Taylor claims that the trial court erred in: (1) denying Taylor's motion to suppress statements he made to a police officer while he was in custody and after invoking his right to counsel; (2) instructing the jury that it could consider Taylor's efforts to escape from the Duval County jail; (3) admitting evidence that Taylor wanted a fellow inmate to secure a gun and handcuff key and hide them in the hospital bathroom so that he could escape; (4) admitting evidence that the stolen vehicle was seen parked near the victim's mobile home on the morning of the murder and found later that day within several blocks of Taylor's residence; and (5) admitting cumulative photographs of the victim's body.

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Penalty Phase

Regarding the penalty phase of his trial, Taylor raises the following three claims: (1) whether the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (2) whether the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor; and (3) whether it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17, of the Florida Constitution to execute a mentally retarded[6] person.

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[6] As footnoted supra, in postconviction, Taylor raised a mental retardation claim, but he has not pursued it in his appeal from the trial court's denial of postconviction relief. In postconviction proceedings, Taylor introduced no new evidence of mental retardation. (See, e.g., PCR/VI 1108-14, 1130-37)

On the other hand, a mental retardation claim was raised on direct appeal, which this Court rejected:

The only evidence of Taylor's alleged mental retardation was presented by his mother, who testified that Taylor's IQ had been tested and that his IQ was 68 to 70. She also stated that Taylor's IQ was tested in 1979, when Taylor was nine years old, and was found to

Taylor, 630 So.2d at 1041-42. After the listings of the issues, this Court's opinion discussed each issue.

Postconviction Evidentiary Hearing.

As outlined in the timeline supra, Taylor filed his first postconviction motion in this case in 1995 (PCR/I 1-162) and several amendments (See PCR/III 520-23; PCR/IV 557-690; PCR/V 781-892; PCR/VI 1108-1114; PCR/XI 1979-2000, 2001-2003)

In August 2007 the trial court conducted a two-day evidentiary hearing. (PCR/VII-X)

At the evidentiary hearing several witnesses testified:

> Harry Shorstein, State Attorney for the Fourth Judicial Circuit (PCR/VII 10-23)

> be normal for his age. No other evidence of Taylor's mental condition was presented. The record does indicate, however, that Taylor was examined by two mental health experts and that his trial counsel determined that it would be in Taylor's best interest for neither expert to testify. Consequently, neither the jury, the trial judge, nor this Court has any other empirical data of Taylor's mental condition. In his sentencing order, the trial judge found Taylor was 'mildly retarded' and that his mild retardation was a nonstatutory mitigating factor even though Taylor 'was a functioning adult; living away from the parental home; engaging in adult occupations and the father of a child.' In weighing the mitigating and aggravating circumstances, the trial judge gave 'this one mitigating circumstance slight weight.' We find that this record supports the trial judge's conclusion and the imposition of the death penalty.

Taylor, 630 So.2d at 1043. Justice Barkett's concurring opinion concluded that "it is clear that the evidence for mental retardation here rests on speculative and poorly substantiated testimony, that even if mental retardation exists it is much less serious than that at issue in Hall [Hall v. State, 614 So.2d 473, 479-82 (Fla.1993) (Barkett, C.J., dissenting)]. Were the evidence of retardation firmer, I might be inclined to a different result." Taylor, 630 So.2d at 1043-44.

Heidi Brewer, formerly counsel with Capital Collateral Regional Counsel (PCR/VII 27-36)

Gary W. Powers, former evidence technician (PCR/VII 38-56)

Bernardo de la Rionda, prosecutor (PCR/VII 58-105; PCR/X 626-30)

Michelle Cooksey, circuit court clerk's office (PCR/VII 105-115)

Shirley Zeigler, former DNA analyst at FDLE (PCR/VII 115-46)

Timothy Cowart, former inmate who testified against Taylor at trial (PCR/VII 148-PCR/VIII 209)

Frank Tassone, lead trial counsel for Taylor (PCR/VIII 211-309)

Randell Libby, DNA analyst hired by the defense for postconviction (PCR/VIII 316-57, 363-98; PCR/IX 405-520); the trial court was unimpressed with Libby's testimony (See PCR/XI 2037) and therefore Taylor correctly states (IB 49) that "the trial court assigned little weight" to it

Refik Eler, co-trial counsel for Taylor (PCR/VIII 358-62)

James Pollock, FDLE DNA analyst who had testified at trial (PCR/IX 520-600; PCR/X 604-25)

Although the State will discuss aspects of the postconviction testimony in greater detail under the pertinent issues, at this juncture, the State also notes the following.

Shirley Zeigler testified for Taylor at postconviction. She testified that, although there were "differences" between her printout and Pollock's (PCR/VII 1285):

> Q All right. Dr. Pollock and you found the same things in terms of under that loci where Mr. Reiter asked you, is that correct?
>
> A Yes, that's correct.
>
> Q Okay. So in terms of your findings versus Dr. Pollock's findings, is there any dispute?
>
> A I didn't -- just by looking at the computer printout I didn't see any.

(PCR/VII 1284) In the postconviction evidentiary hearing, Dr. Pollock

testified that Shirley Zeigler did not dispute his results. (PCR/IX 1688-91, 1703-1705, 1708-1709)

The trial court determined that the testimony of Taylor's postconviction expert, Dr. Libby, was not worthy of much weight:

> At the evidentiary hearing, the Defendant presented Dr. Randall Libby to testify as to what he perceived as problems with the manner in which Dr. Pollack handled and examined the DNA evidence. (P.C. Vol. II at 316-57, 363-400; P.C. Vol. III at 401-520.) The Court considered Dr. Libby's lengthy and detailed testimony as well as Dr. Libby's experience and credentials. The Court notes that while Dr. Libby was quite critical of the methodology and process employed by Dr. Pollack to examine the DNA evidence in the Defendant's case, Dr. Libby is not trained in forensic DNA, has never worked in a forensic DNA lab, and is not a member of the 'Technical Working Group on DNA Analysis Methods' (TWGDAM). (P.C. Vol. III at 430-3 1, 465, 532-33.) Rather, Dr. Libby's experience is as a non-tenured, neurogeneticist at the University of Washington dealing with implications for human DNA. (P.C. Vol. III at 432-33.) The Court is not convinced that Dr. Libby had the requisite background and experience in forensic DNA for this Court to give his testimony considerable weight.

(PCR/XI 2037)[7]

Dr. Pollock, the FDLE DNA expert who testified at trial, not only has a Ph.D. in biochemistry (PCR-Ex/I 66; PCR/IX 1660-1601), and set up the FDLE lab in Jacksonville (PCR/IX 1663), but also, as the following testimony illustrates, he also has been deeply involved in forensic DNA analysis, including on a national level, for years:

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[7] The State also notes that Libby was banned from a State of Washington lab because the lab accused him of failing to follow protocols. Libby attempted to explain that the dispute arose over his actions "while they're putting something in an instrument." He claimed that there was "no possibility of contamination," initially said that he was not "actually" prohibited from going back to that lab and that was "basically the end of it," but he then admitted that "they followed up with a letter saying you can't come back because of this and that." (PCR/IX 1587-90)

Q Now, you mention very briefly the database, you were actually involved in validating the FBI database prior to setting up your lab or as part of it?

A Minor portion of the validation. I didn't actually take all of the data and analyze it, that was sent off for population geneticist to look at. I actually did some -- I actually performed some of the RFLP examinations to produce the data to produce the alleles at a particular given locus.

Q Okay. And were you not mentioned as one of the, I guess, or given credit at some point as one of the persons that did that when the FBI finally published in some way their database in 1990 or '91?

A Well, it was 1991 and it was a preliminary report and it was published in Crime Lab Digest. And yes, I was co-authored on that particular paper. I didn't write the paper, I was co-authored Bruce Badolle (phonetically) did most of that. He was from the FBI.

Q Now, just briefly talk about in terms of at that time what proficiency testing there was, if there was any, at the lab?

A Proficiency testing?

Q Yes, sir.

A Well, proficiency testing really did -- I don't remember exactly when I took my first formal proficiency test. But proficiency testing was one of the suggestions in the TWGDAM guidelines that I, as a member of TWGDAM in 1991, endorsed as being a guideline.

Before those commercial proficiency tests were available we had to rely on either something produced in-house or something produced by another forensic lab in another location. And so we had -- we didn't call them a technical leader back then, I cannot remember what we called him but he would make some samples available to test the procedure in our laboratory and then, of course, test the individual who was doing those procedures.

Q At that time would that have been Paul Dohlman?

A No, that would be Dick Baer (phonetically). He was in the Orlando lab. Discipline coordinator, I'm sorry, I just remembered, he was discipline coordinator, now that's become the technical leader in today's terms.

Q And so you set that all up and then you got on line, do you remember about approximately when you actually started getting samples in?

A May of 1990 is when we accepted our first case.

Q And at that time based on the protocol procedures that y'all had set up did you feel that those adhere to in terms being reliable in the forensic scientific community?

A Oh, absolutely. This was now being implemented, I won't say all 50 states, but in most states had representatives at the first DNA training course that I mentioned previously. And they went back and did the same thing I was doing.

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Q You mentioned briefly TWGDAM, can you tell us what that is?

A Technical working group in DNA analysis methods was first formed -- it was an idea formed by the FBI. The director of the FBI wanted to include individuals from all over the country, including Canada as well, in discussions on issues in the forensic community on DNA analysis. And that was first developed -- I was at the FBI when the first meeting occurred and that was in, I believe, in November of 1988. It was a very small group.

Shortly thereafter invitations went out to the various agencies that the director approved and so I believe it was -- it was some time in 1989 that I was invited to sit on the technical working group committee. And I did so until 1986. And then I rotated with somebody else in the department at that point.

Q You said 1986 -- 1996?

A 1996, excuse me, yes, that is correct. During that time I attended meetings at Quantico usually twice, I believe it was twice, maybe some times three times a year. And then we discussed issues that were on the forefront.

Q All right. Let me cover two more areas then I'm going to get into the specifics about this case right here. There have been two NRC, I guess, books published. What is NRC, by the way?

A National Research Counsel.

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Q NRC existed before these two books, the red one and the yellow were published, NRC was a working group of scientists, I gather?

A Yes.

Q They would deal with various matters in this scientific community?

A Yes.

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Q Do you have any knowledge as to why the NRC came up with some guidelines regarding DNA analysis?

A Yes, they were asked to do so.

***

Q The red book that I'm showing you, that was shown previously to defense expert, and also the yellow book, these were published later on, is that correct, I believe?

A Yes, 1992 and then 1996.

Q So at the time that the examinations were done in this case, the analysis was performed in this case, there was no NRC publication regarding DNA analysis, is that correct?

A That's correct.

Q Okay. Now, in this case, sir, and by the way those NRC reports or publications, are they guidelines or are they mandatory?

A They're guidelines, absolutely.

Q You mentioned TWGDAM. TWGDAM existed in '90, 91, I gather, whenever it was created were you involved?

A Well, when I was -- during this case?

Q Yes, sir.

A Yes.

(PCR/IX 1669-75)

Dr. Pollock underwent "five months" of training at the FBI as a "visiting scientist." (PCR/IX 1712)

SUMMARY OF ARGUMENT

None of the appellate issues support any relief.

ISSUE I: Having been granted an evidentiary hearing on several subclaims, Taylor, after about 12 years of postconviction proceedings and after the 2007 evidentiary hearing, attempted to amend his postconviction motion. This was improper as a matter of procedural rule and public policy,

and the trial court properly denied Taylor's attempt to amend.

ISSUES II, III, IV, V: At the evidentiary hearing, Taylor presented evidence regarding a number of claims and subclaims - some preserved, and some not. In the postconviction proceeding, Taylor attempted to attack Dr. Pollock, an FDLE scientist who had concluded that Taylor's DNA was at the crime scene at 1 in 6 million odds. Taylor called as a witness an expert from Washington state, Dr. Libby, whose postconviction testimony did not impress the trial court enough to rely on it for anything. Taylor also called as a witness Shirley Zeigler, a former FDLE DNA analyst who questioned aspects of Dr. Pollock's DNA analysis but who also did not dispute Dr. Pollock's DNA findings. Ultimately, Taylor's postconviction evidence paled in comparison with the trial evidence proving Taylor's guilt. Taylor failed to meet his burdens for each of the theories he advocates here.

ISSUE VI: Former fellow inmate Timothy Cowart testified at the postconviction hearing that, when he testified at trial about Taylor's admissions to him, he (Cowart) really did not mean what every reasonable person on the planet would have interpreted his trial testimony to mean. The trial court properly disregarded Cowart's postconviction spin on events.

ISSUE VII: The prosecutor's argument to the jury did not violate Taylor's presumption of innocence; the evidence did, and so the prosecutor properly argued the evidence that met the burden of proof, which the prosecutor and the trial court properly recognized many times.

ARGUMENT

SIGNIFICANT CONTEXT.

Other than ISSUES VI and VII, which concern inmate Cowart and the prosecutor's closing argument, respectively, the gravamen of the entire Initial Brief is an attack on the use of a DNA analysis in the trial and related claims that attempt to invoke Brady, Giglio, and IAC. Taylor's Initial Brief's DNA-related claims overlook the very weighty non-DNA evidence introduced in the case.

Assuming for the sake of argument that all of the DNA claims otherwise have merit, Taylor would still not be entitled to relief because he failed to meet his burdens to demonstrate prejudice for his Brady and IAC claims and, concerning Giglio, because the totality of trial evidence affirmatively demonstrates immateriality, non-prejudice, and harmlessness. See "Standards …" section infra. Here, as this Court's direct-appeal opinion summarized, See Taylor, 630 So.2d at 1039-41, there was substantial evidence in addition to the actual DNA results that established Taylor's guilt, including **essentially Taylor's admission to a detective that scientific analysis would identify him as involved in the murder**:

- The night of the murder, Taylor, along with accomplice Murray, was dropped off near the victim's residence (TT/XVIII 367-74);
- The night of the murder, a Ford Ranchero was stolen from a residence near the place where Taylor and Murray had been dropped off (TT/XVIII 384-89); at 4:30 a.m. it was seen backed into a driveway next door to the mobile home where the victim lived (TT/XVIII 378-82); and, later that morning, it was found abandoned only a few blocks from where Taylor lived at the time (TT/XVIII 390-92; see TT/XIX 477-83);
- Jewelry stolen from the victim (See, e.g., TT/XVII 207-15) during the murder was recovered from the backyard of where Taylor had

lived; it had been buried there (TT/XVIII 396-402; see TT/XIX 474-76);

- Within weeks, Taylor was seen in the backyard looking at the area where the jewelry had been buried (TT/XVIII 402-404), then about a month later Taylor went into the backyard and returned a few minutes later with dirty hands; in response to the friend's inquiry as to what he was doing, Taylor responded that he had left some things there and that they were gone (TT/XVIII 406-409);

- Taylor admitted to inmate Timothy Cowart that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead (TT/XIX 508-509, 516); Taylor said that the State could place him, but not his accomplice, at the scene of the crime, that the State could convict him with the evidence it had, and that he was concerned he would receive life without parole or death (TT/XIX 515-516); Taylor asked Cowart to help him escape because of Taylor's concern about this case (TT/XIX 512);

- FDLE serologist Hanson testified that she identified semen on the victim's blouse and on the victim's comforter as having Taylor's blood type (Type A secretor) (TT XIX 538-41);

- **Taylor essentially admitted to a detective that scientific analysis would reveal incriminating evidence when he asked the investigating officer how long it would take to get the results back because he was just wondering when they would be back out to pick him up** (See TT/XIX 504-505).

While ISSUE VI attempts to diminish Cowart's trial testimony, it failed.

Moreover, in their arguments to the jury, the prosecutor stressed all of the evidence to the jury. In opening statement, the prosecutor discussed the victim's phone line being cut and the evidence concerning the victim's injuries, beating, and stabbing and the general crime scene. (TT/XVII 197-98) The prosecutor discussed the victim's jewelry being identified with "certain[ty]." (Id. at 197) The prosecutor discussed the evidence surrounding a "distinct automobile stolen" stolen "in the area of the general vicinity of Ms. Vest's house" the evening of the murder (Id. 198)

and a little later that vehicle being seen "parked very close to the residence of Mrs. Vest" and then the next morning the vehicle being located "very close to the residence where this defendant was residing at that particular time." (Id. at 198-99) The prosecutor then detailed more of the crime scene evidence (Id. at 199-200). Then and only then did the prosecutor even mention the DNA in the context of a non-DNA witness:

> Lastly, we will call Diane Hanson who is a trained serologist. And she will be followed by Dr. Jim Pollock who is also a trained serologist and expert in DNA. And they will conclude our case by matching various evidence taken from the crime scene to the defendant.

(Id. at 200-201)

The prosecutor's opening statement ended with a conclusion that by the end of the trial, the State "will have proven" the defendant guilty beyond a reasonable doubt. (Id. at 201)

Similarly, in closing arguments, the prosecutor stressed the totality of the evidence. The prosecution's first closing began by contending that the State has met its burden. (TT/XXI 698-99) For several pages of the transcript, the prosecutor then discussed each of the following State's witnesses: Mrs Engler (TT/XXI 699); Scott Perry (Id.); Gary Powers (Id. at 699-700); Dr. Floro (Id. at 701-703); James Fisher (Id. at 703); Edward Pierce, Mr. Holton, and Mr. Butler (Id. at 704); Johnny Taylor (Id. at 705, 707); Detective O'Steen (Id. at 705-706, 707); James Leister (Id. at 706); Detective Bogers (Id. at 707-708); Timothy Cowart (Id. at 708-710); Diane Hanson (Id. at 710); Dr. Pollock (regarding the DNA) (Id. at 711-13); and the defense expert witness, Mr. Dizinno (Id. at 713). The prosecutor then

discussed the law, the elements of various crimes, and beyond a reasonable doubt. (Id. at 714-18) At this point, the prosecutor discussed the crime scene, weapons, and the victim's injuries. (Id. at 718-23)

The prosecutor tied-in Cowart's testimony:

> You can see the condition of the body at the time that this cord was applied and you recall the testimony of Dr. Floro and the testimony of Timothy Cowart and the defendant told him that she wasn't dead so he had to strangle her with an electrical cord.

(Id. at 723) The prosecutor discussed the cord some more. (Id. at 723)

The prosecutor then mentioned the blood and semen that Taylor "knew would convict him" and the ransacked premises. (Id. 723-24) He continued:

> Please look first at the Mandarin exhibit, orient yourself, that's St. Augustine Road, Plummer Grant Road, Julington Creek. The testimony was that Steven Taylor was let out of the automobile at this location, place with the red X should be dropped off. And the car was stolen from this location and he committed the murder, rape and burglary at this location, all in close proximity.
>
> And that on September 15th and 16th of 1990, Steven Taylor resided here where the jewelry was recovered, he returned the stolen car or dropped it off here, a short distance.

(Id. at 724) The prosecutor discussed the uniqueness of the stolen vehicle and the murder weapons. (Id. at 724-25)

The prosecutor concluded his first closing argument contending that the circumstantial evidence was "compelling," including –

> Taylor was let out near the victim, car was stolen near Mrs. Vest's house, car was at Mrs. Vest's house during the murder and the car was abandoned shortly thereafter very close to where Steven Taylor lived.

Finally, the prosecutor then mentioned Diane Hanson's testimony about Taylor's blood type and, for five lines of transcript, discussed Dr. Pollock's DNA testimony, after which the prosecutor returned to the other evidence:

> The jewelry was buried and attempted to be recovered by Steven Taylor in the area where he lived. Steven Taylor confessed to Detective Bogers saying I know you're going to come get me as soon as you get the results, and he gave a complete confession to Timothy Cowart.

(Id. 726)

Likewise, the prosecutor's final closing argument stressed the totality of the evidence: dropped off with Gerald Murray (Id. at 747), the locations of the stolen vehicle (Id. at 750), the location of the jewelry and Taylor returning to recover it (Id. at 747-48, 750-51, 753-54), Cowart's testimony about details of the crime (Id. at 751-52), and the DNA (Id. 748, 751), which was immediately followed by stressing Taylor's admission to Detective Bogers:

> But what's also important in there as Mr. Shorstein [co-counsel for the State] has pointed out is, by the defendant's own admission to Detective Bogers he's admitting he's the person who was there and the DNA matches him.

(Id. at 748)

Moreover, again assuming for the sake of argument that there was any Brady or Giglio violations or any IAC deficiency, any arguable prejudice was significantly attenuated through Dr. Pollock's trial direct examination testimony and defense counsel's effective voir dire and cross-examination of Dr. Pollock. See Jones v. State, 998 So.2d 573, 581 (Fla. 2008)(extensive cross-examination of witness at trial undermines postconviction prejudice)(citing Guzman v. State, 868 So.2d 498, 508 (Fla. 2003) (finding that, in light of the significant impeachment evidence presented at trial, the additional evidence would have merely been cumulative)).

Dr. Pollock admitted that DNA analysis depended upon "visualizing the

pattern" (TT/XIX 578); thus, "[i]f they appear to have the same pattern, then that is what's called visual match" (Id. at 580). He indicated that a computer generally is used "to apply certain programs to that digital information." (Id. at 581, 592-93) On direct examination, Dr. Pollock described the procedure he used in this case (Id. at 581-85) and concluded that it was "my findings" that the stain on the blouse matched the DNA profile from Steven Taylor." (Id. at 585) The four autoradiographs Dr. Pollock used in this case were introduced into evidence and displayed for the jury to see. (Id. at 585-91)

Dr. Pollock stated:

> There is also a weaker pattern that appears in the male fraction which also compares favorably with Steven Taylor.
>
> ***
>
> The results on visual match Alice Vest shown here in lane four, Steven Taylor in lane five and it's very difficult to see but there is a band here and here and in 28 I which matches Steven Taylor.
>
> A match of this band and a very weak band up here, two bands in lane number seven which is number 28I. This is the way we examine each of the autoradiographs for a visual match.

(Id. at 588, 589, 590)

Excerpts from defense counsel's cross-examination of Dr. Pollock at the trial include the following:

> Q Is there possibility of human error in that procedure?
>
> A As I said before, there is a possibility of human error because we’re human. We take every means at our disposal to avoid any of these errors, of course.
>
> Q The answer then is yes?
>
> A Of course.

Q All right. As to the second step, the quantity and quality of DNA recover, the quantity portion, is that based on your subjective criteria and that is you make the determination as to with whether the quantity is sufficient?

A That's correct.

(TT/XIX 596)

Q So you're the cutter, you're the extractor and you're the person who decides whether it's obvious, is that correct?

A Yes, sir.

(Id. at 598)

Q Okay. There are how many chromosomes?

A There are 23 sets of chromosomes, those are pairs of chromosomes.

Q And you applied four probes, is that correct?

A That's correct.

Q How many is the most probes you can apply if there are 23 chromosomes isn't it possible to apply 23 probes?

A Well, potentially, you have the potential to have a probe from each and every locus or area of a DNA that is different.

Q And that?

A And that could be more than 23.

(Id. at 599-600)

Q You didn't bring the population data base?

A No, sir.

Q Did you bring the Florida population data base?

A No, sir.

(Id. at 601)

Dr. Pollock denied that the FBI would not use "bands of that faintness," and he indicated that "we made very minor modifications" to the FBI protocol." (Id. at 606)

Pollock also indentified DNA analyst Shirley Ziegler's initials on a DNA document (Id. at 607) and essentially stated that computer generated numbers vary, explaining that "those values fall within our match criteria" (See Id. at 608). Defense counsel pursued the match criteria:

> Q All right. Let's talk about your match criteria. What is your match criteria, plus or minus one percent or is it greater than that?
>
> A Oh, our match criteria is greater than one percent.
>
> Q And isn't it true that Celmark uses as its match criteria one percent plus or minus one percent that if two people examine[] that fragment, it's plus or minus one percent of that they throw it out?
>
> A I don't know what their match criteria is now.
>
> Q Isn't it true that Life Codes, the other company uses as its standard plus or minus one percent?
>
> A Again I'm not sure what their current match criteria is.
>
> Q And your difference in measurement is 1.41 percent, between you and the other individual who measured those, is it not, sir?
>
> A I don't know what the -- I didn't calculate the exact number, I don't have it written down here. It was within two and a half percent though.
>
> Q So yours is two and a half percent?
>
> A The way we have.
>
> Q No, sir, could you answer that question?
>
> A Oh, yes, yes.
>
> Q Okay. So what your -- assuming we're talking about DNA and we're not talking about a genetic difference of a missing arm or half a foot or anything like that, right?
>
> A I guess so, yes.
>
> Q Okay, I mean we're talking about a pattern within the cells?
>
> A Right.
>
> Q And if we can acquaint that to an individual's height, can you do that?
>
> A I'm not sure.

Q All right. If we're looking for an individual that's six feet tall, right, plus or minus one percent maybe someone who's six foot and one half inch or six foot one inch, a plus or minus two and a half percent you're saying, sir, that your difference can be anywhere between five ten and a half, and six two and a half if we can acquaint it to those terms; isn't that the difference between those two?

A If you wish to make an analogy, yes.

Q But it's accurate, is it not, the analogy?

A I don't see any point in it but --

Q Well, the greater the difference the greater possibility if some company throws it out and says plus or minus one percent is too much, you're saying that plus or minus two and a half percent is not too much, isn't that what you're telling the jury?

A We've determined that our values can be as much as two and a half percent apart.

Q And you would still present that as a match?

A Yes, we would.

(Id. at 608-11)

Defense counsel also attacked the database on the ground that Dr. Pollock did not know the details of its source. (See Id. at 618-19)

Dr. Pollock admitted that DNA analysis does not prove identity. (Id. at 620)

IN CONCLUSION, due to the substantial voir dire and cross-examination that defense counsel conducted on Dr. Pollock, Dr. Pollock's admissions to the visually weak bands in this case, and the weighty other incriminating evidence amassed against Taylor, it is understandable why the prosecution did not place more emphasis on DNA in its arguments to the jury.

STANDARDS OF REVIEW AND PRINCIPLES FOR IAC, BRADY, AND GIGLIO.

Ineffective Assistance of Counsel (IAC) Burdens.

Taylor must meet the rigorous tests of Strickland v. Washington, 466 U.S. 668 (1984). "[B]ecause the Strickland standard requires establishment of both prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the deficiency prong, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland, 466 U.S. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. "The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313 (quoting Burger v. Kemp, 483 U.S. 776 (1987)). The standard is not whether counsel would have had "nothing to lose" in pursuing a defense. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "… improper standard of review … [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

Taylor must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)("trial counsel's decision to forgo Watson's testimony").

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Thus, trial counsel is not responsible for a development subsequent to trial, even though a subsequent development can be applied to eliminate or reduce any Strickland prejudice. Compare Bradley v. State, 2010 WL 26522, *13, SC07-1964 & SC08-1813 (Fla. Jan. 7, 2010)(revised opinion; "counsel cannot be deemed ineffective for failing to predict a later Supreme Court decision")(citing Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982)); State v. Lewis, 838 So.2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"); Nelms v. State, 596 So.2d 441, 442 (Fla. 1992)(counsel not responsible for case law decided three years later) with Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993)(basis of claim overruled by subsequent case law; "Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* four years later"; "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him").

Depending on the circumstances, a trial counsel's total failure to investigate an avenue may be deficient, but counsel is not required to

"investigate and present all" evidence that may have assisted the defendant. See Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001)(mitigating evidence)(citing Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001), and Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999)).

In making an ineffective assistance of counsel claim, the defendant is "required to 'identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.'" Conde v. State, 2010 WL 455264, *3 (Fla. 2010)(citing Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986)).

For Strickland's prejudice prong, the defendant must demonstrate that "there is a reasonable probability that, but for the deficiency, the result would have been different. … 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Conde v. State, 2010 WL 455264, *2 (Fla. 2010)(quoting Strickland, 466 U.S. at 694).

Brady burdens.

Riechmann v. State, 966 So.2d 298, 307-308 (Fla. 2007), summarized a postconviction defendant's burdens to establish a claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963):

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti*, 894 So.2d at 168 [Mordenti v. State, 894 So.2d 161 (Fla. 2004)] (*citing Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263 (1999).

> To establish prejudice or materiality under *Brady*, a defendant must demonstrate 'a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial.' *Smith v. State*, 931 So.2d 790, 796 (Fla. 2006) (*citing Strickler v. Greene*, 527 U.S. 263, 289 (1999)). 'In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' *Id*. (*quoting Strickler*, 527 U.S. at 290).

Ponticelli v. State, 941 So.2d 1073, 1084-85 (Fla. 2006). With regards to *Brady*'s second prong, this Court has explained that '[t]here is **no *Brady* violation where the information is equally accessible to the defense and the prosecution**, or where the defense … had the information.' *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993) (*citing Hegwood* v. State, 575 So.2d 170, 172 (Fla. 1991); *James v. State*, 453 So.2d 786, 790 (Fla. 1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State*, 760 So.2d 903, 911 (Fla. 2000). This Court then reviews de novo the application of the law to these facts. *Lightbourne v. State*, 841 So.2d 431, 437-38 (Fla. 2003).

Giglio Burdens.

Davis v. State, 26 So.3d 519, 532 (Fla. 2009), summarized the burdens under Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763 (1972).

> A *Giglio* violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material. See *Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *See* id. at 1050-51. Under this standard, the State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. *See id*. at 1050; *see also Mordenti*, 894 So.2d at 175. Thus, the standard applied under the third prong of the *Giglio* test is more defense friendly than the test set out in *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), which is applied to a violation under *Brady*. Because *Giglio* claims present mixed questions of law and fact, we defer to those factual findings supported by competent, substantial evidence, but review de novo the application of the law to the facts. *See Sochor v. State*, 883 So.2d 766, 785 (Fla. 2004).

Trial court's factual findings entitled to deference on appeal.

On appeal, the trial court's factual findings are entitled to affirmance if supported by competent substantial evidence. See, e.g., Ford v. State, 955 So.2d 550, 553 (Fla. 2007)("Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo")(citing Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004)).

The State respectfully submits that none of Taylor's issues meet the pertinent burden(s).

ISSUE I: WAS THE TRIAL COURT UNREASONABLE IN GRANTING THE STATE"S MOTION TO STRIKE CERTAIN PORTIONS OF THE DEFENDANT'S EVIDENTIARY HEARING MEMORANDUM AND DENYING DEFENDANT'S 2009 ATTEMPT TO AMEND HIS POSTOCNVICTION MOTION? (IB 27-40, RESTATED)

This issue concerns the trial court granting (PCR/XI 2066-67) the State's motion to strike (PCR/X 1916-22) aspects of the defendant's closing argument memorandum because it raised additional claims that had not been previously pled. There were additional pleadings on the matter that further fleshed out the parties' positions below. (See PCR/X 1923-27, 1928-38, 1939-45, 2072-77, 2082-83) The standard of review is discretion and therefore reasonableness. See, e.g., Walton v. State, 3 So.3d 1000, 1011-12 (Fla. 2009)("review the denial of a motion to amend a postconviction motion for abuse of discretion"; under the facts, upheld summary denial; "In his

motion for rehearing, filed in late-March 2007, Walton's counsel sought for the first time leave to amend his lethal injection claim based on newly discovered evidence premised upon the events surrounding the Diaz execution").

Taylor presents six other issues in his appeal, and five of them raise claims based upon evidence at the postconviction evidentiary hearing. To some degree, the State was able to address all of the claims within Taylor's Initial Brief on the merits without regard to whether the trial court struck them, and so if this Court affirms on the merits, ISSUE I would be moot. However, the State also raised in this brief, as alternative arguments, some procedural bars, such as a procedural bar to Taylor's claim that Dr. Pollock was not qualified to use the product rule (See IB 74-75). The State adheres to each of those procedural bar arguments. In essence, the State's position is that a defendant should not be allowed to plead something in postconviction so general as trial counsel was ineffective because the DNA was actually inadmissible and then, on postconviction, be allowed to attack the admissibility on any ground whatsoever without notice from the postconviction pleading of how specifically the evidence was inadmissible. This is especially true here where the conviction was in 1991, and Taylor waited until 2004 to file any postconviction motion containing any actual claims, and Taylor himself has invoked Rule 3.851.

The Timeline table supra indicates the very long history of the postconviction proceedings. Taylor's initial Motion to Vacate Judgments of Convictions and Sentences with Special request for Leave to Amend was filed

15 years ago in **1995**. (PCR/I 1-162) About nine years ago, in 2001, the State proposed various deadlines including a requirement that the Defendant's final Rule 3.850 Motion be filed within 150 days, that is, by February **2002**. (PCR/II 303-304) In 2003, Taylor filed a "Supplemental to Motion to Vacate Judgments of Convictions and Sentence" (PCR/III 520-23), to which the State responded (PCR/III 531-38).

It was not until **2004** that Taylor filed what might be characterized as an actual postconviction motion, consisting of 132 pages and raising 34 claims; on its face it indicated that it was filed "pursuant to Fla.R.Crim.P. 3.85/**3.851**." (PCR/IV 557-690) The State responded. (PCR/IV 701-14)

In **2005**, Taylor filed the postconviction motion on which the evidentiary hearing was arguably based. **This motion cited only to Rule 3.851** on page 1, and it consisted of 111 pages and 21 claims. (PCR/V 781-892) The State responded to the May 2005 postconviction motion. (PCR/IV 701-14)

To summarize the events thus far, there was no postconviction motion of any consequence whatsoever filed until 2004 and then Taylor himself invoked Rule 3.851, not Rule 3.850, in 2005.

After the trial court conducted a Huff hearing and scheduled the evidentiary hearing (PCR/VI 1043-44) and the parties exchanged witness lists (PCR/VI 1045-49), Taylor moved for a continuance (PCR/VI 1070-72), and the trial court entered an Order Rescheduling Evidentiary Hearing for August 6 & 7, 2007 (PCR/VI 1106-1107).

In the ensuing period, Taylor abandoned some claims and revised his Atkins claim, and the trial court conducted a two-day evidentiary hearing at which several witnesses testified. (E.g., PCR/VII 10-PCR/X 641).

In **2007**, the parties then filed their postconviction closing arguments approximately at the same time. (PCR/X 1782-1841; PCR/X 1842-1911) It was at this point, after 12 years of postconviction litigation and multiple amendments to the postconviction motion, that the State surmised that Taylor was trying to raise as claims yet-additional matters that had not been specifically pled, and initiated the motion to strike, which prompted additional pleadings while the trial court's final order was pending.

The State submits that the rigors of Rule 3.851 apply because Taylor waited until 2004 to file an actual postconviction motion and explicitly invoked Rule 3.851, which limits amendments without any exception for a post-hoc-evidentiary-hearing memoranda, See Fla.R.Crim.P. 3.851(f)(4). Further, contrary to the Rule, Taylor failed to "set[] forth the reason the claim was not raised earlier." And, he failed to "attach[] a copy of the claim[s] sought to be added."

Taylor (IB 27) attempts to rely upon Fla.R.Civ.P. 1.190. However, Fla.R.Crim.P. 3.851 applies, and Taylor's attempted amendment was years too late under any reasonable standard. Compare Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981)("When construing court rules, the principles of statutory construction apply") with Stoletz v. State, 875 So.2d 572, 575 (Fla. 2004)("a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more

general terms")(quoting McKendry v. State, 641 So.2d 45, 46 (Fla.1994)).

Especially in a case such as this one, the policy concerns of Fla.R.Crim.P. 3.851(e)(2) strictly regulating successive motions and Fla.R.Crim.P. 3.851(d) strictly regulating when the initial postconviction motion must be filed, should be applied. See also, e.g., Bryant v. State, 901 So.2d 810, 819 (Fla. 2005)(amending after initially deficient postconviction motion required within a reasonable period, "[n]ormally that will be between ten and thirty days").

Contrary to Taylor's argument (IB 32) that his 2005 postconviction motion alleged the currently contested matters with sufficient specificity, this Court has repeatedly made clear that postconviction claims, to be considered on their merits, must be alleged with specificity. See, e.g., Booker v. State, 969 So.2d 186, 196 (Fla. 2007)("while not totally speculative, there is clearly a lack of specificity as to the substance of the testimony that these witnesses would have offered")(citing Bryant v. State, 901 So.2d 810, 821-22 (Fla. 2005); Hannon v. State, 941 So.2d 1109, 1140 (Fla. 2006)("Hannon must allege specific facts that, if accepted as true, establish a prima facie case"); Allen v. State, 854 So.2d 1255, 1258-1259 (Fla. 2003)("conclusory allegations" insufficient; "defendant must allege specific facts"); Thompson v. State, 759 So.2d 650, 659 (Fla.. 2000)("the trial court's summary denial because Thompson did not make specific factual allegations concerning which agencies had failed to comply with the records requests or the types of records that were withheld"). Knight v. State, 923 So.2d 387, 399 (Fla. 2005), applied these principles

to a postconviction allegation pertaining to experts:

> Defendant next alleges that counsel was ineffective by failing to challenge the State's experts including Dr. Fennel and that the defendant was malingering when assessing his competency to proceed. Defendant does not state what questions should have been asked that were not asked and how the result would have been different if the questions has been asked. Conclusory and speculative allegations are insufficient to warrant an Evidentiary Hearing. *Kennedy v. State*, 547 So.2d 912, 913 (Fla.1989).

Thus, general language contained within the 2005 postconviction motion does not contain requisite specificity to cover the matters that the trial court struck (Compare motion at PCR/X 1916-22 with order at PCR/XI 2066-67), such as a claim that Dr. Pollock was not qualified to use the product rule. Cf. Hitchcock v. State, 866 So.2d 23, 27 (Fla. 2004)("movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence").

In this era when defendants may be granted an evidentiary hearing on several postconviction claims and subclaims, at the evidentiary hearing counsel for the State should not be required to consult a list at every question or line of questions or forever be barred from contesting the matter as procedurally barred. Here, at the evidentiary hearing Taylor was afforded a wide range for exploring aspects of DNA and the lab, but, in the end, when he did not tie an evidentiary matter, such as qualification to use the product rule, to a specific claim he had alleged, he should be barred from adding it after-the-fact (E.g., IB 74-75), indeed here 15 years after-the-fact. See also Hitchcock v. State, 991 So.2d 337, 349 (Fla. 2008)("evidence of Richard's physical and sexual abuse of female relatives

… procedurally barred because Hitchcock did not raise it in his postconviction motion").

Indeed, notice requirements should be strictly enforced in a setting in which convicted defendants are prone to groundlessly claim that members of the Bar, their trial lawyers and the prosecutors, were incompetent (IAC) or unethical (Giglio) so that the State can present anticipate the matter being raised and timely produce available rebuttal evidence.

ISSUE II: DID TAYLOR PRESERVE AND PROVE BRADY, GIGLIO, OR IAC CLAIMS PERTAINING TO THE DNA? (IB 40-55, RESTATED)

Taylor contends that the State wrongfully withheld the name of Shirley Ziegler, DNA-related documents regarding FDLE protocols, population database, calculated fragment lengths, and bench notes.

A. ISSUE II is not preserved because it was not sufficiently pled and because Taylor admits that the trial court did not rule on this claim.

As discussed in the "Standards of Review" section supra, Brady, Giglio, and IAC are each distinct claims. For example, Brady and Giglio focus primarily on the prosecution's behavior while IAC focuses primarily on defense counsel's behavior.

Taylor contends (IB 41-42) that these Brady and Giglio claims were sufficiently alleged in CLAIM IV of his postconviction motion, citing to "PCR 789, 798, 799, and 805." Examining the allegations at those locations of the postconviction motion, they were conclusory, entirely non-specific, and thereby insufficient to allege the claims. Thus, the following is the entire discussion of Brady at the first citation in the postconviction motion: "To the extent the state withheld documents regarding the DNA

testing, the state violated *Brady*." (PCR/V 789) The second citation is not any more specific: "To the extent the state withheld documents regarding the DNA testing, the state violated *Brady* and *Giglio*." (PCR/V 798) At the third location, the postconviction motion is not any more specific: "To the extent the State failed to disclose this evidence, the State committed a *Brady* violation and rendered trial counsel ineffective." (PCR/V 799) The fourth location similarly states that Taylor is raising "alternative legal theories and names them as "ineffective assistance of counsel, *Brady*, *Giglio*, and newly discovered evidence" (PCR/V 805-806) without specifying anything.

Taylor on appeal (IB 42), as well as in his postconviction motion (PCR/V 805 n.7) claims that he can plead in the alternative. However, this contention overlooks that he must still plead with specificity how the State supposedly withheld exculpatory (Brady) or used (Giglio) false evidence. Indeed, inconsistency between the IAC and these theories is palpable. See Hitchcock v. State, 991 So.2d 337, 349 (Fla. 2008)("Hitchcock essentially concedes that the evidence does not qualify as newly discovered evidence because he argued in a separate claim, discussed above, that his trial counsel was ineffective for not presenting evidence that Richard sexually and physical abused family members, which was either known by counsel or could have been discovered by the use of diligence at the time of trial").

Where a theory is simply stated as a conclusion without specific facts alleged supporting each of the prongs or criteria of that theory, it is

insufficiently pled and should be summarily denied on that basis, as the trial court did here:

> To the extent that the Defendant generally avers that the State violated *Brady* when it 'withheld documents regarding the DNA testing,' and *Giglio*, this Court denies this subclaim as facially insufficient. (Def's Mot. at 9, 25-29, filed May 23, 2005.) *See Parker v. State*, 904 So.2d 370, 375 n.3 (Fla. 2005); *see also Gordon v. State*, 863 So.2d 1215, 1218 (Fla. 2003) ('A defendant may not simply file a motion for post-conviction relief containing conclusory allegations … and then expect to receive an evidentiary hearing.'). The Defendant has had ample opportunity through pleadings and the evidentiary hearing to present evidence in support of the any *Brady* and *Giglio* subclaims. The Defendant has not taken advantage of these opportunities and, as such, this Court finds that he has failed to prove, or even allege, the requisite prongs of *Brady* and *Giglio*. To the extent that these claims have been generally averred, the Defendant's *Brady* and *Giglio* subclaims are denied. [FN14]
>
> > [FN14] *See e.g.*, *Rhodes v. State*, 986 So.2d 501, 513-514 (Fla. 2008), *citing Spera v. State*, 971 So.2d 754, 758 (Fla. 2007), in which the Florida Supreme Court upheld the denial of facially insufficient *Strickland* claims saying, 'Failure to sufficiently allege both prongs results in summary denial of the claim.'

(PCR/XI 2042-43) Thus, the trial court expressly ruled that the ISSUE II claims were insufficiently pled. Compare Hartley v. State, 990 So.2d 1008, 1015 (Fla. 2008)("circuit court's order denying relief did not even mention Johnson's testimony or this claim, and Hartley did not identify this issue in his motion for rehearing. Thus, the court was never presented with and never ruled on the claim argued here").

Accordingly, Davis v. State, 26 So.3d 519, 531 (Fla. 2009), upheld the summary denial of a Brady claim, reasoning:

> Davis has not satisfied his burden to demonstrate that the State willfully or inadvertently suppressed favorable, material evidence. The conclusory allegations in the pleading fail to specifically set forth that the State had any knowledge of the substance or motives behind Kearney's testimony. Given that the alleged recantation is newly discovered, there is no basis to claim that the State withheld this information from Davis.

Davis, 26 So.3d at 532, also affirmed the summary denial of a Giglio claim:

> We affirm the postconviction trial court's summary denial of this claim because the motion failed to make a prima facie case of a *Giglio* violation. Specifically, Davis failed to include any allegations which demonstrate that the State had knowledge of the allegedly false statements made by Castle and Kearney during the capital trial. Neither the affidavit nor the motion indicates the identity of the individual who threatened Kearney. Davis merely asserted in his motion: 'If pressure was placed on the witnesses to testify in a particular manner, then it was necessary that trial counsel be provided with such information so that he could effectively represent Mr. Davis.' (Emphasis supplied.) ***

See also, e.g., Doorbal v. State, 983 So.2d 464, 482 (Fla. 2008)("This Court has held that vague and conclusory allegations on appeal are insufficient to warrant relief"); Patton v. State, 878 So.2d 368, 380 (Fla. 2004)("A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record")(quoting Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998)).

For the proposition that alternative theories may be pled, Taylor (IB 42) cites to Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995), Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000), and Jennings v. State, 782 So.2d 853, 861 (Fla. 2001). However, Hildwin did not discuss the sufficiency of the pleading, and therefore it is not precedent on this matter; Freeman upheld a summary denial; and Jennings denied the claim as successive. Most importantly, none of these cases authorize or even suggest that alternative theories may be averred in a postconviction motion in a conclusory manner. They do not alter the pleading requirement that postconviction motions must plead specific facts to support components of specific claims.

Moreover, there are fatal flaws to each of these allegations, each not

supported by the record, even as "supplemented" by the postconviction evidentiary hearing.

B. Even if entertained on the merits, ISSUE II has none.

Concerning **Shirley Zeigler**, Taylor contends that her name was not provided to the defense until the cross-examination of Dr. Pollock at trial (IB 48) and that she found two of the four probes inconclusive (IB 48-49).

Even assuming arguendo, that Zeigler's trial testimony would have differed from Dr. Pollock, her mere existence does not establish the elements of a Giglio claim. See Ferrell v. State, 29 So.3d 959, 978 (Fla. 2010)("Ferrell cannot establish a *Giglio* violation by showing merely that the State put on witnesses whose testimony conflicted with another person's version of events").

Moreover, Shirley Zeigler's initials were on a lab report (See TT/XIX 607-608) that had been disclosed prior to trial (See PCR/X 1768; PCR/VIII 1447-48; see also TT/XIX 563-64). Thus, defense counsel was able to specifically reference Zeigler's initials during his cross-examination of Dr. Pollock. (See TT/XIX 607-608) See, e.g., Ferrell v. State, 29 So.3d 959, 979-80 (Fla. 2010)(evidence showed that defense counsel had the information prior to trial); Spencer v. State, 842 So.2d 52, 68 (Fla. 2003)(name disclosed on discovery, not a *Brady* violation; "identity was not suppressed by the State, and that Anthony did not possess any evidence that was favorable to Spencer"); Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000) ("*Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence

cannot then be found to have been withheld from the defendant").

Taylor cites to defense counsel's postconviction testimony for the proposition that "[t]he first time Mr. Tassone was made aware of Shirley Zeigler was at trial when Dr. Pollock identified her initials." (IB 48; see also IB 54: "suppressed records and the names") However, this is Taylor's self-serving and incorrect conclusion that overlooks that defense counsel Tassone's postconviction testimony stating that he thought his files for this case were "destroyed in a fire that occurred in my office in March of '94." (PCR/VII 1369) Thus, at his 2007 postconviction testimony, he had been unable to otherwise refresh his memory of this 1991 trial. Defense counsel testified:

> Q I apologize, let me show you Dr. Pollock's testimony again, hang onto it so I'll get them all back at the same time, that way I don't get confused. Do you recollect approximately the first time you heard the name Shirley Zeigler in relationship to the time of this case?
>
> A Sir, I don't know. I had a brief conversation with you today and from what you pointed out to me it appeared that the first time I heard the name Shirley Zeigler was when I was deposing Dr. Pollock.
>
> Q Deposing or during the trial? I'll show you in a minute.
>
> A Okay, I don't recall, it was questioning of Dr. Pollock.

(PCR/VIII 1370) Taylor's postconviction counsel then went through Mr. Tassone's trial cross-examination of Dr. Pollock. (Id. at 1370-72) When asked if he had "any recollection of having any other documents in [his] possession that were provided by the State that had the initials SLZ other than Exhibit 8," Tassone responded that he has "no independent recollection of that" and then inferred "that was the first time I was presented with that information." (Id. at 1373) Although Tassone could not recall when he

received the document with Zeigler's initials (Id. at 1374), he said he may have looked at it at the prosecutor's office prior to trial (Id. at 1448), and the prosecutor testified that his policy is always "to allow defense attorneys to look at all exhibits" prior to introducing them in the courtroom." (PCR/X 629) The prosecutor said he would have "tendered to defense counsel" Dr. Pollock's report with his discovery response (PCR/VII 1208), and a document indicated that the prosecutor "needs an additional copy of the case file notes" to provide to defense counsel, which were provided on October 3, 1991 (PCR/VII 1212-14).

Taylor contends (IB 54) that the State "suppressed records and … names" "until shortly before and during the trial" and cites to the prosecutor's September 27, 1991, letter to FDLE requesting documents to forward to the defense (PCR-Ex/II 221-23). However, a disclosure of extensive documentation at that time and any lack of recollection 16 years after the trial did not prove that Zeigler's identity was concealed until then; there has been no actual proof of any attempt to conceal her existence and the State denies any such assertion. Moreover, Taylor has affirmatively proved that, indeed, Zeigler's existence through her initials was disclosed prior to jury selection. Thus, this claim is actually an IAC claim based on Mr. Tassone's decision to go to trial rather than persist with his pending motion for continuance (R/I 161-62; XVII 81-82). See ISSUES III, V.

Not only was Zeigler's existence disclosed through the lab report, and thereby no Brady violation proved, there has been no showing that the prosecutor knowingly presented any false trial testimony concerning

Zeigler, and thereby no Giglio violation has been proved.

Freeman v. State, 761 So.2d 1055, 1062-63, 1063 n.6 (Fla. 2000), rejected a Brady claim in situations similar to here. There, "Freeman allege[d] the State improperly withheld Kathy Freeman's statement that Freeman told her he did not intend to kill Collier." There, as here, defense counsel "knew or should have known about the statement through the exercise of reasonable diligence." Like the "details" of the full identity indicated through Zeigler's initials on the document provided to defense counsel, in Freeman, "[d]efense counsel could have discovered the details of any statement through reasonable diligence (for example, by deposition or another discovery method). There was no *Brady* violation." Also, in Freeman, the defendant claimed that "the medical examiner's testimony was flawed and that the defense now has an expert who can point out these flaws." Freeman held that "[t]his type of evidence does not meet the definition of *Brady*; there is no allegation that the State had the information that is now being offered by this defense expert." Here, even if somehow Dr. Libby is incorrectly accredited, Taylor has not proved that the State was responsible for Dr. Libby's information.

Moreover, concerning any supposed materiality or prejudice under a Brady or Giglio analysis, Zeigler testified at the evidentiary hearing that she could not give an opinion regarding Dr. Pollock's[8] finding a match and that, when asked whether, concerning the "two probes" in which "he found a

[8] See his credentials discussed in the Facts section supra.

match," it would have been a violation of protocol, she equivocated: "As far as I can remember, yes." (PCR/VII 1266) Further, she substantially agreed with the findings of Dr. Pollock. She testified that, although there were "differences" between her printout and Pollock's (PCR/VII 1285):

> Q All right. Dr. Pollock and you found the same things in terms of under that loci where Mr. Reiter asked you, is that correct?
>
> A Yes, that's correct.
>
> Q Okay. So in terms of your findings versus Dr. Pollock's findings, is there any dispute?
>
> A I didn't -- just by looking at the computer printout I didn't see any.

(PCR/VII 1284) In addition to Zeigler, Dr. Pollock testified that Shirley Zeigler did not dispute his results. (PCR/IX 1688-91, 1703-1705, 1708-1709) See Cruse v. State, 588 So.2d 983, 988 (Fla. 1991)("While the preliminary position of Dr. Miller is more questionable, even his most defense-oriented statements were at best mere restatements of the opinions expressed by the experts who actually testified at trial"; "State indicated that Dr. Miller was ultimately leaning toward a finding that Cruse was sane"; "we find that no *Brady* violation has occurred").

Further, as discussed supra in the "Significant Context of the DNA Issues" section, the Zeigler postconviction testimony that Taylor now advocates pales in comparison with the other evidence of Taylor's guilt and defense counsel's effective voir dire and cross-examination[9] at trial. See

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[9] The trial court correctly referenced this cross-examination in detail, and defense counsel's preparation for it, when it discussed the IAC

Jones, 998 So.2d at 581 (extensive cross-examination of witness at trial undermines postconviction prejudice)(citing Guzman); Sims v. State, 750 So.2d 622, 625 (Fla. 1999)("defense counsel's acknowledgment of an awareness of Halsell's criminal involvement with Gayle in other robberies and burglaries … cannot conclude that the State's failure to provide the information contained in the Gainesville report undermines our confidence in the outcome of the proceedings"); cf. Reed v. State, 875 So.2d 415, 423 (Fla. 2004)("given Reed's incriminating statements, trial counsel could not be found deficient under the standards of Strickland for not having the hair reexamined")(citing Gudinas v. State, 816 So.2d 1095, 1101-02 (Fla. 2002) (finding no ineffective assistance in not pursuing DNA testing in light of incriminating statements by Gudinas to his attorneys and other inculpating physical evidence)). Indeed, Dr. Pollock's credentials, as excerpted in the facts supra, are impressive.

Taylor (IB 49-50) discusses Dr. Libby, but the trial court essentially found his lack of authoritativeness for these proceedings. (See PCR/XI 2037), See Reed v. State, 875 So.2d 415, 432 n.9 (Fla. 2004) (rejected appellate Brady claim that had not been directly addressed by trial court; relied on trial court's finding on another claim that a document would not have assisted defendant); and, contrary to Taylor's position, Zeigler did

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pertaining to the DNA claim. (See PCR/XI 2034-36, block-quoted in ISSUE III infra) The trial court's analysis also applies to ISSUE II concerning whether anything material was withheld or misrepresented as well as whether there was prejudice.

not dispute Dr. Pollock's findings, and Dr. Pollock's in-the-trenches credentials far-overshadowed Libby's academic background, in which he was not even tenured, as the trial court discussed.

Taylor (IB 50-51) submits that Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994), quashed State v. Vargas, 667 So.2d 175 (Fla. 1995)(non-DNA), a 1994 First DCA appellate case, decided three years after the trial here and containing unknown specific parameters compared with this case, could somehow assist his Brady or Giglio issue here. Vargas does not resolve **weight** of expert testimony, especially when it witnessed by the trial court, like here. If Vargas is considered, it does not assist Taylor; it undermines his cause. See Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838. For example, Vargas, 640 So.2d at 1144 n.7, accepted a wider window of variation than here:

> In the initial brief, appellant also asserted that the FBI's method of determining a match is not generally accepted in the relevant scientific community, based on Dr. Pollock's testimony that the use of a '5% window' of variation for proclaiming a match is not generally accepted because the consensus is that each laboratory should develop its own criteria. We are not persuaded by this argument in this case.

Vargas also supported the use of RFLP here: "Dr. Tracey testified as an expert in the field of molecular biology and population genetics. He had worked and done research in RFLP analysis, and had reviewed work done at the FDLE lab, and said it is widely accepted in the general scientific community as a reliable testing method." Dr. Tracey's population-statistics testimony concerned "principally within ethnic or within racial groups." Vargas, 640 So.2d at 1146. Taylor is white. (See, e.g., R/I 1) "Dr.

Wakeland testified [that] … the existing controversy in the scientific community relates 'totally' to the calculation of the probability that someone else in the population could also match the crime scene DNA sample" but admitted that "he was not an expert in forensic DNA analysis, and he had not done any forensic work. He agreed that the concept of applying population genetics to DNA profiles was widely accepted within the scientific community, and that a large number of labs use the FBI data bases." Id. at 1147. The First DCA ultimately held that the FBI databases would not support DNA results at a level of "one in 30 million and one in 60 million" but that "a more conservative calculation may be possible, which would be generally accepted in the relevant scientific community." Id. at 1150-51. Here, one in 6 million is a more "conservative calculation." Moreover, today, contrary to Taylor's suggestion (IB 51) the product rule is commonly accepted. See, e.g., Everett v. State, 893 So.2d 1278, 1281 (Fla. 2004)(FDLE analyst used product rule and FBI database)(citing Butler v. State, 842 So.2d 817, 828 (Fla. 2003) (Butler's claim of invalidity of product rule "is inaccurate in light of the case law that continues to uphold the validity of the product rule").

Taylor also claims that FDLE violated **protocols**, but his reliance (IB 49-50, 52-55) on Zeigler's and Libby's postconviction testimonies is misplaced, as discussed supra. Concerning the protocols, Taylor (IB 52) also discusses Dr. Pollock's trial and postconviction testimony and a copy of the protocols. Taylor overlooks the facts that Dr. Pollock established the FDLE protocols as a proper adaptation of the FBI's protocols and

followed them here.

At trial Dr. Pollock testified that he began to analyze the DNA February 25, 1991; that "we made very minor modifications" to the FBI protocol. (Id. at 606) There was a lag between the FBI protocol change and when FDLE received it. (See Id. at 614) At the postconviction evidentiary hearing, Dr. Pollock explained that he set up the FDLE lab in Jacksonville (PCR/IX 1663) and that Dr. Ruth DuBois, an external scientist from Florida State University's department of biology genetics reviewed the FDLE procedures and validation studies and "gave us the stamp of approval for going ahead." (PCR/IX 1664) FDLE conducted hundreds of tests to make sure that things were running correctly. (Id. at 1664-65) Dr. Pollock testified about FDLE's "proficiency testing." (Id. at 1670-71)

Some local adaptations of FBI protocols that were generally accepted in the scientific community:

> In 1991 we used the, what I call, the modified FBI procedure. That's what most laboratories in the country were doing. Taking this procedure that the FBI developed, taking it back to their laboratories and tailoring it to their needs. *** We're talking minor changes to the procedures.

(PCR/IX 1668-69) He continued:

> Q And at that time based on the protocol procedures that y'all had set up did you feel that those adhere to in terms being reliable in the forensic scientific community?
>
> A Oh, absolutely. This was now being implemented, I won't say all 50 states, but in most states had representatives at the first DNA training course that I mentioned previously. And they went back and did the same thing I was doing.

(PCR/IX 1671) He explained that the FBI's protocols were "adapted … for their own use." (PCR/IX 1712) He explained, concerning "cutoff" protocol

that, based on his experience, he made the FDLE protocol less "conservative" than the FBI's and that his protocol was reproducible. Other labs also made these changes. Dr. Pollock explained that there was no change in the FDLE protocol after it was implemented and adapted from the FBI in about late 1990 through the time of the analysis in this case. He said that "I don't believe I made any protocol changes for quite a while in the laboratory." (Id. at 1688) So, consistent with the FDLE protocol, he "interpreted in this particular case there was one band that was above ten thousand base pairs or 10 KB and … did interpret that and … did get a match." (Id. at 1685-86)

Thus, in essence, Taylor in postconviction elaborated on what Mr. Tassone showed in his trial voir dire and cross-examination, that is, that the FDLE protocols were different from the FBI's, but on postconviction, Dr. Pollock was able to explain more of the background, rationale, and differences grounded on his extensive expertise. In terms of the appellate claims, these were changes that were not material or prejudicial.

Taylor (IB 54) argues that defense counsel was "sandbagged" into not calling Dr. Goldman as a witness, but, at this juncture Taylor adds nothing specific that Dr. Goldman would have said at trial, and Taylor did not call Dr. Goldman as a witness at the postconviction evidentiary hearing. Thus, Taylor fails to connect his allegation to any criteria for a Brady or Giglio claim and fails to meet those burdens.

Concerning Taylor's allegation (IB 54) that "the State suppressed records and the names of vital individuals that weren't provided until

shortly before and during the trial," he adds nothing specific to his previous discussion of Zeigler, Dr. Pollock, and FDLE protocols, which have been discussed in the foregoing pages here. Thus, Taylor has not demonstrated that "Dr. Pollock's testimony was false" at all or that his trial testimony could have been "impeached" by Zeigler (IB 54-55).

Finally but also importantly, concerning all of ISSUE II's claims, Taylor bore the burden of demonstrating that the result of the DNA testing admitted at trial was actually incorrect in a material way. He needed to prove that, rather than the 1 in 6 million odds introduced at trial, no number would have been appropriate or that a materially different number would have been appropriate. Cf. Reed v. State, 875 So.2d 415, 425, 427 (Fla. 2004)(IAC claims; "we find that the circuit court did not err in concluding that trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way"; " circuit court correctly noted that Reed failed to present evidence indicating that Scott's identification of the print was in error"). Again, Taylor failed to meet his burden.

For all of the foregoing reasons, Taylor has failed to demonstrate that the State withheld anything that was material and that would have made any difference in the outcome. Indeed, although memories faded some from the 1991 vintage of the trial proceedings, what remains clear is that the State provided pertinent information, and defense counsel Tassone used that information consulting with the defense expert, Dr. Goldman, and conducting very competent voir dire and cross-examination of Dr. Pollock at trial.

ISSUE III: HAS TAYLOR DEMONSTRATED BOTH STRICKLAND IAC PRONGS BASED ON ALLEGED DEFICIENCIES IN CHALLENGING THE DNA AT TRIAL? (IB 55-76, RESTATED)

In ISSUE III, Taylor claims that the trial court erred in denying his IAC claim alleging that trial defense counsel Mr. Tassone failed to competently challenge the DNA results. (IB 55-75) He claims that, if Mr. Tassone had been competent, he could have excluded the DNA and the guilty verdict would have been different" (IB 75-76).

A. The trial court's order.

The trial court rejected Taylor's IAC claim pertaining to the DNA. The trial court's order reviewed IAC law (PCR/XI 2029-30), summarized Claim IV and its subclaims (PCR/XI 2032), and then found that the IAC "subclaims" of "Claim IV" pertaining to the DNA did not support postconviction relief:

> **Subclaim 1: Ineffective Assistance for Failing to File and Litigate a *Frye* Motion**
>
> In subclaim 1, the Defendant claims that counsel was ineffective for failing to file and litigate a motion in limine pursuant to *Frye*[FN11].Specifically, the Defendant claims that trial counsel failed to challenge the admissibility of the DNA evidence pursuant to *Frye* and failed to object to Dr. Pollack being allowed to testify as an expert witness.
>
> To the extent the Defendant claims ineffective assistance of trial counsel for failing to litigate a matter regarding the admissibility of evidence, this claim is procedurally barred as an impermissible attempt to circumvent the direct appeal procedural bar. *See Arbelaez v. State*, 775 So.2d 909, 919 (Fla. 2000) ('Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.'); *Johnson v. Wainwright*, 463 So.2d 207, 212 (Fla. 1985) (finding that 'matters that should have been and, if properly protested and preserved for appeal, could have been raised by the initial appeal … are not proper ground for relief by motion to vacate under rule 3.850.').
>
> To the extent the Defendant claims that trial counsel failed to challenge the admissibility of the DNA evidence pursuant to the Defendant's claim is denied. In his motion for post conviction relief

the Defendant's reliance on cases such as *Hayes*, *Brim*, and *Murray*[FN12] is misplaced, as those cases involved direct appeals of *Frye* claims and not ineffective assistance of counsel claims based on the failure to litigate a issue. As pointed out by the Defendant, a more instructive case is *Armstrong v. State*, 862 So.2d 705 (Fla. 2003), in which Armstrong (as the Defendant here) claimed in a Rule 3.850 motion that his counsel was ineffective for failing to ask for a hearing. In *Armstrong*, the Florida Supreme Court affirmed the trial court's order denying Armstrong's Rule 3.850 motion and quoted the trial court's reasoning, that 'any refinements or additions to the *Frye* analysis which have evolved since the trial, sub judice, cannot be applied in evaluating the effectiveness of trial counsel's performance. *id.* at 713 (citations omitted). The Florida Supreme Court also noted:

> This trial occurred in 1991, six years prior to this court's clarification of the test in *Brim v. State*, 695 So.2d 268 (Fla. 1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the *Frye* test. Armstrong's counsel cannot be ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of the trial.

Id. at 713 n. 7 (emphasis added). The reasoning from Armstrong applies equally to the Defendant's claim here. Mr. Tassone 'cannot be ineffective for not demanding the satisfaction of a more complex test than was required by the law' at the time of Taylor's trial in 1991. *Id*.

This Court also declines the Defendant's suggestion that *Brim* should be applied retroactively. In *Brim*, the Florida Supreme Court held that the *Frye* test should be applied in determining whether to admit population frequency statistics of DNA. *See Brim*, 695 So.2d at 271. The Florida Supreme Court has specifically held that *Brim* is simply 'a clarification of the *Frye* test' and that '*Brim* has never been held to apply retroactively.' *Cherry v. State*, 959 So.2d 702, 710 (Fla. 2007); *see also Armstrong*, 862 So.2d at 713. Subclaim 1 is denied.

Subclaim 2: Ineffective Assistance for Failing to Challenge DNA and Serology Evidence

The Defendant avers that Mr. Tassone provided ineffective assistance of counsel for failing to challenge the DNA and serology evidence at trial. A review of the record shows otherwise. In preparation for trial, Mr. Tassone asked the trial court to appoint Dr. David Goldman, as an expert witness to assist Mr. Tassone at trial. At the time, Dr. Goldman was a professor at the National Institute of Health (NIH), and Chief of the Section on Genetic Studies. (R. 87; T.T. at 605.) The trial court granted the Defendant's motion in an Order

entered on September 20, 1991. (R. 87) Mr. Tassone testified at the evidentiary hearing that he consulted with Dr. Goldman in preparation for trial, and that the substance of their conversations provided enough ammunition for Mr. Tassone to effectively cross examine the State's expert, Dr. James Pollack. (P.C. Vol. II at 253-54, 279.) Mr. Tassone also deposed Dr. Pollack on September 4, 1991. (State's Ex. 7.)

At trial, when the State tendered Dr. Pollack as an expert witness in DNA analysis, Mr. Tassone asked the trial court for permission to voir dire Dr. Pollack as to his qualifications as an expert. (T.T. at 556.) During voir dire, Mr. Tassone asked Dr. Pollack about his limited experience being qualified as an expert in DNA analysis (T.T. at 55-56), the lack of "quality control analysis" of Dr. Pollack' s laboratory by an outside agency (T.T. at 564-68), and the potential for human error in the laboratory analysis of DNA fragments (T.T. at 567-68). At the end of voir dire, Mr. Tassone would not "stipulate to Dr. Pollack's qualifications for the reasons given his responses to examination." (T.T. at 569.) The trial court disagreed and found Dr. Pollack qualified to be an expert on forensic serology and DNA analysis. (Id.)

During cross examination, Mr. Tassone vigorously questioned Dr. Pollack on the reliability and methodology of his DNA results including: the potential for human error in the analysis of DNA (T.T. at 596-97); the subjectiveness of the quantity and quality of DNA being examined (T.T. at 596- 97); the subjectiveness of the amount of enzyme used to cut the DNA and the potential for human error (T.T. at 597-98); the subjectiveness in the separation of DNA fragments and the potential for human error (T.T. at 599); the fact that the population database employed by Dr. Pollack did not account for the percentage of people in the population, though small, who have more than two DNA bands (T.T. at 600); the fact that the Texas and Florida databases included individuals with three DNA bands (T.T. at 600-01); that as to the DNA autoradiogram of probe D1S7, the bands were too faint to use pursuant to FBI standards (T.T. at 604-05); that it was unclear whether Dr. Pollack used the old or the newly revised FBI protocols (revised in December 1990, but which were not released to Dr. Pollack until February 1991) (T.T. at 606-07); that the match criteria for Life Codes and Celimark was within 1%, while the match criteria for Dr. Pollack's lab was within 2.5% (T.T. at 608-11); and that as to locus D17S79 (which contains the most commonness throughout the population), one band for the victim and the Defendant was the same size (T.T. at 616-618). In summary, Mr. Tassone's pretrial investigation and cross examination of Dr. Pollack sought to discredit Dr. Pollack's testimony, and by extension, Dr. Pollack's DNA analysis, by showing that his methodology and quality control were lacking:

> Mr. Tassone: So you're the cutter, you're the extractor and you're the person who decided whether it's obvious, is that correct?
>
> Dr. Pollack: Yes
>
> (T.T. at 598.)
>
> As to the serology evidence, *** [not contested in this issue]
>
> At the evidentiary hearing, the Defendant presented Dr. Randall Libby to testify as to what he perceived as problems with the manner in which Dr. Pollack handled and examined the DNA evidence. (P.C. Vol. II at 3 16-57, 363-400; P.C. Vol. III at 401-520.) The Court considered Dr. Libby's lengthy and detailed testimony as well as Dr. Libby's experience and credentials. The Court notes that while Dr. Libby was quite critical of the methodology and process employed by Dr. Pollack to examine the DNA evidence in the Defendant's case, Dr. Libby is not trained in forensic DNA, has never worked in a forensic DNA lab, and is not a member of the "Technical Working Group on DNA Analysis Methods" (TWGDAM). (P.C. Vol. III at 430-3 1, 465, 532-33.) Rather, Dr. Libby's experience is as a non-tenured, neurogeneticist at the University of Washington dealing with implications for human DNA. (P.C. Vol. III at 432-33.) The Court is not convinced that Dr. Libby had the requisite background and experience in forensic DNA for this Court to give his testimony considerable weight.
>
> Consequently, this Court finds that the record supports that Mr. Tassone did not commit error as defined by *Strickland*, and that Mr. Tassone adequately challenged the serology and DNA evidence in the Defendant's case. Consequently, Subclaim 2 is denied
>
> [FN11] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
>
> [FN12] *Hayes v. State*, 660 So.2d 257 (Fla. 1995); *Brim v. State*, 695 So.2d 157 (Fla. 1997); *Murray v. State*, 692 So.2d 157 (Fla. 1997).

(PCR/XI 2033-37)

B. Application of standard of review: ISSUE III does not merit relief.

As discussed in the "Ineffective Assistance of Counsel (IAC) Burdens" section supra, to prevail on an IAC claim, Taylor must prove both Strickland deficiency prong and Strickland prejudice prong; hindsight is inappropriate; and there is a strong presumption against a defendant. (See also trial court's summary of Strickland law at PCR/XI 2029-30)

The State submits that the trial court's order facially merits

affirmance.

Also as discussed supra, in reviewing a trial court's order, its factual findings are entitled to appellate deference where it is supported by competent substantial evidence. Here, the trial court observed Dr. Libby testify at the postconviction evidentiary hearing and essentially decided to not rely on his testimony (See PCR/XI 2037). Therefore, Taylor's attempted reliance (IB 61 n.13, 63, 70, 72-74) on Libby's testimony is misplaced.

The State now addresses each of what appear to be Taylor's primary IAC contentions seriatim, in roughly the same order as Taylor argues them.[10]

Taylor contends (IB 56-57) that the trial court's reasoning on procedural bar is incorrect. However, Taylor does not address the trial court's citations as applicable authority to Arbelaez and Johnson. Nevertheless, in the ensuing pages of the trial court also addressed the

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[10] The State does not address Taylor's listing of what he contends were claims in his pleading because unless Taylor, **as the non-prevailing party below**, averred a claim and supported it with evidence, it was not preserved below, and unless the claim is also sufficiently argued on appeal, it is not preserved at the appellate level, See, e.g., Bryant v. State, 901 So.2d 810, 827-28 (Fla. 2005)(cursory appellate claim waived); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Hall v. State, 823 So.2d 757, 763 (Fla.2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("**Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved**)(citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999); Duest v. Dugger, 555 So.2d 849, 851-52 (Fla. 1990)).

IAC claim as such.

Taylor (IB 57) seems to recognize the prohibition against retroactively applying standards to a defense counsel as discussed in Armstrong v. State, 862 So.2d 705 (Fla. 2003). **BUT** then, as the State will discuss in the ensuing pages, Taylor repeatedly violates that Strickland principle of prohibiting the "distorting effects of hindsight." To be clear, Armstrong is on point. Armstrong, 862 So.2d at 713, rejected a Frye-based claim against trial counsel concerning its 1991 trial:

> We further note the error in Armstrong's assertion that his trial counsel provided ineffective assistance by failing to challenge more specific elements of DNA testing, such as autoradiograms and population substructuring, through a *Frye* hearing. This trial occurred in 1991, six years prior to this Court's clarification of the *Frye* test in *Brim v. State*, 695 So.2d 268 (Fla. 1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the *Frye* test. Armstrong's trial counsel cannot be found ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of trial.

See also Bradley, 2010 WL 26522, *13 (revised opinion; "counsel cannot be deemed ineffective for failing to predict a later Supreme Court decision")(citing Muhammad); Lewis, 838 So.2d at 1122 ("appellate counsel is not considered ineffective for failing to anticipate a change in law"); Nelms, 596 So.2d at 442 (counsel not responsible for case law decided three years later); compare Fretwell, 506 U.S. 364 (Strickland's prohibition against evaluating trial defense counsel's performance based on hindsight is a protection for counsel).

Taylor argues (IB 57-59) that, under an IAC theory, this Court on appeal should award him the same result as in the direct appeal in Murray

v. State, 838 So.2d 1073, 1080 (Fla. 2002). There are several alternative reasons why Taylor's argument should be rejected. First, Taylor's postconviction motion did not argue that one accomplice should per se obtain the benefit of another accomplice's appellate result. Instead, the State has found where the postconviction motion cited to one of this Court's Murray decision as **precedential authority** (See PCR/V 793-94) but not as a basis for parity among accomplices as such. Therefore, this appellate claim is procedurally barred as unpreserved below. Second, because this claim was not raised as such below, Taylor obtained no trial court ruling on it, which also bars it here. See, e.g., Jones v. State, 998 So.2d 573, 581 (Fla. 2008)("*Brady* claim … not preserved because … not addressed by the trial court"; "'To be preserved, the issue or legal argument must be raised and ruled on by the trial court'")(*quoting Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008), *modified* 986 So.2d 560). Third, there is no, and there should be no, legal principle requiring parity of accomplices in trial tactics and precise quality of attorneys and evidence. It is axiomatic that each trial is different[11] and each trial lawyer's skill-set is different, perhaps with one lawyer better at cross-examination and another lawyer better at closing argument but both lawyers meeting Strickland's standard for competency. Strickland requires a skill set to be applied at a certain level of competency; it does not require a lawyer to

[11] For example, Murray (2002) involved DNA analysts DeGuglielmo and Warren and different evidence than here.

obtain the same result as another lawyer. Fourth, while some very selected aspects of certain cases may be compared, there are no "collective trials" or "collective appeals" concerning a guilty verdict, in the sense that any time one defendant obtains a result concerning guilt or innocence, all accomplices must reap the same result. If this were allowed, accomplice-defendants could collude and try our various defenses in front of different juries and try out various appellate tactics and issues that correspond to their trial tactics. Fourth, and most basic, counsel-parity is not contemplated within Strickland's tests. Instead, **each** trial counsel is strongly presumed to have been competent even though the defendant was convicted; acquitted defendant's do not and cannot raise postconviction claims. Fifth, Taylor's defense counsel is the focus of the evaluation here, not Murray's. An accomplice's "reward[]" is irrelevant to a Strickland inquiry. (Indeed, although also irrelevant to a Strickland evaluation of Taylor's defense counsel, the result of Murray's case is that now his conviction and death sentence, without the State using DNA evidence, have been affirmed on direct appeal by this Court convicted and sentenced to death. See Murray v. State, 3 So.3d 1108, 1112 (Fla. 2009). By Taylor's argument, Taylor's DNA claim should be per se rejected.) And, finally sixth, as prohibited by Armstrong, et al, Taylor's attempted use of Murray, and also Brim (IB 58-59), is essentially an attempt to bypass the prohibition against hindsightedly evaluating defense counsel's effectiveness retroactively based upon events that occurred after the trial. For example, Taylor cites (IB 61-63) to two 1994 and one 1995

Florida cases concerning the FBI database, and Taylor even improperly assumes that there was only one database and that one database, with no modifications, was applicable in those 1994 cases as well as in the 1991 analysis here.

Taylor (IB 59-63) cites to several appellate cases and articles that he contends put defense counsel on notice as to what he could claim. Of course, the ones that occurred after this October 7-10, 1991 jury trial are not pertinent to a Strickland claim, as already discussed. Taylor's ability to cite at the appellate level, some out-of-state cases and academic articles, do not bind defense counsel concerning what strategy he must take. Academic articles can probably be found on many topics that pertain to a defense counsel's trial decisions, but they do not demonstrate that counsel **must** pursue those lines of inquiry in order to meet Strickland's deficiency test.[12] Indeed, Taylor's postconviction witness, Dr. Libby, was an academic without pertinent professional experience, and as such, the trial court did not rely on his opinions. Perhaps one way to put it is that the references that Taylor cites might show what might have been explored, but they do not show what must have been explored or ultimately done under Strickland. This rationale also applies to the Florida cases that Taylor cites. Thus, there are legions of appellate cases denying Strickland claims that had allege that trial counsel, under the law and perhaps even under

[12] Moreover, the academic articles have not been subjected to adversary testing, and the State objects to their introduction into Taylor's brief.

scientific principles, **COULD HAVE DONE** x, y, or z.

Accordingly, Strickland's test does not require defense counsel to "investigate and present all" evidence that may have assisted the defendant, See Grayson, 257 F.3d at 1225 (mitigating evidence)(citing Housel, 238 F.3d at 1294; Tarver, 169 F.3d at 715), nor even do what is "**prudent or appropriate,**" Chandler, 218 F.3d at 1313 (quoting Burger, 483 U.S. 776).

Moreover, to the degree that an area of law is new and developing, including where it is tracking developing areas of science, Strickland's competency of counsel does not require defense counsel to be at or near the cutting edge of challenging those results. This is illustrated by Andrews v. State, 533 So.2d 841, 845 (Fla. 5th DCA 1988), which Taylor admits (IB 59) "incorrectly applied the relevancy test."

Further, as discussed under ISSUE II supra, Vargas (cited at IB 62) actually undermines Taylor's claim. For example, it indicated that "one in 30 million and one in 60 million" was not supported but suggested that lesser odds would be supported.

Taylor cites (IB 66-67) to trial defense counsel's concessions that he could have done or known more. However, defense counsel's hindsighted second-guessing of him/herself "'"is of little persuasion in these [postconviction] proceedings,"'" Mills v. State, 603 So.2d 482, 485 (Fla. 1992)(quoting Routly v. State, 590 So.2d 397, 401 n.4 (Fla. 1991), quoting

Kelley v. State, 569 So.2d 754, 761 (Fla. 1990)). Defense counsel does not determine Strickland standards.[13]

At this juncture, the State does note, however, that Mr. Tassone often qualified his testimony with an introductory comment that he did not recollect, given the fire that burned up his file and given the 16 years that had passed since the trial. Regarding Mr. Tassone's knowledge of Frye (See IB 66), he started with the following: "It's very difficult for me to go back and tell you what I did or did not know … ." (PCR/VIII 1395) Concerning Mr. Tassone's knowledge of the protocols (IB 67), he began with the following: "You know, I do not have a recollection of that. My guess is probably -- I know we had some discussion about protocols and whether the protocol for the FBI or Cellmark or FDLE was the same. I remember Dr. Goldman and I talking about some differences in protocol." (PCR/VIII 1389) He thought that he consulted with Dr. Goldman prior to the trial. (Id. at 1405) To his "recollection," Goldman did not visit the lab. (Id. at 1388) Concerning what Tassone said he and Dr. Goldman knew about Zeigler (IB 67), he inferred "It appears from what I have seen today that I did not know that" (Id. at 1389) and he really did not address what Dr. Goldman knew. (See Id.) He had no recollection of seeing any proficiency tests but then "venture[d]" a guess. (See Id. 1400-1401)

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[13] Therefore, the State does not digress into analyzing exactly what defense counsel said vis-à-vis Taylor's interpretation of it, but Mr. Tassone thought he did an adequate job of cross-examining Dr. Pollock (PCR/VIII 1413).

Regarding not accepting Dr. Pollock at trial as an expert (IB 67-68), Tassone said that the transcript appears to indicate that he "could not stipulate to his expertise." (Id. at 1394-95) Thus, at trial, after conducting his voir dire of Dr. Pollock, Mr. Tassone stated: "I cannot on behalf of Mr. Taylor stipulate to Dr. Pollock's qualifications for the reasons given [in] his response to examination." (TT/XIX 569) Although the trial court said it will "dictate on the record" reasons for finding Dr. Pollock to be an expert (IB 68), the trial court then followed up: "I find that the expertise of Dr. Pollock as an expert in forensic serology and expert in DNA analysis has been established sufficient to allow him to testify as to his findings and as to his opinion." (TT/XIX 569)

On cross-examination at the postconviction hearing, Mr. Tassone testified:

> Q *** My point is you cross examined and voir dired Dr. Pollock regarding his qualifications and regarding the DNA science itself?
>
> A Yes, sir.
>
> Q And the basis for you doing that, I would assume, would be based on conversations you had with Dr. Goldman?
>
> A Primarily, yes, sir.
>
> Q Okay. Cause I gather you don't have – I think it's been established already for the record you don't have your file in terms of a fire to your office?
>
> A Correct.
>
> Q But I would assume you would have conferred with Dr. Goldman as a result of that, gathered more knowledge about DNA specifically on this particular case and been able to cross examine him regarding Dr. Pollock's qualifications, is that correct?
>
> A Correct.

(Id. at 1406-1407; see also Id. at 1412-14)

Mr. Tassone's recollection was that he had "far more than one" conversation with Dr. Goldman, even though there is only one on Tassone's bill. (Id. at 1418) He continued: "My feeling and my level of comfort after talking about this with Dr. Goldman was very good." Dr. Goldman educated Mr. Tassone about DNA and assisted with questions for Dr. Pollock. (Id. at 1419, 1427-28)

Dr. Goldman was very high-up in the National Institute of Health. (Id. at 1414, 1428)

Tassone acknowledged that sometimes it is better to get your points across through cross-examination than calling another expert as a witness. (Id. at 1428)

Mr. Tassone took Dr. Pollock's deposition. (Id. at 1420-22; PCR-Ev/I 69-108) As trial prep, he also thoroughly reviewed the homicide reports, evidence technician reports, and, with co-counsel, deposed appropriate witnesses. (Id. at 1420-25)

Mr. Tassone acknowledged correspondence he sent to the prosecutor requesting a copy of the autoradiograms, population database, case file, photographs of the DNA gels, description of the database, and the procedures used to obtain the DNA results. (Id. at 1410-11 referencing State's Exhibit #3; PCR-Ex/I 16) Mr. Tassone acknowledged Dr. Pollock's bill, referencing copies provided of the autoradiographs, database, case notes, and 35 pages of procedure. (Id. at 1411-12; PCR-Ev/II 222)

Therefore, the crucial set of facts that Taylor's discussion of Mr. Tassone's preparation ignores is the voir-dire and cross-examination that

he conducted of Dr. Pollock (TT/XIX 556-69, 594-22), as the trial court detailed (PCR/XI 2034-36) and as the State has quoted and discussed supra in the "The Significant Context of the DNA Issues" section.

Based on Mr. Tassone's multiple consultations with Dr. Goldman, his obtaining pertinent documents prior to trial for Dr. Goldman, and the voir dire examination and cross-examination of Dr. Pollock that he actually conducted at trial, the State disputes Taylor's conclusion that Mr. Tassone was unprepared for trial (IB 68-69).

Taylor (IB 70-73) discusses "Calculated Fragment Lengths." He underlines (IB 70) a portion of Dr. Pollock's testimony in which Dr. Pollock said that he changed the FBI protocols. If Taylor is suggesting that Pollock may have changed the protocols for this case, he is incorrect, as discussed in ISSUE II supra. As detailed there, Dr. Pollock explained that he initially set up the FDLE lab in Jacksonville. (PCR/IX 1663; see also Id. at 1710)

Some local adaptations of FBI protocols that were generally accepted in the scientific community and common with "most laboratories in the country," "tailoring" the protocols to the situations in local labs with "minor changes to the procedures." (PCR/IX 1668-69, 1712) He continued:

> Q And at that time based on the protocol procedures that y'all had set up did you feel that those adhere to in terms being reliable in the forensic scientific community?

> A Oh, absolutely.[14] This was now being implemented, I won't say all 50 states, but in most states had representatives at the first DNA training course that I mentioned previously. And they went back and did the same thing I was doing.

(PCR/IX 1671)

Dr. Pollock explained, concerning "cutoff" protocol that, based on his experience, he made the FDLE protocol less "conservative" than the FBI's and that his protocol was reproducible. Other labs also made these changes. Dr. Pollock explained that there was no change in the FDLE protocol after it was implemented and adapted from the FBI in about late 1990 through the time of the analysis in this case. (Id. at 1688)

Dr. Ruth DuBois, an external scientist from Florida State University's department of biology genetics reviewed the FDLE procedures and validation studies and "gave us the stamp of approval for going ahead." (PCR/IX 1664) FDLE conducted hundreds of tests to make sure that things were running correctly. (Id. at 1664-65)

Consistent with the FDLE protocol, he "interpreted in this particular case there was one band that was above ten thousand base pairs or 10 KB and … did interpret that and … did get a match." (Id. at 1685-86) Therefore, the State disputes Taylor's statements and suggestions (IB 71-72) that Dr. Pollock found matches "in violation of FDLE (FBI) Protocols." The analysis

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[14] Taylor twice (IB 71, 72) cites to subsequent testimony from Dr. Pollock concerning Florida practices. Apparently, Taylor, at postconviction, was not interested in clarifying "precisely" what Dr. Pollock meant by "what we were doing in Florida" that varied from "methodology that was used in the scientific community." (PCR/IX 1698)

comported with preset FDLE protocols, and difference with the FBI cut-off does not mean that it "violated" the FBI's protocol.

Pollock explained that his interpretation of weak banding in two of the exhibits in this case was based upon his experience working "probably hundreds and hundreds of autoradiographs." (PCR/IX 1684) He continued: "I knew what was interpretable and what was not interpretable."He unequivocally stated that this technique was accepted in the scientific community. (Id.)

Taylor discusses (IB 70-71) Ms. Zeigler, which the State, in ISSUE II supra also discusses. Zeigler testified at the evidentiary hearing that she could not give an opinion regarding Dr. Pollock's[15] finding a match and that, when asked whether, concerning the "two probes" in which "he found a match," it would have been a violation of protocol, she equivocated: "As far as I can remember, yes." (PCR/VII 1266) More importantly, she substantially agreed with the findings of Dr. Pollock. She testified that, although there were "differences" between her printout and Pollock's (PCR/VII 1285):

> Q All right. Dr. Pollock and you found the same things in terms of under that loci where Mr. Reiter asked you, is that correct?
>
> A Yes, that's correct.
>
> Q Okay. So in terms of your findings versus Dr. Pollock's findings, is there any dispute?
>
> A I didn't -- just by looking at the computer printout I didn't see any.

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[15]See Dr. Pollock's credentials discussed in the facts section supra..

(PCR/VII 1284) In addition to Zeigler, Dr. Pollock testified that Zeigler did not dispute his results. (PCR/IX 1688-91, 1703-1705, 1708-1709) Dr. Pollock explained that Zeigler captures the image independently, and in that era, her image could have slight variations in the size and sizing of the alleles, and here, she concurred with his results. (PCR/IX 1709)

Taylor suggests that there was some sort of fatal flaw in the DNA analysis due to "sperm DNA" (IB 71); he continues (IB 74), without citing to the record, by asserting IAC because there was no "male DNA" found on the swab, "and therefore the State failed to prove that either Mr. Taylor or Mr. Murray sexually battered Ms. Vest." This is incorrect. Dr. Pollock testified that "the four loci we used were reliable." (PCR/IX 1700) He continued:

> As far as the individual fractions and the analysis in this case, I already testified there was a very low level of semen present in both the vaginal swab and on the blouse.
>
> ***
>
> I don't know that that -- I don't know for a fact that the source of that DNA is sperm, it could be epithelial, it could be saliva, it could be -- it could be sperm, however, though, because I have seen in other cases that I've worked over the years, I've seen several rape cases where I've gotten a large amount of male DNA or the male source of DNA, I can't call it male DNA because we don't have any male marker here but male source of DNA in the female fraction.
>
> ***
>
> That particular profile was foreign to the victim. No matter what the source was, whether it was sperm, whether it was saliva, whether it was skin cells, whatever the source was that was foreign to the victim in this case. That profile, I'm not saying it was male, but it did match Mr. Taylor's DNA profile.

(PCR/IX 1701, 1723) In other words, there were some aspects of his observations that did not enable him to identify the sex of the

contributor, but he did not exclude it being a male, and he was certain that it matched Taylor. Moreover, forensic serologist Hanson identified on the blouse semen and sperm, as such, and as Taylor's type. (TT/XIX 540) And, the totality of facts discussed in "The Significant Context of the DNA Issues" supra seals Taylor's guilt.

Taylor (IB 74-75) also contests Dr. Pollock's ability to calculate the statistical probabilities. However, the State has not found where this claim was alleged in Taylor's postconviction motion and contests this claim as unpreserved below.

Moreover, even Dr. Libby testified at the postconviction hearing that "calculating numbers are not difficult." "There is no problem calculating one if one were provided with a particular database to compute things upon, sure." (PCR/IX 1614, transcript p. 475) Turn to more credible testimony, here Dr. Pollock not only demonstrated to the trial court his ability to perform the calculations, but he also exhibited his expertise to the trial court:

> Q Let me ask you this way and I'll get to the specific point. You came up with number one in six million using the product rule, do you recall that at all?
>
> A I did, however, that was -- that one in six million in this particular case was based on what we were calling the general population frequency which was a combination of the four different frequencies.
>
> Q Can you expand on that in terms for the record to Judge McCaulie, what you mean by that?
>
> A Our approach to statistics was to be as conservative as possible. There had been some suggestions of substructuring. Substructuring actually exists in -- generally, you don't notice something like substructuring in a very large population group. In Jacksonville it's

a melting pot. If you were to go to an isolated island in the South Pacific you very definitely would see that.

But in order to eliminate that, or at least minimize it, what we chose to do was to take the most conservative observation for an allele in the four population databases that we were observing. So in other words, if we take that's the highest value, that's the largest frequency observed; and then use that frequency to plug into the product rule.

If taken individually the numbers would have been higher for each of the population groups, but given as a general population frequency was more conservative.

Q So in other words, you would have combined Caucasian, African American at that time and, I guess, Hispanics southeast and southwest and American Indian or Asian?

A No, it was south eastern Hispanic and south western Hispanic, African American, black and Caucasian. We didn't actually combine the databases, but looking at the individual databases we took the most common occurrence for a particular allele which would then be a conservative approach.

Now, by its nature the binning method was chosen to be an extremely conservative approach to population frequencies.

Q At that time, not just right now, you had a working knowledge of the database, how they were created, I believe, you mentioned you were actually involved in the validation of some of them, is that correct?

A Correct.

Q Okay. I want to reference you on that deposition to page 31.

A Did you say 31?

Q 31, yes. *** At the bottom there on page 31, line 18, do you recall Mr. Tassone asking you the question, 'And can you show me the mathematical formula that you displayed to me on a piece of paper or chalk board or something, the mathematical formula you used to come up with this?'

And he was asking you about how you developed a population stuff, et cetera, one in six million, do you recall that or can you read that and is that accurate what I just read?

A Yes, I see where you're reading.

Q Okay. And then if you can just read a little bit on page 31 at the bottom, and line page 32 at the top. And does that refresh your memory in terms of the formula or the exhibit that you came up with?

A Yes.

Q And that was the exhibit that we've attached to the deposition, is that correct, or that was attached at that time?

A Yes.

Q Okay. And just what was the purpose of that exhibit, why did you do that?

A The defense counsel asked me to give him an example of using the product rule.

(PCR/IX 1678-81) Dr. Pollock elaborated:

Very basically the product rule is the multiplication of individual events, unrelated individual events together. In this particular case it's multiplying the allele frequencies using where you have two -- where you have heterozygote it would be 2PQ, meaning two times the allele -- the first allele frequency, times the second allele frequency. And then multiplying that by a different event which would be the allele frequencies at the next marker.

Now if, in fact, that marker were homozygous it would be P squared. So you're multiplying together individual events to come up with the frequency for the overall event.

(Id. at 1695-96) Dr. Pollock was qualified to use the product rule. See, e.g., Everett v. State, 893 So.2d 1278, 1281 (Fla. 2004)(FDLE analyst used product rule and FBI database)(citing Butler v. State, 842 So.2d 817, 828 (Fla. 2003) (Butler's claim of invalidity of product rule "is inaccurate in light of the case law that continues to uphold the validity of the product rule").

Taylor (IB 75) also mentions the database. Dr. Pollock testified:

Q Okay. And the next claim or allegation is that the database itself that you relied on, which for purposes of the record, you relied on the FBI database or did you have your own at that time?

A It was the FBI database that was published in April of '91.

Q That the database itself was flawed. Are you aware of that or do you have any statement or comment regarding that?

A I don't have any specific -- let me rephrase that. I know that that database was scrutinized many many times, it was used in courts throughout the nation for years.

I know that at one point when we had the Florida database and that was analyzed by a population geneticist, I think Bruce Ware, they potentially found a duplicate in it which was removed. And when we did that and we looked at the numbers it really made no difference, it was such a minute difference.

So if there were any duplicates in that original database, it really would not have impacted the overall frequency that we're getting.

Q And when did that occur, when you mentioned Bruce -- Dr. Ware did that?

A I'm sorry, I don't recall when that was.

(PCR/IX 1696-97)

More importantly, Taylor seems to be suggesting that at postconviction, it is the State's burden to demonstrate Dr. Pollock's qualifications to calculate the product rule and the validity of the database and the formula. However, this is incorrect. Taylor bears the burden of overcoming the strong presumption that counsel was not deficient by showing something that he omitted that any competent counsel would have done. Here, Tassone's voir dire and cross exam, educated through consultation with Dr. Goldman, demonstrated his competence.

Finally, in his "Prejudice" section (IB 75-76), Taylor repeats many of his erroneous discussions, which have been rebutted at various points supra. He (IB 75) incorrectly attempts to minimize the evidence of guilt; as discussed supra, the evidence was strong, with and without the DNA. Taylor (IB 75) incorrectly suggests that the FDLE wholesale adopted the FBI's protocol and that Pollock arbitrarily modified the protocol; to the

contrary, the modified protocols comported with scientific community standards and common practice around the country. Contrary to the trial court's discrediting Dr. Libby, Taylor (IB 76) accepts Libby's discussion of three loci and then assumes that Pollock was in "violation" of "FBI protocols," when, pursuant to common national practice, the FBI protocols had been adjusted. Taylor again cites to the Vargas case, mistakenly thinking that it supports his claim, when he has not established that it is factually relevant, and, it can be argued that it is harmful to Taylor's cause. In discussing "Judge Farmer," Taylor (IB 76) seems to believe that DNA in all cases is the same, but here it was only one part of a case composed of many parts demonstrating Taylor's guilt, and defense counsel conducted a very competent voir dire and cross examination of Dr. Pollock at trial. Taylor has failed to demonstrate Strickland prejudice.

C. Additional Analysis.

Mr. Tassone was a very experienced trial attorney. Prior to being appointed to Taylor's case, 15 is a conservative estimate of the number of cases that went to the death penalty phase. (PCR/VIII 1351, 1420) This buttressed the presumption of his competence even further. See, e.g., Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger").

As "Nichols rigorously cross-examin[ing] Scott" in Reed v. State, 875 So.2d 415, 427 (Fla. 2004), concerning factors affecting a fingerprint's freshness, here Tassone rigorously cross-examining Pollock, rendered

further measures using an expert "unnecessary."

Here and in Belcher v. State, 961 So.2d 239, 250-251 (Fla. 2007), the defendant "cannot establish deficient performance for failure to retain an expert witness when defense counsel rigorously challenged the State's own witness." There, "defense counsel attacked Dr. Floro's testimony," and here Tassone attacked Dr. Pollock's testimony. And here and in Belcher, the defendant "is also unable to establish prejudice to his defense, given that the expert obtained for the postconviction proceedings [here, Ms. Zeigler agreeing with Pollock's finding] came to the same conclusions as" the state's trial expert." See also Hannon v. State, 941 So.2d 1109, 1119-21 (Fla. 2006)("Although current counsel may disagree with trial counsel's strategy at that time…, such current disagreement does not render trial counsel's performance deficient … Hannon has failed to demonstrate that trial counsel was deficient in strategically deciding not to depose Richardson, not to seek a continuance, or otherwise conduct an investigation into Richardson's background").

For this case, Mr. Tassone did hire a preeminent DNA expert, consult with that expert, and use that knowledge to conduct an effective cross-examination. He also obtained DNA records, deposed the State's expert, and tested the State's expert's ability to apply the product rule. If Taylor is contending that Tassone could have hired a better expert, that is not the test, and Taylor certainly did not prove that through his production of Dr. Libby. If Mr. Tassone had produced Ms. Zeigler for the trial, then undoubtedly the postconviction claim would attack Tassone for producing a

witness who did not dispute Dr. Pollock's DNA finding.

In any event, after years of postconviction proceedings, Taylor has failed to muster an expert who presented credible findings that directly contradict Dr. Pollock's findings, and, for this reason alone, he has failed to meet his Strickland burdens. See Reed, 875 So.2d at 425, 427 (IAC claims; "we find that the circuit court did not err in concluding that trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way"; "circuit court correctly noted that Reed failed to present evidence indicating that Scott's identification of the print was in error"); Overton v. State, 976 So.2d 536, 548, 551 (Fla. 2007)("Overton has not asserted any reason why DNA testing of the crime scene swabs will produce different **results** than the other DNA testing, which linked Overton to the scene. Overton's argument that DNA testing of these crime scene swabs would have changed the outcome is purely speculative"; "case law established that RFLP DNA testing results would be admitted here and the *Frye* hearing was unnecessary on that DNA matter"; " counsel possessed proper discovery from the FDLE Lab to challenge the RFLP testing").

Analogously, in Asay v. State, 769 So.2d 974, 985-87 (Fla. 2000), trial defense counsel consulted with a psychiatrist for the penalty phase of the trial. Here, Tassone consulted with Dr. Goldman, a national authority in the field of DNA. Asay presented postconviction testimony from "Dr. Sultan, a psychiatrist, and Dr. Crown, a psychologist" that facially was more favorable than what defense counsel presented at trial. Here, Libby's

testimony should not be accredited at all, and even if it is, its weight on Taylor's behalf is marginal at best, certainly not rising to the level of establishing either of Strickland's prongs. As in Asay, "the nature of the evidence now presented does not undermine the reliability of the trial," 769 So.2d at 987.

In conclusion, in addition to the other strong incriminating evidence, Taylor essentially admitted to the police that he would be scientifically identified, and, as such, Taylor's weak postconviction showing pales and falls woefully short of Strickland prejudice. See Reed, 875 So.2d at 423 ("given Reed's incriminating statements, trial counsel could not be found deficient under the standards of Strickland for not having the hair reexamined")(citing Gudinas v. State, 816 So.2d 1095, 1101-02 (Fla.2002) (finding no ineffective assistance in not pursuing DNA testing in light of incriminating statements by Gudinas to his attorneys and other inculpating physical evidence)).

ISSUE IV: DID TAYLOR PRESERVE AND PROVE BRADY, GIGLIO OR IAC CLAIMS PERTAINING TO THE BLOUSE? (IB 77-84, RESTATED)?

The postconviction motion alleged that the State introduced a white blouse as "arguably a subterfuge to distract Mr. Taylor's counsel and the trial court – as well as the jury - from the absence of a 'turquoise' blouse," which was actually the basis of Diane Hanson's and Dr. Pollock's scientific analyses. (See PCR/V 801-803) While this claim may not be as conclusory as ISSUE II, it still alleged inconsistent theories. Indeed, it appears that everything alleged in the claim was in the trial record or in the open courtroom for all to see, thereby entirely negating any Brady or

Giglio claim on its face. Therefore, after detailing substantial supportive background regarding the blouse (PCR/XI 2037-42), the trial court correctly ruled:

> The Defendant has had ample opportunity through pleadings and the evidentiary hearing to present evidence in support of the any *Brady* and *Giglio* subclaims. The Defendant has not taken advantage of these opportunities and, as such, this Court finds that he has failed to prove, or even allege, the requisite prongs of *Brady* and *Giglio*. To the extent that these claims have been generally averred, the Defendant's *Brady* and *Giglio* subclaims are denied.

(PCR/XI 2042)

Taylor on appeal rephrases (IB 80) the issue: "There is no direct or deductive evidence to conclude that the item marked at trial as exhibit HH (introduced in evidence as exhibit 61) was, in fact, a green/turquoise blouse." As rephrased, Taylor is still not alleging any facts that might support a Brady or Giglio claim. Instead, ISSUE IV appears to distill to a chain of custody issue, which is procedurally barred by the direct appeal.

In concluding that the trial court did not expressly address the IAC claim (IB 82), Taylor overlooks the trial court's factual finding that negates any IAC claim. The trial court's order found that there was no change in the physical exhibit and that essentially Gary Powers was incorrect when he suggested that the blouse was white:

> Having reviewed the record with respect to the blouse, the Court notes that there were times during the examination of the witnesses when it would have been helpful for clarity of the record, for the prosecutor and Mr. Tassone to have asked the witnesses to specify the color of the blouse that was being introduced into evidence. However, it is evident that it was the green blouse that the witnesses were referring to in their testimony and which was entered into evidence at trial.

(PCR/XI 2042) In other words, there was one blouse, the one retrieved from

the murder scene and scientifically analyzed.

In discussing the supportive record, for example, the trial court accredited the prosecutor's postconviction testimony:

> Following the Defendant's trial and direct appeal, Mr. de la Rionda submitted a letter dated April 6, 1994, to the Office of the Clerk of Court, Duval County, which included three lists describing those exhibits that were being returned to the Clerk's Office by the Florida Supreme Court and/or after being used in the Defendant's trial. (State's Ex. 1.) The third list, 'Exhibit C Evidence Cross Reference,' lists under State vs. Steven Taylor, 'Exhibit HH Green Blouse Intro 61.'(Id.) This notation appears to explain that the green blouse was labeled as State's Exhibit HH and introduced at trial as Exhibit No. 61. (Id.) At the evidentiary hearing, Mr. de la Rionda testified as to this letter and specifically testified that the blouse alternatively referred to as 'Exhibit HH,' 'Item 61,' and '28 I,' all referred to the green blouse that was recovered from the crime scene. (P.C. Vol. IV 627-29.)

(PCR/XI 2041-42) Indeed, the exhibit shows on one line for one "Green Blouse" the "HH" and "61" in Taylor's case (PCR-Ex/I 4) and the prosecutor's accredited testimony explicitly stated:

> Q There have been various references through the proceedings today and yesterday to State's Exhibits HH, 61 and 28-I, what do those refer[] to?
>
> A That refers to the green blouse that was an exhibit when it came to us from FDLE was referred to as 28-I, when we marked it for identification purposes to introduce it in the trial it was marked as HH, and eventually was introduced in evidence as 61.

(PCR/X 1766)[16]

Thus, as further detailed in the trial court's order (PCR/XI 2038-42),

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[16] On appeal, Taylor (IB 81) contests the probative value of the prosecutor's listing of the evidence, but at the postconviction hearing he appears to have vouched for it while attempting to use it to his advantage. (See PCR/VIII 1367-68) In any event, the trial court accredited it and the prosecutor's related testimony.

when **the** blouse was introduced into evidence, it had been marked for identification as "HH" and then marked into evidence as "61." (See TT/XIX 537) At trial, Gary Powers had testified that he recovered the blouse (marked as "HH" for identification) at the murder scene. (TT/XVIII 288) Diane Hanson then testified that on that blouse, she "identified the presence of semen" and "intact spermatozoa." (TT/XIX 540) She also identified the "source of the semen to be type A secretor," and Taylor is a Type A secretor. (TT/XIX 540-41) Hanson turned over to Dr. Pollock (TT/XIX 541), and Dr. Pollock testified that received various items of evidence from Diane Hanson including a stain from a turquoise colored blouse, which he renumbered for FDLE as "28I" (TT/XIX 581-83) and on which he performed a DNA analysis (TT/XIX 583-85) Thus, there is no evidence of tampering or contamination of the blouse. Taylor, even after over a decade of hindsight, has failed to demonstrate a valid ground for excluding the blouse and related scientific evidence. See, e.g., Murray v. State, 3 So.3d 1108, 1115-1116 (Fla. 2009)("Generally, relevant physical evidence can be admitted unless there is evidence of probable tampering")(citing Taylor v. State, 855 So.2d 1, 25 (Fla. 2003). Here, not only was there no evidence of tampering, a chain of custody, although not required, was also demonstrated.

Moreover, there can be no Strickland prejudice because in her deposition, Hanson testified that she performed her analysis on the blouse that was marked as 28I (PCR/VIII 1423-27; PCR/I 31), which was the number Dr. Pollock assigned to it.

Therefore, there was no lawful ground to contest the admissibility of the blouse (and related scientific evidence), and, therefore, in postconviction Taylor has failed to demonstrate either Strickland deficiency or prejudice for IAC.

Taylor's discussion (IB 81) of Gary Powers' postconviction testimony overlooks Powers clarification that he was "**assuming** it is a white blouse" and that he "**can't remember** exactly what I picked up that day." (PCR/XI 1194)

The State also disputes **Taylor's conclusion** (IB 81; see also IB 83) that "Tassone understood item HH to be a white blouse after reviewing the court documents and Powers' report." In contrast, Tassone testified that, 16 years after the trial, he has no "independent recollection of seeing that particular item" (PCR/VIII 1355-56; see also Id. at 1429-30). After Taylor's counsel went through some documents with him, Tassone repeated, "I don't have an independent recollection of whether I viewed that particular item." (Id. at 1361). A little later, when asked about what color Dr. Pollock testified "to what color was 28-I," Tassone responded, "I think white," but postconviction counsel indicated that Dr. Pollock testified it was turquoise, Tassone responded, "Whatever he said." (PCR/VIII 1441).

Taylor (IB 83) concludes that Tassone "acknowledged that the record did not indicate any foundation for Dr. Pollock's testimony,"; instead, Tassone indicated that he saw no foundation on one page of the record, "I don't see a foundation **on page 583**." (PCR/VIII 1364) Tassone indicated that he has no "independent recollection why I did not [object] *** or whether I, in my

opinion, should I even have objected." (Id. 1364)

Further, trial counsel's hindsighted self-evaluation is non-probative for determining Strickland's prongs. See Mills, 603 So.2d at 485 (quoting Routly quoting Kelley).

On appeal, Taylor also contends (IB 81) that at a subsequent trial in accomplice Murray's case, the "61" exhibit number in Taylor's trial became Exhibit number "50." However, what happened to the exhibit numbering after Taylor's trial is irrelevant to this claim, as a matter of pleading (framed in the postconviction motion) as well as a matter of logic because, by the time of Murray's trial, a change of exhibit numbers no longer mattered to Taylor. Further, grounded on practical reality, there is no legal requirement that the same exhibit numbers must be maintained between or among accomplices' trials; indeed, here the incriminating evidence for each accomplice was not identical and an accomplice (Murray) was tried multiple times. A change in exhibit numbers may also simply mean that the prosecutor introduced the evidence in a different order. Here, the prosecutor, for the clerk, listed on the same line the same "Green Blouse" as "HH" and "61" for Taylor's case and "CC" and "50" for Murray's pending case then. A change in numbers does not implicate a change in the physical exhibit in any way. Neither Brady nor Giglio nor IAC is implicated.

In sum, there is no factual basis for an IAC claim, and if somehow Brady or Giglio is entertained on appeal, there is no factual basis for either of them. Taylor has failed to demonstrate that the blouse was inadmissible, so there is no Strickland deficiency to be Strickland

prejudicial, nor is there any Brady/Giglio materiality, for that matter. Moreover, in this case, given the totality of all of the evidence discussed supra, including Taylor's expectation that the physical evidence would incriminate him, there is no Strickland, or any other cognizable, prejudice.

ISSUE V: HAS TAYLOR DEMONSTRATED BOTH STRICKLAND IAC PRONGS BASED ON ALLEGED DEFICIENCIES IN PREPARING FOR TRIAL? (IB 84-90, RESTATED)

ISSUE V essentially repeats several allegations Taylor makes in ISSUES II and III and then frames those allegations in terms of Tassone's trial preparation.

The postconviction motion alleged insufficient trial preparation (PCR/V 805), but as detailed in the discussions of ISSUES II and III, all the allegations in those issues were not preserved, and the Strickland competency of Tassone's trial preparation was demonstrated by his ability to voir dire and cross-examine Dr. Pollock. The Strickland deficiency and prejudice burdens were Taylor's, and he failed to meet each of them.

ISSUE V essentially complains that, no matter how much extensive trial preparation defense counsel did, counsel should have done more. However, the possibility of doing more is not the Strickland test. The Strickland test is not what a defendant can find at postconviction[17] but rather the reasonableness of defense counsel's actions in the situation at the time of trial. Cf. case law regarding defendant, at postconviction, finding more

[17] Thus, Strickland is distinguished from newly discovered evidence, which bears upon innocence and has its own set of rules.

penalty phase experts. Here, Mr. Tassone's actions in 1991 were more than reasonable.

Here, the trial court order denying relief on this claim is supported by competent substantial evidence and shows how Taylor failed to meet his Strickland burdens:

> In the instant subclaim, the Defendant avers that Mr. Tassone was inadequately prepared for trial in particular with respect to this preparation of the DNA evidence. As a consequence, the Defendant argues that Mr. Tassone provided ineffective assistance of counsel. A review of the record and the evidentiary hearing testimony shows otherwise.
>
> At the evidentiary hearing, Mr. Tassone testified that the Defendant's case was his fifteenth death penalty case, a number that he stated was an estimate. (P.C. Vol. II at 211-12, 281.) In preparation for trial, Mr. Tassone asked the trial court to appoint Dr. David Goldman, as an expert witness to assist Mr. Tassone at trial. At the time, Dr. Goldman was a professor at the National Institute of Health (NIH), and Chief of the Section on Genetic Studies. (R. 87; T.T. at 605.) The trial court granted the Defendant's motion in an Order entered on September 20, 1991. (R. 87) Mr. Tassone testified at the evidentiary hearing that he consulted with Dr. Goldman in preparation for trial (P.C. Vol. II at 27, 62-71, 104-05, 131-32, 236, 246-52, 266, 269-72), and that the substance of their conversations provided enough ammunition for Mr. Tassone to effectively cross examine the State's expert, Dr. James Pollack. (P.C. Vol. II at 253-54, 266-69, 272-74, 277-279.)
>
> As explained in subclaim 2 *supra*, during voir dire of Dr. Pollack, Mr. Tassone asked Dr. Pollack about his limited experience being qualified as an expert in DNA analysis (T.T. at 55-56), the lack of 'quality control analysis' of Dr. Pollack's laboratory by an outside agency (T.T. at 564- 68), and the potential for human error in the laboratory analysis of DNA fragments (T.T. at 567-68). At the end of voir dire, Mr. Tassone would not 'stipulate to Dr. Pollack's qualifications for the reasons given his responses to examination.' (T.T. at 569.)
>
> During cross examination, Mr. Tassone vigorously questioned Dr. Pollack on the reliability and methodology of his DNA results including: the potential for human error in the analysis of DNA (T.T. at 596-97); the subjectiveness of the quantity and quality of DNA being examined (T.T. at 596-97); the subjectiveness of the amount of enzyme used to cut the DNA and the potential for human error (T.T. at

> 597-98); the subjectiveness in the separation of DNA fragments and the potential for human error (T.T. at 599); the fact that the population database employed by Dr. Pollack did not account for the percentage of people in the population, though small, who have more than two DNA bands (T.T. at 600); the fact that the Texas and Florida databases included individuals with three DNA bands (T.T. at 600-01); that as to the DNA autoradiogram of probe D1S7, the bands were too faint to use pursuant to FBI standards (T.T. at 604-05); that it was unclear whether Dr. Pollack used the old or the newly revised FBI protocols (revised in December 1990, but which were not released to Dr. Pollack until February 1991) (T.T. at 606-07); that the match criteria for Life Codes and Cellmark was within 1%, while the match criteria for Dr. Pollack's lab was within 2.5% (T.T. at 608-11); and that as to locus D17S79 (which contains the most commonness throughout the population), one band for the victim and the Defendant was the same size (T.T. at 616-618). In summary, Mr. Tassone's pretrial investigation and cross examination of Dr. Pollack sought to discredit Dr. Pollack's testimony, and by extension, Dr. Pollack's DNA analysis, by showing that his methodology and quality control were lacking. While Mr. Tassone decided not to call Dr. Goldman as a defense expert at trial, it is clear from the record that Dr. Goldman's assistance helped Mr. Tassone in his trial preparation and cross examination of witnesses in particular his effective cross examination of Dr. Pollack.
>
> Refik W. Eler, who was co-counsel with Mr. Tassone during the trial, also testified as to Mr. Tassone's preparation for the Defendant's case. (P.C. Vol. II at 358-363.) Mr. Eler agreed that the State had a strong case, in terms of evidence, against the Defendant. (P.C. Vol. II at 361.) He testified that, 'Mr. Tassone put many hours in the case, a lot in the DNA itself, and had been practicing many more years before I was.' (P.C. Vol. II at 362.)
>
> The Court notes that the Strickland standard is reasonably effective counsel, not perfect or error-free counsel. The record at trial and at the evidentiary shows that Mr. Tassone provided effective assistance of counsel to the Defendant. Consequently, subclaim 4 is denied.

(PCR/XI 2043-45)

Indeed, Mr. Tassone marshaled his extensive experience and information Dr. Goldman provided to him in conducting his voir dire and cross examination of Dr. Pollock. At the postconviction hearing, Tassone testified why, as a matter of tactics, he decided to not attempt to delay

the trial:

> Q Do you recollect why it was you decided not to call Dr. Goldman or go forward with the continuance?
>
> A I don't have an independent recollection why. I have an independent recollection of what Dr. Goldman told me which I think is the reason why.
>
> Q Okay.
>
> A And Dr. Goldman essentially indicated that on the basis of what he reviewed or what I told him or both that he essentially said that in his opinion that the DNA testing was done properly, or maybe not properly was the word but that he didn't have any major complaints with the DNA testing.

(PCR/VIII 1387)

In addition the foregoing discussion, including trial court's sound order, the State submits its discussions of ISSUES II and III as support of denying this claim. The State now highlights some of the points it made in those issues supra.

Tassone was sufficiently prepared for trial to satisfy Strickland. As part of trial preparation, Tassone --

- Took Dr. Pollock's deposition (PCR/VIII 1420-22; PCR-Ev/I 69-108) and Diane Hanson's deposition (PCR/VIII 1422-26; PCR-Ev/I 18-40), among others (See, e.g., PCR/VIII 1420);
- Reviewed the homicide reports, evidence technician reports (PCR/VIII 1420);
- Sought and obtained a copy of the autoradiographs, database, case notes, and 35 pages of procedure. (PCR/VIII 1410-12; PCR-Ex/I 16; PCR-Ev/II 222);
- Retained Dr. Goldman, who was a DNA expert very high-up in the National Institute of Health (PCR/VIII 1414, 1428);
- Had "far more than one" conversation with Dr. Goldman (PCR/VIII 1418), who educated Mr. Tassone about DNA and assisted with questions for Dr. Pollock (Id. at 1419, 1427-28), such as concerning "differences in protocol" (PCR/VIII 1389), who provided Tassone with a "very good" "level of comfort after

talking about this with" him (Id. at 1419).

Thus, Mr. Tassone's voir-dire and cross-examination that he conducted of Dr. Pollock (TT/XIX 556-69, 594-22), showed his preparation, as the trial court detailed (PCR/XI 2043-44).

Concerning Shirley Zeigler, discussed at length supra, Taylor has shown no postconviction evidence that, in 1992, Tassone should have known any information that would have caused all competent attorneys to have delayed the trial. The test is not what information Taylor at postconviction was able to find in terms of any significance of Zeigler's initials on a lab report (See TT/XIX 607-608) that had been disclosed prior to trial (See PCR/X 1768; PCR/VIII 1447-48; see also TT/XIX 563-64; PCR-Ev/II 222).[18] Indeed, if, pre-trial, Tassone had inquired further, it may have triggered the State to list Zeigler as a witness to corroborate Dr. Pollock's findings. Thus, Taylor at postconviction discovered that, although Zeigler

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[18] When asked if he had "any recollection of having any other documents in [his] possession that were provided by the State that had the initials SLZ other than Exhibit 8," Tassone responded that he has "no independent recollection of that" and **then inferred** "that was the first time I was presented with that information." (PCR/VIII 1373) Although Tassone could not recall when he received the document with Zeigler's initials (Id. at 1374), he said he may have looked at it at the prosecutor's office prior to trial (Id. at 1448), and the prosecutor testified that his policy is always "to allow defense attorneys to look at all exhibits" prior to introducing them in the courtroom." (PCR/X 629) The prosecutor said he would have "tendered to defense counsel" Dr. Pollock's report with his discovery response (PCR/VII 1208), and a document indicated that the prosecutor "needs an additional copy of the case file notes" to provide to defense counsel, which were provided on October 3, 1991 (PCR/VII 1212-14).

had some differences with Dr. Pollock,[19] she did not see any basis in the printouts for disputing Pollock's findings. (PCR/VII 1284) At postconviction, Dr. Pollock testified that Zeigler did not dispute his results. (PCR/IX 1688-91, 1703-1704, 1708-1709) Hence, her initials were on the report.

However, under Strickland, deficiency need not be addressed when there is no prejudice.

An examination of prejudice could start with Zeigler not disputing Pollock's findings, as discussed above.

Further, the postconviction proceedings showed that Dr. Pollock's credentials were even more extensive, including playing a pivotal role in setting up the FDLE lab in Jacksonville, as discussed supra.

Taylor adds nothing specific that Dr. Goldman would have said at trial if Tassone had more time to prepare for trial, and Taylor presented nothing consequential through Dr. Libby, as the trial court refused to rely on Libby's postconviction testimony for any material fact due to Libby's lack of pertinent credentials (See PCR/XI 2037).

Therefore, Taylor's postconviction evidence failed to show that Dr.

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[19] At one point, Zeigler testified at the evidentiary hearing that she could not give an opinion regarding Dr. Pollock's finding a match and that, when asked whether, concerning the "two probes" in which "he found a match," it would have been a violation of protocol, she equivocated: "As far as I can remember, yes." (PCR/VII 1266) Dr. Pollock explained that Zeigler captures the image independently, and in that era, her image could have slight variations in the size and sizing of the alleles, and here, she concurred with his results. (PCR/IX 1709)

Pollock's DNA finding of a match was prejudicially in error or that his 1-in-6 million odds were prejudicially in error. See Reed v. State, 875 So.2d 415, 425, 427 (Fla. 2004)(IAC claims; "we find that the circuit court did not err in concluding that trial counsel's consultation with an independent serologist would not have changed the statistical numbers in any way"; "circuit court correctly noted that Reed failed to present evidence indicating that Scott's identification of the print was in error").

In conclusion, in addition to the other strong incriminating evidence, bulleted supra, Taylor essentially admitted to the police that he would be scientifically identified, and, as such, Taylor's weak postconviction showing pales and falls woefully short of Strickland prejudice. See Reed, 875 So.2d at 423 ("given Reed's incriminating statements, trial counsel could not be found deficient under the standards of *Strickland* for not having the hair reexamined")(*citing Gudinas v. State*, 816 So.2d 1095, 1101-02 (Fla. 2002)(finding no ineffective assistance in not pursuing DNA testing in light of incriminating statements by Gudinas to his attorneys and other inculpating physical evidence)).

ISSUE VI: DID TAYLOR PRESERVE AND PROVE BRADY, GIGLIO, OR NEWLY DISCOVERED EVIDENCE CLAIMS PERTAINING TO TIMOTHY COWART? (IB 90-97, RESTATED)

This claim suffers from the same fatal defect as the claim in ISSUE II. Taylor's postconviction motion falls woefully short of alleging any legally cognizable claim. The claim referred to an affidavit in which Timothy Cowart said that his trial testimony and deposition were false; the State "pressured and confused him," and, if the State knew Cowart's testimony was

untrue, Brady and Giglio applied; and if trial counsel knew or should have known about it, IAC applied; and if no one knew about it, it is newly discovered evidence. (See PCR/V 825-26) No facts were alleged to support any of the theories. No evidentiary hearing should have been granted.

However, the trial court afforded Taylor an evidentiary hearing and made factual findings based, in part, on its observations of Cowart testifying at the postconviction evidentiary hearing. As such, the trial court's factual findings are supported by competent substantial evidence and should be affirmed:

> In the instant claim, the Defendant raises an allegation of ineffective assistance of counsel and *Brady* and *Giglio* violations based on what the Defendant describes as false testimony provided by Timothy Cowart in his sworn statement, deposition, and trial testimony. Before deciding whether these claims rise to the level of ineffective assistance of counsel or *Brady* or *Giglio* violations, this Court will first consider … [sic] statements and testimony.
>
> This Court has reviewed Mr. Cowart' s April 4, 1991 sworn statement to the State Attorney (State's Ex. 2), Mr. Cowart's October 4, 1991 deposition given to trial counsel Refik Eler (Def.'s Ex. 7), and Mr. Cowart's October 9, 1991 trial testimony (T.T. at 506-19). In all three statements, Mr. Cowart asserts he voluntarily contacted the State Attorney's Office to inform the State that: the Defendant said he was 'doing a burglary' with co-defendant Gerald Murray; the victim surprised the Defendant; it was a messy job; and the Defendant stabbed, choked, and strangled the victim with a cord to make sure she was dead. (State's Ex. 2 at 3, 4, 6, 8-9; Def.'s Ex. 7 at 6-7, 9, 11-13, 16, 20-23, 27-30; T.T. at 506-09, 515-16.)
>
> Mr. Cowart testified at the evidentiary hearing and was questioned as to the veracity and substance of his sworn statement, deposition, and trial testimony. (P.C. Vol. I at 148-200; Vol. TI at 206-10.) Mr. Cowart's testimony at the evidentiary hearing was consistent with his previous testimony with one exception. While Mr. Cowart testified that all of his previous statements were truthful, he attempted to backtrack from his previous statement that the Defendant admitted to Mr. Cowart that he committed the instant crimes. Rather, Mr. Cowart said when the Defendant stated that 'he' committed the crimes, the 'he' the Defendant was referring to was the co-defendant Gerald Murray and not the Defendant himself. (P.C. Vol. I at 152-57, 175-

76.) This Court finds this newly revised portion of Mr. Cowart's testimony to be lacking in credibility. In Mr. Cowart's three previous statements, it is clear that the 'he' Mr. Cowart and the Defendant refer to is the Defendant. For example, at trial, the following exchange occurred between the State and Mr. Cowart:

> Q: … Mr. Cowart, when you were in jail with Steven Taylor, did you and he develop a relationship wherein you spoke to each other?
>
> A: Yes, sir.
>
> Q: Did there come a time when he asked you to do something for him?
>
> A: Yes, sir.
>
> Q: And at that time did you and he have a discussion about this case?
>
> A: Yes, sir.
>
> Q: **I want you to tell the jury what Mr. Taylor told you about this case.** [bold typeface in trial court order]
>
> A: I'm not - you want me to tell you exactly what happened or just what he said about the case? You lost me.
>
> Q: **I want you to tell the jury what he said about the case.** [bold typeface in trial court order]
>
> A: That it was a messy job, that the lady surprised **him** inside of the trailer, and **he** stabbed her and then choked her and then had to strangle her with a cord to make sure she was dead. [bold typeface in trial court order]
>
> Q: Did he indicate to you how this case started, why he went to the trailer?
>
> A: They was doing a burglary, he said they, they was doing a burglary.

(T.T. at 508-09, emphasis added.) It is clear that the 'he' Mr. Cowart refers to in his testimony is the Defendant and not the co-defendant Gerald Murray. This Court finds no merit to the Defendant's claim that Mr. Cowart's sworn statement, deposition, and trial testimony were false. Consequently, as the Defendant has failed to demonstrate that Mr. Cowart's statements and testimony were false, the Defendant's claims of ineffective assistance of counsel, *Brady* and *Giglio* violations also must fail.

(PCR/XI 2047-49)

Cowart's postconviction testimony is an illustration of the sound foundation of the principle that "recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is

not satisfied that such testimony is true," Sweet v. State, 810 So.2d 854, 867 (Fla. 2002)(quoting Armstrong v. State, 642 So.2d 730, 735 (Fla. 1994). Cowart shows that attempted or partial recantation is also unreliable. It appears that Cowart attempted to exonerate Taylor from some of the most heinous parts of the crime without subjecting himself to perjury. Cowart failed.

The trial court's excerpt of part of Cowart's trial testimony is only one example among many that show Cowart, in 1991, was referring to Taylor participating in the most heinous of the heinous acts of this murder.

Up to the point of Cowart's trial testimony that the trial court excerpted, Cowart had not even mentioned accomplice Murray, and every time Cowart said "he" or "him," it was absolutely clear that Cowart was referring to Taylor. (See TT/XIX 507-508) Then, afterwards, when Cowart was asked if Taylor ("he") indicated why Taylor ("he") went into the trailer, Cowart responded, "They was doing a burglary, he said they, they was doing a burglary." Cowart continued to refer to Taylor as "he" or "him" for pages of transcript. (See Id. at 509-11) Then, Cowart confirmed that "he" was Taylor:

> Q And again, what were the words he said about how he killed the woman in the trailer?
>
> A Stabbed, choked and then strangled her with a cord.

(Id. at 511) And then, continuing to use "he" and "him," Cowart testified that Taylor told him about Taylor's concern that the State had taken hair and body tissue and done a rape test on him and that they could put him at the scene of the crime but they couldn't put his partner there. And that

the State was going to convict him with the evidence they had and that it was his concern he was going to do life without parole or either he would be under the death penalty if convicted. (Id. at 515) At trial, when Cowart indicated that Taylor was referencing Murray, Cowart made that clear (See also Id. at 516), and Taylor was, in fact correct when "he" (Taylor) predicted that "he" (Taylor) would be convicted and sentenced accordingly.

It is clear in Cowart's sworn statement that he had initiated contact with the prosecution to assist in this case against Taylor, not Murray. (See PCR-Ex/I 7-11) Cowart's sworn statement continued with a narration of Cowart's conversation with Taylor:

> And I asked him, I said, man, that charge they got you with, I said, Did you actually do it? He said, Man, I freaked out. He said, I was going to do a burglary and he said, My bus partner is trying to turn State's evidence on me, and he said, I freaked out, Man. I stabbed her, and I choked her to make sure she was dead. And – kind of scary, you know, me hearing that.

(PCR-Ex/I 12) Cowart continued: "[H]e said I was doing a burglary *** [a]nd the lady – he said, She surprised me and I stabbed her and I choked her with a cord to make sure she was dead." (Id. at 12-13)

The trial court disbelieved Cowart's postconviction testimony that attempted modify what was very clear in 1991. The State did nothing wrong. There is nothing new.

ISSUE VI is meritless.

ISSUE VII DID TAYLOR'S POSTCONVICTION CLAIM REGARDING A PROSECUTOR'S COMMENT AND A JURY INSTRUCTION DEMONSTRATE STRICKLAND DEFICIENCY AND STRICKLAND PREJUDICE? (IB 97-99, RESTATED)

Taylor claims that his trial counsel was prejudicially ineffective by not objecting to a prosecutor comment and a jury instruction regarding the

presumption of innocence.

Taylor (IB 98) cites to Claim V his 2005 postconviction motion (at PCR/V 821-22) that alleged that the following prosecutor's closing argument "told the jury that they must presume Mr. Taylor to be guilty unless Mr. Taylor presents evidence of his innocence. In doing so, the prosecutor shifted the burden of proof from the state to Mr. Taylor" (PCR/V 822):

> You will recall that during our opening statements I was somewhat careful to not overstate the evidence because during your opening statements there is, as the Court pointed out, a presumption of innocence. And the presumption of innocence does not leave the defendant **until evidence has been presented that wipes out that presumption**. There is no longer a presumption of innocence, the evidence has been presented, more evidence than I referred to in the opening statement.

(TT/XXI 698-99)

The trial court summarily rejected this claim:

> In Claim V, the Defendant suggests that the trial judge and prosecutor improperly and unconstitutionally shifted the burden of proof and presumption of innocence based on an improper statement by the prosecutor during closing arguments. The Defendant also claims that Mr. Tassone was ineffective for failing to object to the prosecutor's improper statement. To the extent the Defendant claims trial court or prosecutor error, this Court finds the instant claim is procedurally barred because it could have and should have been raised on direct appeal. *Sireci v. State*, 773 So.2d 34, 40 (Fla. 2000); *Demps v. Dugger*, 714 So.2d 365, 367 (Fla. 1998); *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995). To the extent the Defendant claims ineffective assistance of trial counsel, this claim is also procedurally barred as an impermissible attempt to circumvent the direct appeal procedural bar. See *Arbelaez v. State*, 775 So.2d 909, 919 (Fla. 2000) ('Arbelaez may not relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.').
>
> Moreover, a review of the record supports that the prosecutor's statement was not improper. The prosecutor's statement in closing argument is 'the presumption of innocence does not leave the defendant until the evidence has been presented that wipes away that presumption. There is no longer a presumption of innocence as evidence has been presented.' (T.T. at 698-99.) When read in context

> of the entire closing argument, this Court finds that the prosecutor's comment is merely a statement of his belief that the State satisfied its burden of proof. (T.T. at 698-726.) *See Dailey v. State*, 965 So.2d 38, 44 (Fla. 2007). Therefore, Mr. Tassone's failure to object was not deficient. *Id*. at 44 (finding counsel was not ineffective for failing to object to prosecutor's statement, when read in context, appeared only to express prosecutor's belief that the State satisfied its burden of proof). Accordingly, the Defendant's Claim V is denied.

The State submits that the trial court's reasoning is correct and supports denying this appellate claim.

Further, while the postconviction motion mentioned the "trial judge" in passing (PCR/V 822), it did not specify anything that the trial judge said that was supposedly objectionable. Therefore, any such claim here was unpreserved below. See, e.g., Hutchinson v. State, 17 So.3d 696, 703 n.5 (Fla. 2009)(claim was not in amended postconviction motion; "such a claim is not cognizable on this appeal because it is being raised for the first time"); Dailey v. State, 965 So.2d 38, 44 (Fla. 2007)("With regard to the prosecutor's alleged 'blatant misstatement of fact' concerning Shaw's testimony, this claim was never raised in Dailey's postconviction motion. Therefore, it is not cognizable on appeal")(citing Gordon v. State, 863 So.2d 1215, 1219 (Fla.2003) (holding that a claim is procedurally barred where it 'was not raised in [the defendant's] motion for postconviction relief')); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'").

Concerning the lack of merit of the postconviction IAC claim that was

preserved below, the trial court's reliance upon Dailey v. State, 965 So.2d 38, 44 (Fla. 2007), is well-founded. Dailey held that "the prosecutor's statements concerning Dailey's presumption of innocence … when read in context … appear to be a statement by the prosecutor of her belief that the State satisfied its burden of proof. Therefore, counsel's failure to object was not deficient." Here, immediately after making the comment that ISSUE VII targets, the prosecutor detailed the evidence that had been introduced that proved Taylor's guilt. (See TT/XXI 699-726) See also, e.g., Merck v. State, 975 So.2d 1054, 1062 (Fla. 2007)("Each of these comments was made in the context of arguing that the evidence supported finding the HAC aggravating factor and that the aggravating factors should be found to outweigh the mitigating factors"); Conahan v. State, 844 So.2d 629, 640 (Fla. 2003)("A prosecutor may refer to the evidence as it exists before the jury and comment on the uncontradicted or uncontroverted nature of it during closing argument so long as it is not susceptible to being interpreted as a comment on the defendant's failure to testify"); Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992)("Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment").

Here, in the context of its other comments to the jury the prosecutor clearly and correctly accepted its burden to overcome the presumption of innocence (See, e.g., TT XXI 749-50) and argued details of the State's evidence that overcame that presumption (See TT XXI 698-726).

Thus, as the trial court found, the prosecutor's argument was proper. As such, defense counsel was not Strickland deficient for not objecting to

a proper comment and there can be no Strickland prejudice. See Conde v. State, 2010 WL 455264, *2 (Fla. 2010)(applying Strickland's standards, affirmed summary denial of trial court's rejection claim that "Conde contends that trial counsel was ineffective for failing to object to several allegedly improper prosecutorial statements made during closing arguments").

Moreover, the trial court's jury instructions repeatedly and properly directed the jury concerning the presumption of innocence and the State's burden of proving each element with evidence beyond a reasonable doubt. For example, immediately after closing arguments, the trial court informed the jury of the parameters of reasonable doubt and if "after carefully considering" the evidence, the jury does not have a stable and unwaivering conviction that the defendant is guilty, it "must find the defendant not guilty because the doubt is reasonable." (TT/XXI 763) The trial court directed the jury that any circumstances in circumstantial evidence "must be proven beyond a reasonable doubt." (Id. at 765) "The constitution requires the State to prove its accusations against the defendant." (Id. at 766) The State court went through each pertinent crime and directed the jury that before it could find the defendant guilty, it must first find that the State proved each element beyond a reasonable doubt. (See TT/XXI 770-87)

Furthermore, the trial judge had instructed the jury at voir dire:

> I advise you that the defendant in every criminal case is presumed innocent. The defendant does not have the duty to prove himself innocent, and in fact, the defendant does not have to put on any evidence, nor does he have to testify. ***

> The State, the prosecution must prove the defendant guilty beyond and to the exclusion of every reasonable doubt. ***

(TT/XVII 107-108) Defense counsel, in voir dire, stressed the presumption and the State's burden. (See TT/XVII 150-53, 160) After the jury was sworn, the trial judge again instructed the jury on the State's burden:

> It is your solemn responsibility to determine if the State proves the charge beyond a reasonable doubt. ***
>
> ***
>
> I admonish you that should not form any definite or fixed opinion of this case until you have heard all of the evidence, the arguments of the attorneys, and the court's instructions on the law ***
>
> ***
>
> The defendant has entered his plea of not guilty. This means that you must presume or believe that the defendant is innocent. Now, this presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following elements: *** Now, that's the State's burden and the defendant is not required to prove anything.
>
> Whenever the words reasonable doubt are used you must consider the following: *** In summary, if you have a reasonable doubt then you should find the defendant not guilty, but if you have no reasonable doubt then you should find the defendant guilty.
>
> ***

(TT/XVII 189-94)

All of the trial court's instructions, as well as the context of the prosecutor's comment, belie any contention that Taylor might make that the trial court's jury instructions regarding "until that presumption of innocence has been overcome" (See TT/XXI 762-63) compounded the trial court's error.

Moreover, Belcher v. State, 961 So.2d 239, 246 (Fla. 2007), rejected an

IAC trial counsel claim that attacked a prosecutor's comment that was almost identical to this one:

> Belcher claims that trial counsel should have objected to the following statement by the prosecutor, Mr. De La Rionda, during voir dire questioning of the panel of prospective jurors:
>
> Mr. De La Rionda: Do all of you understand that as we sit here today the defendant, Mr. Belcher, is presumed to be innocent? Do all of you understand that?
>
> (Affirmative response from prospective jurors)
>
> Mr. De La Rionda: Okay. Do you understand that does not mean he is innocent? It means he is **presumed to be innocent until you hear the evidence to the contrary**? Can all of you agree with that?
>
> (Affirmative response from prospective jurors)

Belcher held, in part:

> The transcripts indicate that the prosecutor was merely explaining the presumption of innocence to prospective jurors. In addition, as the lower court concluded, **we do not see a proper basis for defense counsel to object**.

Further, concerning prejudice, Belcher, 961 So.2d 246-47, held:

> Belcher cannot establish any prejudice. He admits in his brief, and the trial transcripts confirm, that the jury was correctly instructed on both the presumption of innocence and the reasonable doubt standard of proof by the trial court.

Here, the jury was instructed in language that Belcher explicitly approved and repeatedly told about the State's burden and the defendant's presumption of innocence.

Counsel's actions cannot be Strickland prejudicial where they were proper under subsequent case law. See Lockhart v. Fretwell, 506 U.S. 364,

113 S.Ct. 838 (1993)(basis of claim[20] overruled by subsequent case law; "Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* four years later"; "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him"). See also Williams v. State, 967 So.2d 735, 759-60 (Fla. 2007)(portion of jury instruction stated: "presumption stays with the Defendant, as to each material allegation in the indictment, through each stage of the trial, unless it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt"; "the trial court's reading of this instruction was 'sufficient to apprise the jury of the applicable principles'")(discussing McCrae v. State, 510 So.2d 874, 878 (Fla. 1987)).

Taylor's attempted reliance upon Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), is misplaced for several reasons. First, there unlike here, the prosecutor initially minimized and perhaps even mocked the presumption of innocence, arguing, for example, in voir dir:

> There's nothing magical about those terms [i.e., 'presumption of innocence' and proof 'beyond a reasonable doubt']. The presumption of a person being innocent was designed to protect those persons who are, indeed, not guilty of a crime. [Objection] But was not intended to let those who are guilty escape justice. [Objection]

Id. at 471. Second, as detailed above, unlike Mahoney, here "the trial court's overall charge on the presumption of innocence and burden of proof was … sufficiently specific," 917 F.2d at 473-74, to ensure that the jury

---

[20] Unlike Fretwell, here there is no basis for this claim at any time.

understood the presumption and the prosecution's burden. Third, here, the prosecutor repeatedly accepted the beyond-a-reasonable burden on the State and properly argued that the evidence met that burden. (See TT/XXI 712-26) Fourth, Mahoney does not address the limited and precise language here. And, fifth, Mahoney was not even decided by a court in this federal circuit.

Moreover, in addition to all of the foregoing arguments and authorities, the prosecutor's comment was harmless, and not a basis for Strickland prejudice, in light of all of the other explanations, admonitions, and qualifications concerning the State's burden submitted to the jury and in light of the evidence of guilt, for example as bulleted supra in the "The Significant Context of the DNA Issues" section. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994) ("Wuornos also argues the State committed various forms of prosecutorial misconduct in the penalty phase"; "misstated the burden of proof regarding heightened premeditation"; "We find all of these claims to be poorly supported by the record and of minor consequence singly or in their totality. Any error would be harmless and clearly was cured by the trial court's instructions to the jury").

For the forgoing reasons, the prosecutor's argument (and the judge's instructions) were not error at all, and, arguendo, if erroneous at all, were harmless. Taylor has failed to demonstrate Strickland deficiency and Strickland prejudice. His burden was to demonstrate both; he demonstrated neither. See also Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992)("'The

proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence'"; "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment").

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of postconviction relief and affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 30th, 2010: Michael P. Reiter, Esq.; 5313 Layton Drive; Venice, FL 34293.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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