IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1382

STEVEN RICHARD TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

Lower Tribunal Case No. 1991 CF 002456

INITIAL BRIEF OF APPELLANT

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PRELIMENARY STATEMENT

This appeal arises from the denial of Appellant's motion for postconviction relief by Circuit Court Judge W. Gregg McCaulie Fourth Judicial Circuit, Duval County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence.

The following abbreviations will be used to cite the record in this cause, with appropriate page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court;

"PCR" -- postconviction record on appeal in this proceeding.

"PCE" -- postconviction exhibits.

"EH" -- Evidentiary Hearing

REQUEST FOR ORAL ARGUMENT

Appellant has been sentenced to death and is, therefore, in peril of execution by the state of Florida. If this Court grants relief, it may save his life; denial of relief may hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Appellant, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and case law interpreting the rule), to grant him oral argument in this case and to set aside adequate time to fully air and discuss the substantial issues presented, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

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STATEMENT OF CASE

Taylor was indicted for murder, burglary, and sexual battery by a grand jury in Duval County, Florida, in 1991 (R 5-7, 78-80). Taylor was found guilty after a jury trial (R 797-98). Taylor's jury recommended a sentence of death (R 879). On December 9, 1991 the Court sentenced Taylor to death as to the first-degree murder conviction (R 905).

On direct appeal, this Court affirmed Taylor's convictions and sentences. Taylor v. State, 630 So.2d 544 (Fla. 1993). Taylor filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 3, 1994. Taylor v. Florida, 115 S.Ct. 99 (1994). On November 1, 1995, Appellant filed a shell motion entitled Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, raising a total of forty-five (45) claims for relief (PCR 1-2). On June 23, 2003, Appellant filed a Supplemental Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend, raising one (1) claim for relief (PCR 520-523). On May 13, 2004, Appellant filed an Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend, raising thirty-two (32) grounds (PCR 557-690). On May 23, 2005,

Appellant filed a Motion for Postconviction Relief to Vacate Judgment of Conviction and Sentence by a Person under the Sentence of Death and Incorporated Memorandum of Law, raising twenty-one (21) grounds[1].

The State filed Responses on July 15, 2003; June 14, 2004; June 23, 2004; and June 6, 2005. On December 13, 2005, the Trial Court conducted a Huff[2] hearing and issued an Order on June 15, 2006, stating that an evidentiary hearing was required as to Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the Ake[3] claim), and Claim IX.

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[1] Claims asserted in Amended 3.850 Motion are: (1) access to records, (2) production of records, (3) trial attorney file, (4) ineffective assistance of counsel - DNA, (5) prosecutor's comments, (6) ineffective assistance of counsel - Timothy Coward, (7) instruction regarding experts - withdrawn at evidentiary hearing, (8) instruction on reasonable doubt - withdrawn at evidentiary hearing, (9) ineffective assistance at penalty phase - withdrawn at evidentiary hearing, (10) prosecutor's prepared sentencing order - withdrawn at evidentiary hearing based on prosecutor's assertion, (11) ineffective experts, (12) prior mental retardation ruling, (13) *Ring* issue, (14) prosecutor comment on requirement of death - withdrawn at evidentiary hearing, (15) burden shifting, (16) responsibility of jury, (17) instruction on pecuniary gain aggravator, (18) failure to acknowledge mitigation - withdrawn at evidentiary hearing, (19) automatic aggravator, (20) electrocution and lethal injection unconstitutional, and (21) *Apprendi* issue.

[2] Huff v. State, 622 So.2d 198 (Fla. 1993).

[3] Ake v. Okalahoma, 470 U.S. 68 (1985).

On July 18, 2007, the Appellant filed a Motion for Leave to Amend Claim XII, Amended Claim XII, and Motion to take Judicial Notice. On July 30, 2007, the Trial Court issued an Order granting the Appellant's Motion to take Judicial Notice and the Motion for Leave to Amend Claim XII. On August 1, 2007, the State filed a Response opposing the Defendant's Motion.

On August 6 and 7, 2007, an evidentiary hearing was held on Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the Ake claim), and Claim IX. At the beginning of the August 6, 2007, evidentiary hearing, Appellant asked the Court to withdraw from its consideration Claims VI paragraphs 2-8, VII, VIII, IX, X, XIV, and XVIII. (PCR 7-9).

On September 10, 2007, the State filed their closing argument (PCR 1782). The Appellant filed his closing argument on September 12, 2007 (PCR 1842). On October 5, 2007, the State filed a Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law (PCR 1916). Appellant filed his Response to State's Motion to Strike and Objections and Motion to Amend the Pleadings to Conform with the Evidence (PCR 1923). The State

subsequently filed their Opposing Motion to Amend the Pleadings to Conform with the Evidence (PCR 1928). Appellant filed his reply on October 12, 2007 (PCR 1939).

On June 22, 2009, the trial court entered its order denying Appellant's postconviction motion (PCR 2024). On June 26, 2009, the trial court filed its order granting the State's Motion to Strike Appellant's closing arguments and denied Appellant's Motion to Amend the Pleadings to Conform with the Evidence (PCR 2066). The Appellant filed his Notice of Appeal on July 14, 2007 (PCR 2068). The Appellant filed his Motion for Rehearing on July 31, 2007 (PCR 2072). The trial declined ruling on the Motion for Rehearing for Lack of Jurisdiction (PCR 2082). On August 11, 2009, Appellant filed a Motion to Relinquish Jurisdiction in this Court, which was denied on October 9, 2009.

STATEMENT OF FACTS

This Court set out the record facts on direct appeal as follows:

> 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, 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 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.

However, as described below, additional facts were established at the evidentiary hearing that were not presented at the original trial.

Pre-Trial and Trial -

The guilt phase of Appellant's trial began on October 7, 1991. Before trial, the Defense filed a demand for discovery on March 12, 1991 (R 10-13). In paragraph 1 of the demand for discovery, counsel requested all names and addresses of persons known to the prosecutor to have

information that may be relevant to the offense charged and to any defense with respect thereto (R 10).

At paragraph 10 in the demand for discovery, counsel requested: reports or statements of experts made in connection with this particular case, including reports of evidence technicians and crime lab personnel; and results of physical or mental examinations, as well as results of scientific tests, experiments, or comparisons (R 12).

At paragraph 12 of the demand for discovery, counsel requested material that tends to negate the accused’s guilt of the offense charged (R 12).

Prior to trial, Defense filed a Motion for Production of Favorable Evidence on September 26, 1991, specifically requesting any and all evidence "which may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory, regardless of the fact that such evidence or information is the fruit of the work product of the prosecutor." (R 115).

The State’s last response to demand for discovery was filed on September 26, 1991 (PCE Vol. II, p224-225). None of the six responses list Shirley Zeigler (FDLE analyst), Paul Dohlan (FDLE supervisor), or the name of the individual with the initials TMW (these initials appear on the page entitled PROBINGS on State’s Exhibit 7). In

addition, Defense Exhibit 17, FBI/FDLE protocol (PCE Vol. III, p451-485), was not provided to the defense. These protocols established that Dr. Pollock changed the protocol and/or violated the protocol in his conclusions.

At Dr. Pollock's deposition on September 4, 1991 (PCE Vol. I, p69-109), Pollock fails to mention Shirley Zeigler or the identity of the person with the initials TMW. The only document defense counsel referenced during Dr. Pollock's deposition was Dr. Pollock's report, which was generated on July 17, 1991 (PCE Vol. I, p110-111).

Dr. Goldman (Defense DNA expert) was appointed on September 20, 1991. Dr. Goldman did not testify at trial because he was unavailable. In addition, Dr. Goldman did not receive all of the FDLE DNA documents or FDLE protocols.

Evidentiary Hearing -

DNA and Frye[4] - At the evidentiary hearing, Mr. Tassone (Appellant's trial counsel) indicated he believed that Mr. de la Rionda (Assistant State Attorney), at his request, wrote to Dr. Pollock (PCE Vol. I, p16, 17) requesting the following items: copies of the autoradiograms, population database, case file, photographs of the DNA gels as well as description of the database and procedures used to obtain

[4] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

the DNA results. In addition, Mr. Tassone's Motion for Continuance states that Dr. Goldman hadn't received Dr. Pollock’s case notes until on or after October 3, 1991 (R 61). Mr. Tassone’s billing records (PCE Vol. III, p388-392) indicate that he had a one-and-a-quarter hour conversation with Dr. Goldman on October 1, 1991.

On October 4, 1991, Mr. Tassone filed his Second Motion for Continuance (R 161) indicating, among other things, that Dr. Goldman did not have enough time to prepare his report or findings and could not attend the trial scheduled for October 7, 1991. This Motion was filed after Mr. Tassone spoke with Dr. Goldman on October 1, 1991. A hearing was conducted on the Motion for Continuance on October 4, 1991 (PCE Vol. I, p388-492). At that hearing, Mr. Tassone informed the Court that he did not intend to call Dr. Goldman as a witness based upon the information he (Mr. Tassone) had received up to a week before the hearing. However, Mr. Tassone indicated that he might need to speak with Dr. Goldman telephonically during the trial. On October 7, 1991, the day of trial, Mr. Tassone withdrew his Motion for Continuance (PCE Vol. III, p386-387). The record is silent as to whether Mr. Tassone ever spoke with Dr. Goldman during the trial.

Mr. Tassone testified (PCR 1371, 1373) the records indicated to him the first time he heard the name “Shirley Zeigler” was during Dr. Pollock’s cross-examination during trial (PCR 1371, 1373); at that point of the trial, Dr. Pollock identified the initials SFZ (R 607) on the Calculated Fragment Lengths Report[5] (PCE Vol. I, p61-64) as being Shirley Zeigler. Mr. Tassone testified that neither the State's witness list, nor his witness list, contained Shirley Zeigler's name (PCR 1369).

In addition, Mr. Tassone testified that the records referenced in Defense Exhibit 5[6] probably weren’t produced until after September 27, 1991, because he wouldn’t have made a second request if they were in his possession (PCR 1375, 1377). Moreover, Mr. Tassone's Motion for Continuance shows he only received the case notes on or after October 3, 1991. At the evidentiary hearing, Mr. Tassone testified that he would have wanted to know before trial that another

[5] Webster’s Ninth New Collegiate Dictionary, 1991 defines *report* as “to give an account; to make a written record or summary.”

[6] The records requested in Defense Exhibit 5 were audioradiograms, the population database, case file, photographs of the DNA gels, a description of the database, and the procedures used to obtain the DNA results. Neither trial counsel's expert nor postconviction counsel's expert was ever able to review the originals of the audioradiograms. Dr. Libby wanted to resize the bands, but was unable to without the originals.

FDLE analyst disagreed with Dr. Pollock's opinions regarding a match on the probes (PCR 1380). At the evidentiary hearing, Shirley Zeigler testified two probes were inconclusive: D1S7 and D4S139 – (PCR 1266-1267). Additionally, Zeigler testified that if Dr. Pollock stated they were a match, that such testimony would be a violation of protocol (PCR 1266). At the evidentiary hearing, Dr. Libby (Defense DNA expert) testified that three of the four probes utilized by Dr. Pollock were inconclusive: D1S7 (PCR 1544, 1632-1634), D4S139 (PCR 1548-1549) and D17S79 (PCR 1521). In addition, Dr. Libby testified that the FBI utilizes five to eight probes, while Pollock only utilizes four probes[7] (PCR 1505). Further, Dr. Libby testified that he visited an FBI facility and found the database unreliable (PCR 1554). One reason Dr. Libby found the FBI database unreliable was the differences in the calculated lengths between analysts (PCR 1470-1471).

Mr. Tassone testified that based upon the information that was provided to Dr. Goldman, Dr. Goldman didn't have any complaints with FDLE's testing process (PCR 387). However, Mr. Tassone also testified that this was his first DNA case, and if he had been provided with all of the

[7] FDLE protocols indicate that the commercial kits show five probes. One was crossed out on the protocol.

State's evidence in sufficient time for the trial, he would have made sure Dr. Goldman was there to properly and thoroughly impeach Dr. Pollock's trial testimony (PCR 1387-1391).

For example, Dr. Goldman did not know that Dr. Pollock changed the FBI protocols. Dr. Pollock testified at trial, "I have found that it's not necessarily a better protocol" (R 606). Dr. Goldman did not know that Dr. Pollock also took it upon himself to cross out the FBI protocol that states: base pairs in excess of 10,094 are inconclusive (PCE 471). In addition, Dr. Goldman did not speak with Mr. Tassone regarding the validity of the population database or about the calculated fragment lengths (PCR 1387-1389). Finally, Mr. Tassone did not speak with Dr. Goldman about Shirley Zeigler's finding that two probes were inconclusive, because Mr. Tassone didn't know she existed, nor did he have possession of necessary documents at the time he spoke with Dr. Goldman.

Mr. Taylor's case was Mr. Tassone's first DNA case (PCR 1393). In addition, counsel was not knowledgeable about Frye hearings, and he did not research the issue (PCR 1393). Mr. Tassone testified that he "probably" didn't know that novel science was subject to a Frye test (PCR 1395). In addition, Mr. Tassone testified: "I do not recall doing

any research or having any knowledge about the Frye test at the time of Mr. Taylor's case (PCR 1398)."

Mr. Tassone testified: "Based on what I read of the ABA guidelines and what in my opinion has been adopted by the United States Supreme court in Rompilla versus Beard[8] I should have asked for a Frye test." (PCR 1397).

Mr. Tassone testified that he would have wanted Shirley Ziegler's findings, specifically that she found two of the four DNA probes were inconclusive (PCR 1380-1383). Mr. Tassone testified Dr. Goldman did not visit the FDLE lab or review their procedures (PCR 1388), Mr. Tassone had no recollection whether he spoke with Dr. Goldman about Dr. Pollock's deposition (PCR 1388). Mr. Tassone had not requested nor received FDLE lab protocols and neither Mr. Tassone nor Dr. Goldman knew about Shirley Zeigler or her opinion prior to trial (PCR 1389). Mr. Tassone testified that he probably didn't inform Dr. Goldman about the Frye requirements when he requested Dr. Goldman's opinion (PCR 1398). Mr. Tassone had no recollection about discussing databases with Dr. Goldman (PCR 1398-1399). Mr. Tassone did not request or see any analyst proficiency tests, but would have wanted to see them (PCR 1401, 1404). Mr. Tassone testified that the court admitted Dr. Pollock as an expert

[8] Rompilla v. Beard, No. 04-5482 (6/20/2005)(S.Ct. 2005)

in DNA analysis and serology, but he was not admitted for statistics or databases (PCR 1404-1405). Mr. Tassone acknowledged that although Dr. Pollock, in fact, testified about statistics, he did not object (PCR 1405).

At the evidentiary hearing, Dr. Pollock was asked by the State whether the DNA testing methodology he set up at FDLE "adhered to acceptable methodology that was used in the scientific community, in the forensic scientific community?" Dr. Pollock responded, "Well, not precisely what we were doing in Florida, but the general FBI procedure was generally accepted, yes." (PCR 1698)(emphasis added). After acknowledging the FBI methodology was generally accepted, Dr. Pollock testified, "So in my procedure I crossed out that part of the FBI procedure where it says above 10 KB not interpreted…" (PCR 1686).

Although Dr. Pollock testified at trial that Taylor matched on all four loci, loci D1S7 and D4S139 show no bands were detected in the male fragments for item 28I (PCE Vol. I, p57-64). Conversely, Shirley Zeigler testified at the evidentiary hearing that those two loci were inconclusive, and if Dr. Pollock testified they were a match, it was against protocol (PCR 1265-1266). Dr. Libby testified at the evidentiary hearing that finding a result in the female fragment of D1S7 and D4S139 was not an

expected result and should render an inconclusive opinion, which coincided with Shirley Zeigler's opinion.

When questioned about claiming a match where no bands were detected in the male fraction, but found in the female fraction, Dr. Pollock testified that there was no protocol against finding a match (PCR 1725). However, FDLE Protocol A2 & A5 below suggest a contradiction to Dr. Pollock's statement. Dr. Pollock testified at trial that D1S7 and D4S139 matched Mr. Taylor even though the band appeared in the female fraction, which appear to be in violation of FDLE protocol. Ironically, at the evidentiary hearing Dr. Pollock testified, "We would generally expect the sperm DNA to come out in the male fraction." (PCR 1702). Dr. Libby testified that because the DNA did not show up in the expected location they were inconclusive. Shirley Zeigler also testified they were inconclusive.

In addition, Dr. Pollock found a match on loci D4S139 at lanes 5 and 7, even though the base pairs were in excess of 10,094, which was in violation of FDLE (FBI) Protocols. Dr. Pollock testified the FBI was too conservative in designating 10,094 as excessive for base pairs, so he crossed out that part of the protocol (PCR 1685), located at A4 below. Dr. Pollock testified earlier that FBI

protocols were generally accepted, but what FDLE was doing was not.

FBI (FDLE) protocol clearly states that base pairs in excess of 10,094 are inconclusive. Additionally, the FBI protocol states if the allelic control bands are not found in the visually expected position, the autorad cannot be assessed further.

XV. ASSESSMENT OF AUTORADIOGRAPY DATA

There are four major steps in the assessment of autoradiograph (autorad) data. Each of these steps will be described.

A. Visual evaluation of autorads

1. Examine the lane containing the allelic control specimen K562. There must be either one or two bands, depending on which RFLP loci has been probed. If the allelic control specimen does not exhibit the expected number of bands for the locus being probed, the autorad cannot be assessed further.

2. Visually inspect the allelic control band(s) for their position relative to the adjacent size markers. Depending on the locus being probed, **the allelic control band(s) should be located in an expected position on the autorad. If the allelic control band(s) are not found in a visually expected position, the autorad cannot be assessed further.**

3. Visually inspect the lanes that contain size markers. The bands in these lanes must be of sufficient intensity to enable them to be used as size references for the allelic control, the known, and the questioned specimen bands. If regions of the size ladder lanes are not visible, specimen bands cannot be sized in these regions.

> 4. Visually inspect the lanes that contain known or questioned specimen DNA to assess the quality of the fragment bands. Determine if the bands in these lanes are extremely broad or exhibit pronounced band curvature. These band irregularities can signal potential mobility shifts. **~~If any fragment band for a specimen has migrated to a position that is greater than the position of the 10094 bp size marker band, the evaluation of that specimen at the locus is considered inconclusive.~~**
>
> 5. Based on the assessments of band quality and band position, decide which of the specimens will be subjected to the computer assisted band sizing procedure.

(PCE Vol. III, p471)(emphasis added).

In addition, Dr. Libby testified that loci D17 was also inclusive.

> A I don't have a problem with the sizing on D17 but my comment is that it is not -- it's really inconclusive since the victim and the suspect both have the same size upper allele. So it's unclear who could have contributed to that. I would have not used that in a match calculation. (PCR 1632).

FBI Database - At the evidentiary hearing, Dr. Libby testified that in 1991, the FBI database was unreliable.

> Q By the way, with regard to the FBI data, did you also find that situation occurring where different analysts came up with the same -- different answers?
>
> A I've seen different sizings, are you speaking out of the database now?
>
> Q Uh-huh.
>
> A I've seen different sizes in their database.

Q Was that in the 1991 database?

A About that era.

Q Has that affected the reliability of utilizing that database by outside labs?

A Well, I think it cast a question over how useful is the database in terms of inferring statistical frequencies when, in fact, one is not sure if those sizings are accurate. (PCR 1524-1525).

At the evidentiary hearing, the State introduced Exhibit 7 (PCE Vol. I, p57-64). These pages represent the calculated fragment lengths of the four loci measured by Dr. Pollock and Shirley Zeigler. Item 67-E lane 9 and 10 represent the DNA sample from the swab (PCR 1690) Exhibit KKK at trial. At locus D17S79 for item 67-E Dr. Pollock reported a band detected at lane 9 (female fractions) and no band detected at lane 10 (male fraction). However, Shirley Zeigler detected a band at both lane 9 and lane 10 for 67-E. While both Shirley Zeigler (PCR 140) and Dr. Pollock (PCR 550) agreed that finding was a discrepancy in their measurement, Dr. Pollock stated he did not report the finding of the band at lane 10 because the bands detected at 67-E belonged to the victim, were not foreign to her, and therefore had no probative value (PCR 550-551, 564, 587, 589). However, since Mr. Taylor was charged with

Sexual Battery, and no male DNA was found on the swab, the charge was unsupported.

Blouse - One questionable issue is what color was the blouse, trial Exhibit 61? In addition, was trial Exhibit 61 the source of the item identified by Dr. Pollock during the trial as item 28I? Note, DNA was obtained from a cutting allegedly from item I28. During trial, Officer Powers identified item HH (Exhibit 61) as being a blouse collected from the victim's residence. Powers did not testify to the color, but did testify that the blouse was "...on the floor beside the bed." (R Vol. XVIII, p288). Mr. Tassone objected to its introduction on the ground of relevance, which was granted. (R Vol. XVIII, p288-289).

During Ms. Hanson's (FDLE analyst) trial testimony, she stated she had performed testing on Item HH (introduced as Exhibit 61 without objection by Mr. Tassone)(R Vol. XIX, p537). However, she did not identify the color of the Exhibit, nor did she testify as to any connection between Exhibit 61 and item 28I (28I was testified to by Dr. Pollock).

Dr. Pollock testified at trial that he had examined his item 28I as follows:

> That's my exhibit number 28I, which was identified as a stain from a blouse, this was a turquoise colored blouse with the staining areas

> was a couple of centimeters squared, and I extracted DNA from that particular exhibit and that was suitable for further analysis and was suitable for comparison with the DNA extracted from the known blood standard. (R Vol. XIX, p563).

None of the testimony offered by Officer Powers, Ms. Hanson, or Dr. Pollock connected Exhibit 61 to Dr. Pollock's item 28I, as either coming from the victim's residence or that Exhibit 61 and item 28I are from the same cloth.

At the evidentiary hearing, Officer Powers testified he identified Exhibit 61 at trial as a white blouse (PCR 1193). Office Powers admitted on cross-examination that he didn't specifically remember what he picked up that day. However, after reviewing his report and his testimony, he believed the item he identified at trial was a white blouse. (PCR 1195-1196). Even Mr. Tassone understood item HH to be a white blouse after reviewing the court documents and Powers' report.

At the evidentiary hearing, Mr. Tassone testified he had no recollection of seeing State's item HH (PCR 1356). Mr. Tassone also testified that after reading the trial testimony and reviewing Officer Powers' report, he believed the item being identified by Officer Powers was Exhibit 10 on Powers' report (white blouse)(PCR 1358). After reviewing

Mr. Powers', Ms. Hanson's, and Dr. Pollock's testimony, Tassone acknowledged that the record did not indicate any foundation for Dr. Pollock's testimony (PCR 1356-1366). Mr. Tassone had no recollection as to why he didn't object to either the introduction of Exhibit 61 or to Dr. Pollock's testimony regarding item 28I. (PCR 1364).

SUMMARY OF ARGUMENT

ISSUE I - Although some facts were presented at the evidentiary hearing that were not specifically alleged in Appellant's 3.850 motion, all facts presented went directly to claims alleged in Appellant's 3.850. The trial court's striking of Appellant's closing argument and denial of Appellant's Motion to Amend the Pleadings to Conform with the Evidence pursuant to Fla.R.Civ.P. 1.190 was a clear abuse of discretion. The trial court apparently relied upon the Appellee's misbelieve that the evidence was presented pursuant to Fla.R.Crim.P. 3.851, which is incorrect. Appellant's amendments related back to the original filing of his 3.850 motion, which was in 1995.

In addition, Appellee did not object to the evidence at the hearing, cross-examined the witnesses, was sufficiently noticed as to the claims, had the opportunity to present evidence in contradiction, and did not suffer any prejudice. Further, the evidence was necessary to

establish the merits of the case more effectually. The trial court's ruling denied Appellant furtherance of justice.

ISSUE II - critical documents and witness names were either not provided to the defense or were provided late. It appears from the record the defense did not receive FBI/FDLE protocols until postconviction (PCE 19, Vol. III p451-485). In addition, it wasn't until three days (PCE Vol. III, p436-438) before trial that Dr. Goldman received the calculated fragment length reports/summaries and bench notes. In addition, the name of a critical witness—Shirley Ziegler, FDLE analyst—was not divulged until cross-examination of the State's DNA expert. Failure to provide the requested documents and Ziegler's name—an individual who had information valuable to the defense—in sufficient time to make use of them at trial prejudiced Appellant. United States v. Campagnuolo, 592 F.2d 852, 860-861 (5th Cir. 1979)(It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial, and that the effective implementation of Brady v. Maryland must therefore require earlier production in at least some situations.)

The documents and testimony of Shirley Zeigler established that FDLE DNA procedures and conclusions were

not generally accepted in the scientific community and would also have impeached Dr. Pollock's conclusions. Failure to provide this information prior to trial was a Brady and Giglio violation.

ISSUE III - This case was defense counsel's first DNA case. He had little or no knowledge about the Frye test, nor did he do any research on Frye. Trial counsel failed to request a Frye hearing, or call a DNA expert as a witness at trial (although one was appointed to him), and he failed to request a continuance when critical information and a witness was discovered during the trial. Had trial counsel obtained a continuance and performed research on Frye, and had he taken Shirley Ziegler's deposition, the DNA evidence would have been precluded from admission, or at least been impeached.

The evidentiary hearing evidence established that Dr. Pollack (FDLE analyst) changed FBI/FDLE protocols, made conclusions that violated the protocols, and admitted that what FDLE was doing was not generally accepted in the scientific community. In addition, Shirley Ziegler (FDLE analyst) testified that two of the four loci were inconclusive and that Dr. Pollock violated FDLE protocols when he testified that they matched Mr. Taylor’s loci. As a result, Appellant was prejudiced. DNA was the primary

evidence against the Appellant; therefore, trial counsel was ineffective.

ISSUE IV – Certain DNA was introduced into evidence without establishing relevant foundation. Trial counsel failed to object to its introduction. Dr. Pollack testified he collected and tested DNA from Item 28I (allegedly cuttings from a green/turquoise blouse). No admissible testimony connected Item 28I to any item that was collected from the victim's residence. In fact, State's Exhibit 61 (allegedly a turquoise blouse) was identified by Officer Powers as being collected from the victim's residence, but failed to identify the color of the blouse. Ms. Hanson (FDLE serology expert) also failed to indicate the color of Exhibit 61. In addition, no one connected Exhibit 61 to Item 28I. At the evidentiary hearing, Officer Powers and Mr. Tassone believed that Exhibit 61 was a white blouse, not turquoise.

Appellant was prejudiced because trial counsel failed to object to relevance and failed to establish a proper predicate for foundation. The DNA evidence was introduced about an item that failed to establish any chain of custody, lack of tampering, or where the item came from. As a result, trial counsel was ineffective.

ISSUE V - trial counsel could not have been properly prepared for trial because he did not: (1) have any prior experience about DNA, (2) research Frye as it pertained to DNA, (3) receive all records and names from FDLE, (4) have his DNA expert available for trial, (5) request a continuance, although he knew he needed one, and (6) request a Richardson hearing when he was informed of a potential exculpatory/impeachment witness during trial.

ISSUE VI - Timothy Cowart did not recant his testimony, he merely clarified his testimony. Although the court found his testimony lacking credibility, the state did not refute Cowart's testimony when he stated that he told the Assistant State Attorney prior to trial that Murray, not Taylor, stabbed, strangled, and raped Ms. Vest.

ISSUE VII - Presumption of innocence is a fundamental right, which does not disappear until the jury determines such during deliberation. The presumption does not disappear, as suggested by the state and instructions, when the evidence has been presented.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO STRIKE APPELLANT'S CLOSING ARUGMENTS AND DENYING APPELLANT'S MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE?

The standard of review when a court grants or denies a Motion to Amend the Pleading to Conform with the Evidence is abuse of discretion.

Fla.R.Civ.P. 1.190(b) reads as follows:

> **(b) Amendments to Conform with the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense upon the merits.
>
> **(e) Amendments Generally.** At any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Although undersigned counsel could find no Florida case specifically addressing Fla.R.Civ.P. 1.190(b) in a postconviction case, there are a number of cases that have approved the utilization of other subsections in Fla.R.Civ.P. 1.190 in a postconviction setting. Rosier v. State, 603 So.2d 120 (5th DCA 1992); Boyd v. State, 801 So.2d 116 (4th DCA 2001); Saucer v. State, 779 So.2d 261 (Fla. 2001); Bryant v. State, 901 So.2d 801 (Fla. 2005).

In Allen v. Butterworth, 756 So.2d 52 (Fla. 2000), this Court acknowledged that postconviction cases are quasi civil in nature as they are derived from Habeas Corpus proceedings. Therefore, Appellant contends that Fla.R.Civ.P. 1.190(b) and (e) apply to postconviction cases. Appellant suggests it would be incongruent and unfair for an appellate court to rely upon Fla.R.Civ.P. 1.190 in support of its decision in a postconviction case, but disallow an appellant to rely upon the same rule in support of his argument.

After the evidentiary hearing and closing arguments, the State filed a Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law (PCR 1916-1922). Appellant, in turn, filed a Response to the State's Objection and Motion to Strike and sought to amend the pleadings to conform with the evidence (PCR 1923-

1927). The State then filed its Response Opposing the Motion to Amend the Pleading to Conform with the Evidence (PCR 1928-1938).

After denying Appellant's postconviction motion, the trial court entered an order granting the State's Motion to Strike Appellant's Closing Argument and Memorandum of Law and denied Appellant's Motion to Amend the Pleading to Conform with the Evidence (PCR 2066-2067). Because the trial court provided no explanation in its order, Appellant can only conclude the trial court agreed with the State's arguments.

Appellant contends the State's arguments are flawed for various reasons:

First, Appellant filed his postconviction motion pursuant to Fla.R.Crim.P 3.850 and not pursuant to Fla.R.Crim.P. 3.851 as alleged throughout the State's Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law (PCR 1916-1922) and Response Opposing the Motion to Amend the Pleading to Conform with the Evidence (PCR 1928-1938).

Appellant filed his first postconviction motion on November 1, 1995 (PCR 1) pursuant to Fla.R.Crim.P. 3.850, which provided:

> (c) **Contents of Motion.** The motion shall be under oath and include:
>
> **(6) a brief statement of the facts (and other conditions) relied on in support of the motion.** (emphasis added). This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

On October 1, 2001, provisions of Fla.R.Crim.P. 3.851 became effective:

> **(a) Scope.** This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. **Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.** (emphasis added).
>
> **(e) Contents of Motion**.
>
> **(1) Initial Motion....**
>
> (D) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and...

Appellant's postconviction motion an the amendments are held to the standard of Fla.R.Crim.P. 3.850(c) and not Fla.R.Crim.P. 3.851(e)(1)(D).

Second, the Appellant's amendments to the original motion relate back to the time of the original filing. The State's argument that the Appellant's Amendments lack

specificity required in Fla.R.Crim.P. 3.851 is erroneous. The amendments relate back to the original filing. Fla.R.Civ.P. 1.190 states:

> **(c) Relation Back of Amendments.** When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

Bryant v. State, 901 So.2d 801 (Fla. 2005)(Had the circuit court stricken the motion with leave to amend, the amended motion Bryant filed in March 2003 would have been timely because it would have related back to the original filing.)

Third, the State argued in their Opposition to Amend the Pleading to Conform with the Evidence as follows: (1) The proposed amendments violate applicable provisions of Rule 3.851 (PCR 1932), (2) The Defendant's 2005 postconviction motion did not cover the newly alleged claims (PCR 1934), (3) The introduction of evidence in a postconviction evidentiary hearing is insufficient to justify amending the postconviction motion (PCR 1935), and (4) The introduction of evidence in a postconviction evidentiary hearing is insufficient to justify amending the postconviction motion (PCR 1937).

As to the State's first argument - The proposed amendment violates applicable provisions of Rule 3.851,

Appellant has dispelled this argument earlier because Rule 3.850 applies and not 3.851.

As to the State's second argument, Appellant is not sure what the State is suggesting. If they are saying that the 2005 amended postconviction motion did not contain specific allegations, Appellant disagrees. See below for description of contents of Appellant's motion.

However, if the State is suggesting that Appellant's closing argument contains claims not contained in the 2005 postconviction motion, Appellee is incorrect. Apparently there is definitional differences between the State's characterization of a "claim" compared to what the Appellant contends are "facts." However, Appellant agrees that his closing argument contains not only facts alleged in his postconviction motion, but also contains additional facts revealed at the evidentiary hearing that support his alleged claims, such as: ineffective assistance of counsel, Brady, Giglio, probable tampering (trial Exhibit 61), and newly discovered evidence (Timothy Cowart). (PCR 788-821). As a result of additional evidence revealed at the hearing, and unavailable prior to the hearing, Appellant filed his Motion to Amend the Pleading to Conform with the Evidence.

Some of the facts alleged in Appellant's postconviction motion are as follows: inadequate collection and storage,

contamination due to simultaneous placement, faint probes, base pairs beyond standard cut-off, band sharing, change of protocol midway through testing, conflicting results between two different FDLE analysts, manual override for sizing program, State's expert had insufficient knowledge concerning population database, database flawed, non-compliance with TWGDAM Guidelines, failure to challenge Pollack as an “expert in the field,” Cross-reference to items listed as basis for Frye motion, unreliable loci due to male and female fractions in probe, disproportionate female fraction, improper transfer of Taylor's DNA, degradation present "in other loci," faintness of fractions or bands, Zeigler's conclusion differed from Pollack's, and margin of error overly generous and conflicted with protocols of "leading DNA laboratories" (PCR 1918-1919).

As to the State's third argument in their Opposition to the Motion to Amend the Pleading to Conform with the Evidence, they state: "The introduction of evidence in a postconviction evidentiary hearing is insufficient to justify amending the postconviction motion." Basically, the State argues that their failure to object to evidence presented at the evidentiary hearing did not waive the requirements of pleading. The cases they cite are unrelated to a Motion to Amend Pleading to Conform with the Evidence.

Fla.R.Civ.P. 1.190 specifically states otherwise. Di Teodoro v. Lazy Dolphin Development Corporation, 418 So.2d 428 (Fla. 3rd DCA 1982)(In the present case, we find that the issue of the bartender's intentional tort was tried by implied consent. **It is basic in trial practice that an opposing party must object and obtain a ruling on the admission of evidence or else that objection is waived.)**(emphasis added).

As to the fourth argument contained in the Opposition to Amend the Pleading to Conform with the Evidence, the State argues: Public Policy. The State, in essence, alleges to allow an amendment of the pleading to conform with the evidence would be an invitation to violate rule 3.851. The State suggests to allow Appellant to amend the pleading to conform with the evidence would amount to adding a fifth amendment. So what? How was the State prejudiced? Some of the amendments withdrew a number of claims. Is the State suggesting that withdrawal of claims should not be permitted? The State acknowledged that, other than the shell motion, the number of pages were reduced with each amendment and, ultimately, many of the claims were withdrawn. Again, rule 3.851 does not apply, rule 3.850 applies. In regard to policy it has been held:

> The law favors the trial of cases on their merits and, therefore, a liberal policy of allowing litigants freedom to amend their pleadings exists. Hatcher v. Chandler, 589 So.2d 428 (Fla. 1st DCA 1991). This liberal policy of allowing amendments is recognized in the Florida Rules of Civil Procedure. Florida Rule of Civil Procedure 1.190(e) provides that in the furtherance of justice, upon such terms as may be just, the court may at any time permit a pleading to be amended. This liberality in granting leave to amend diminishes, however, as the case progresses to trial. Bachanov. Once the trial has commenced, the right to amend is controlled by rule 1.190(b). Under that rule, if evidence is objected to on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence. **The court shall do so freely when the merits of the cause are more effectually presented thereby. The court may only do so, however, if the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits.** (emphasis added).

Ohio Casualty Insurance Company v. MRK Construction, Inc., 602 So.2d 976 (Fla. 2nd DCA 1992).

There are many cases interpreting Fla.R.Civ.P. 1.190(b): Smith v. Smith, 971 So.2d 191 (Fla. 1st DCA 2007)(An unpled issue is deemed tried, or not tried, by implied consent depending on whether the opposing party had a fair opportunity to defend against the issue and could have offered additional evidence on that issue if it had been pleaded.); Twenty-Four Collection, Inc. v. M. Weinbaum Constructions, Inc., 427 So.2d 1110 (Fla. 3rd DCA 1983)(Page after page of unobjected-to testimony of the

principals and employees of the parties and nearly the entirety of the parties' closing arguments to the court are precisely devoted to the issue of anticipatory repudiation. Since it is clear that any issue, whether denominated an affirmative defense or a counterclaim, may be tried by implied consent.); Department of Revenue v. Vanjaria Enterprises, Inc., 675 So.2d 252 (Fla. 5th DAC 1996) (Further, the issue must be treated as though it had been raised in the pleadings because the parties tried the issue by consent.); Hemraj v. Hemraj, 620 So.2d 1300, 1301 (Fla. 4th DCA 1993)(finding alimony issue was tried by implied consent in dissolution action, despite absence of pleadings specifically demanding alimony, where former wife's pretrial statement listed alimony as a disputed issue to be tried, former husband did not object to that portion of the statement, and alimony issue was argued in opening and closing statements.); Shrine v. Shrine, 429 So.2d 765, 767 (Fla. 1st DCA 1983)(The essence of the broad test generally applied to determine whether an issue has been tried by implied consent is whether the party opposing introduction of the issue into the case would be unfairly prejudiced thereby.); Smith v. Mogelvang, 432 So.2d 119, 122 (Fla. 2d DCA 1983)(An unpled issue is deemed tried, or not tried, by implied consent depending on whether "the opposing party

had a fair opportunity to defend against the issue and ... could have offered additional evidence on that issue if it had been pleaded."); Dey v. Dey, 838 So.2d 626, 627 (Fla. 1st DCA 2003)(Inasmuch as it is Former Wife's attorney who raised the issue of shared parental responsibility at the final hearing and questioned his client about this subject, Former Wife cannot reasonably claim prejudice from the trial court's consideration of this issue.)

Notwithstanding the complaints made by the State in their Motion to Strike Closing Argument and Opposition to Amend the Pleading to Conform with the Evidence, case law has set out guidelines for the trial court to consider when weighing whether to grant or deny the Motion to Amend.

One example to consider pursuant to Fla.R.Civ.P. 1.190(b) is whether the issue was tried by implied consent. In support that the issue was tried by implied consent, Appellant contends as follows: (1) the evidence presented at the evidentiary hearing, as described in the issues below, went without objection by Appellee at the hearing. It should be noted that Fla.R.Civ.P. 1.190(b) doesn't even require a motion be filed if no objection is made by the opposing party to the introduction of evidence, the pleading is deemed amended. (emphasis added). (2) the State had ample opportunity to cross-examine all the witnesses

and, in fact, did. The State also had ample opportunity to introduce evidence in an attempt to either impeach Appellant's witnesses or clarify issues. (3) The State was not prejudiced because the pleading was clear that the Appellant was attacking the DNA procedures, protocols, Dr. Pollock's qualifications and conclusions, the population database, and the State's failure to provide documents and names of witnesses who could provide favorable evidence. (4) The issue of DNA and the database is meritorious because the science was novel and it was important for the defense to have received every opportunity to present contradicting evidence to the jury.

However, even if Appellant failed to cross all the t's and dot all the i's regarding Fla.R.Crim.P. 1.190(b), the trial court should have considered the motion to amend in light of Fla.R.Crim.P. 1.190(e):

> **(e) Amendments Generally.** At any time in **furtherance of justice**, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. (emphasis added).

In Rosier v. State, 603 So.2d 120 (5th DCA 1992), the court held:

> Amendments and supplements to rule 3.850 motions are commonplace. See, e.g., Wright v. State, 581 So.2d 882 (Fla.1991); Herring v. State, 580 So.2d 135 (Fla.1991). We believe that the principle expressed in Florida Rule of Civil Procedure 1.190(e) applies here:
> At any time in **furtherance of justice**, upon such terms as may be just, the court may permit any process, proceeding, pleading or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. **At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties**.
> The civil rule is pertinent because post-conviction collateral remedies such as those initiated under rule 3.850 are in the nature of independent collateral civil actions. See State v. White, 470 So.2d 1377, 1378 (Fla.1985). In State v. Lasley, 507 So.2d 711 (Fla. 2d DCA 1987), the court noted that, "[l]ike a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of rule 3.850 within the criminal rules." (emphasis added).

Appellant is mindful that this case is nearly 19 years old. That "shell motions" are no longer tolerated. However, if the State is accurate that specificity is so stringently adhered to, then we have unfortunately gone to two extremes: from shell motions which say practically nothing with specificity to motions that require every word a witness might testify to. Neither of these extremes provides justice to either party; there has to be a middle ground. Appellant hopes this Court is mindful that

postconviction proceedings do not permit discovery in the manner provided by Rules of Criminal Procedure. Lewis v. State, 656 So.2d 1248 (Fla. 1994).

It is commonplace, whether discovery is provided or not, to have witnesses present more testimony at trial or a hearing than was available to the attorneys for either side prehearing. According to the State's argument, if a witness provides more information (whether through testimony or records) at a postconviction hearing that wasn't available or included in the motion, it can't be utilized in support of the motion. Appellant contends that if that statement is true, it would cause absurd results and be tantamount to no justice at all.

Appellant contends that the trial court abused its discretion by denying Appellant's Motion to Amend the Pleading to Conform with the Evidence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT NO BRADY OR GIGLIO VIOLATION OCCURRED?

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. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The standard of review is *de novo*.

To establish a Giglio violation, the defendant has the burden to show (1) the testimony given was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. Giglio v. U.S., 405 U.S. 150 (1972). The standard of review is *de novo*.

The trial court denied Appellant's claim "as facially insufficient." (PCR 2042). The trial court explained, "The Defendant has had ample opportunity through pleadings and the evidentiary hearing to present evidence in support of 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." (PCR 2042). As support for its explanation, the trial court cited to Defendant's Motion at 9, 25-29, filed May 23, 2005. (PCR 2042).

However, the trial court failed to consider the allegations of Brady expressed in Appellant's postconviction motion at pages 9-25. Within these pages Appellant argued ineffective assistance of counsel and Brady violations as alternative positions **"[t]o the extent**

the state withheld documents regarding the DNA testing, the state violated *Brady*" (PCR 789, 798, 799, 805)(emphasis added.

This Court has recognized an alternative pleading. Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (Hildwin argues that the State withheld exculpatory evidence in derogation of Brady. Alternatively, Hildwin contends that his trial counsel was ineffective for failing to discover that evidence.); Freeman v. State, 761 So.2d 1055 (Fla. 2000)(He further contends that to the extent that these claims are not cognizable under Brady, they demonstrate ineffective assistance of counsel.); Jennings v. State, 782 So.2d 853 (Fla. 2001)(Appellant raises a backup ineffective assistance claim based on Crisco, such that if the Court declines to find a Brady violation because Crisco's testimony was already possessed by appellant independent of the State's notes, then defense counsel was ineffective for failing to use the information during the penalty phase.)

Notwithstanding the trial court's finding, Appellant's postconviction motion and evidentiary hearing evidence did in fact spell out factual allegations constituting the invalidity of the DNA testing, results, and conclusions, as well as lack of acceptance in the scientific community. In addition, the documents and name not provided by the State,

although requested as described below, were: FDLE protocols, calculated fragment lengths, bench notes, and the name of Shirley Zeigler

Appellant's postconviction motion states: “Some examples include the following: preservation of evidence compromised due to inadequate collection and storage resulting in degradation, contamination due to the fact that the lab pulled out reference samples and questioned items and simultaneously placed in gel; faint probes relied upon; base pairs beyond standard cutoff for declaring a match, band sharing, change of protocol midway through testing; conflicting results between two different FDLE analysts; and sizing programs utilized provided for manual overrides.” (PCR 793).

Prior to trial defense counsel requested, but did not receive, much of the discovery requested below.

(1) An Indictment was filed against Mr. Taylor on March 7, 1991 (R 5).

(2) The Public Defender filed a demand for discovery on March 12, 1991 (R 10-13). Mr. Tassone was appointed to represent Mr. Taylor on May 2, 1991 (R 25). Mr. Tassone filed his demand for discovery on May 29, 1991 (R 29-31). The State

filed its first response to demand for discovery on May 20, 1991 (Defense EH Exhibit 6).

(3) An order appointing Dr. Goldman (Defense DNA expert) was filed September 20, 1991 (R 87).

(4) Dr. Pollock's deposition was taken on September 4, 1991 (State's EH Exhibit 9).

(5) Mr. Tassone filed a Motion for Production of Favorable Evidence on September 26, 1991 (R 115-118).

(6) The State submitted some DNA discovery on or about September 27, 1991 (Defense EH Exhibit 5).

(7) Mr. Tassone conducted a telephonic conference with Dr. Goldman on October 1, 1991 (Defense EH Exhibit 14).

(8) The State submitted Dr. Pollock's case notes to Mr. Tassone on or about September 27, 1991 (PCE Vol. II, 221-222)).

(9) Mr. Tassone filed a Second Motion for Continuance on October 4, 1991 (R 161, PCE Vol. III, p436-438) indicating the records requested were not received by Dr. Goldman until a week or more after they were requested.

(10) Trial for this case began on October 7, 1991.

The demand for discovery and request for favorable

evidence filed by the defense was clearly seeking all information from anyone having any knowledge about the case.

In paragraph 1 of the demand for discovery, counsel requested the names and address of all persons known to the prosecutor to have relevant information to the offense charged and to any defense with respect thereto.

In paragraph 10 in the demand for discovery, counsel requested: reports or statements of experts made in connection with this particular case, including reports of evidence technicians and crime lab personnel; and results of physical or mental examinations, as well as scientific tests, experiments, or comparisons.

At paragraph 12 of the demand for discovery, counsel requested material that tends to negate the guilt of the accused as to the offense charged.

Appellant's Motion for Production of Favorable Evidence specifically requested any and all evidence “which may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory, regardless of the fact that such evidence or information is the fruit of the work product of the prosecutor.” (R 115).

The State's last response to demand for discovery was filed on September 26, 1991 (PCE Vol. II, p224-225). None of the six responses list Shirley Zeigler (FDLE analyst), Paul Dohlan (FDLE supervisor), or the name of the individual with the initials TMW (these initials appear on the page entitled PROBINGS on State's Exhibit 7). In addition, Defense Exhibit 17, FBI/FDLE protocol (PCE Vol. III, p451-485), was not provided to the defense. These protocols established that Dr. Pollock either changed the protocol or violated the protocol in his conclusions.

At Dr. Pollock's deposition on September 4, 1991 (Defense Exhibit 15, PCE Vol. III, p395-435), he fails to mention Shirley Zeigler or the identity of the person with the initials TMW. The only document Mr. Tassone referenced during Dr. Pollock's deposition was Dr. Pollock's report, which was generated on July 17, 1991 (PCE Vol. I, p110-111).

At the evidentiary hearing, Mr. Tassone indicated he believed that Mr. de la Rionda, at his request, wrote to Dr. Pollock (PCE Vol. II, p221-223) requesting the following items: copies of the autoradiograms, population database, case file, photographs of the DNA gels, as well as the description of the database and procedures used to obtain the DNA results. In addition, EH Defense Exhibit 5

indicates that the State forwarded Dr. Pollock's case notes to Mr. Tassone on or after October 3, 1991. Mr. Tassone's billing records (PCE Vol. III, p388-392) indicate that he had a one-and-a-quarter hour conversation with Dr. Goldman on October 1, 1991.

On October 4, 1991, Mr. Tassone filed his Second Motion for Continuance (R 161) indicating, among other things, that Dr. Goldman did not have enough time to prepare his report or findings, and he could not attend the trial scheduled for October 7, 1991. This Motion was filed after Mr. Tassone spoke with Dr. Goldman on October 1, 1991. A hearing was conducted on the Motion for Continuance on October 4, 1991 (PCE Vol. III, p364-385). At that hearing, Mr. Tassone informed the Court that he did not intend to call Dr. Goldman as a witness based upon the information he, Mr. Tassone, had received up to a week before the hearing. However, Mr. Tassone indicated that he might need to speak with Dr. Goldman telephonically during the trial. On October 7, 1991, the day of trial, Mr. Tassone withdrew his Motion for Continuance (PCE Vol. III, p386-387). The record is silent as to whether Mr. Tassone ever spoke with Dr. Goldman during the trial.

Mr. Tassone testified at the evidentiary hearing (PCR 1371, 1373) the records indicated to him the first time he

heard the name “Shirley Zeigler” was during Dr. Pollock’s cross-examination during trial(PCR 1371-1372); at that point, Dr. Pollock identified the initials SFZ (R 607) on the Calculated Fragment Lengths Report[9] (PCE Vol. II, p260-263) as being Shirley Zeigler. Mr. Tassone testified that neither the State's witness list, nor his witness list, contained Shirley Zeigler's name (PCR 1369). The first time Mr. Tassone was made aware of Shirley Ziegler was at trial when Dr. Pollock identified her initials (PCR 1371-1373).

In addition, Mr. Tassone testified that the records referenced in Defense EH Exhibit 5[10] probably weren’t produced until after September 27, 1991, because he wouldn’t have made a second request if they were in his possession (PCR 1375, 1377). Moreover, Defense EH Exhibit 5 indicates he only received the case notes on or after October 3, 1991. At the evidentiary hearing, Mr. Tassone testified that he would have wanted to know before trial that another FDLE analyst disagreed with Dr. Pollock’s opinions regarding a match on the probes (PCR 1380). At the

[9] Webster’s Ninth New Collegiate Dictionary, 1991 defines *report* as “to give an account; to make a written record or summary.”

[10] The records requested in Defense EH Exhibit 5 were audioradiograms, population database, case file, photographs of the DNA gels, as well as a description of the database and the procedures used to obtain the DNA results.

evidentiary hearing, Shirley Zeigler testified she found two probes inconclusive: D1S7 and D4S139.(PCR 1266, 1267). In addition she testified that if Dr. Pollock testified they were a match, that testimony would be a violation of protocol (PCR 1267). Dr. Libby (Defense DNA expert) testified at the evidentiary hearing three probes were inconclusive: D1S7 (PCR 1444, 1633), D4S139 (PCR 1633) and D17S79 (PCR 1521). In addition, Dr. Libby testified that the FBI utilizes five to eight probes, while Pollock only utilizes four probes (PCR 1505). Further, Dr. Libby testified that he visited an FBI facility and found the database unreliable (PCR 1554). One reason he found the database unreliable is because of the differences in the calculated lengths between analysts (PCR 1470-1471).

At page 14 of its order, the trial court assigned little weight to Dr. Libby's testimony:

> "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 430-31, 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.”

Appellant concedes a trial court has the discretion to accept or reject the credibility of an expert. However, that discretion can be abused when based upon improper reasons. The trial court's reasoning for lack of credibility of Dr. Libby is “forensic” experience. Dr. Libby's vitae establishes his substantial experience regarding DNA and genetics (Exhibit 18, PCE Vol. 3, p439-450). In addition, Shirley Zeigler's testimony was more in tune with Dr. Libby than Dr. Pollock. Experience in forensic science is not required when the expert is experienced on the subject matter, footnote 10, Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994). The Vargas court found:

> At oral argument, appellee suggested that the relevant scientific community in the instant case is limited to forensic scientists. **We do not believe the relevant community is so narrow.** See for example U.S. V. Porter, 618 A.2d 629, 634 (D.C.App.1992), quoting the trial court to the effect that the relevant scientific community includes “ ‘those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it,’ ” and noting that there is no question that forensic scientists accept the evidence as reliable for use in criminal trials. (emphasis added).

Coincidentally, Dr. Pollock testified for the State in Vargas in 1991, before Appellant's case went to trial. Non-

forensic experts testified for Vargas and the appellate court held: “we conclude that the FBI's method for estimating population frequencies, which relies on the product rule, has not found general acceptance in the field of population genetics.” Vargas, 640 So.2d at 1150.

The Vargas case is a prime example of how the Frye standard regarding databases existed in Florida in 1991.

> Appellant first argues, and we agree, that he is entitled to challenge the DNA profile evidence as novel scientific evidence because he complied with the requirement set forth in Correll v. State, 523 So.2d 562, 567 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988), by making “a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed,” even though the same type of evidence has already been received in a substantial number of Florida cases. Of the few Florida appellate decisions that discuss the admissibility of DNA profile evidence, none have considered a challenge to the adequacy of the data bases used to calculate the probability that someone other than the defendant might have the same DNA “fingerprints” as defendant. Id. at 1143.

Mr. Tassone testified that based upon the information that Dr. Goldman received, the doctor did not have any complaints with FDLE’s testing process (EH248). However, Mr. Tassone also testified that this was his first DNA case, and if he had been provided with all of the State’s evidence in sufficient time for the trial, he would have

had Dr. Goldman at the trial to properly and thoroughly impeach Dr. Pollock's trial testimony (PCR 1387-1390).

For example, Dr. Goldman could not know that Dr. Pollock changed the FBI protocols. Dr. Pollock testified at trial "I have found that it's not necessarily a better protocol" (R 606). Dr. Pollock also took it upon himself to cross out the FBI protocol, which states that base pairs in excess of 10,094 are inconclusive (PCE Vol. III, p451-485). It is important to note the FBI protocols that FDLE was using has substantial marking on practically every page indicating there was a substantial change from the FBI protocols (PCE Vol. III, p451-485).

In addition, Dr. Goldman did not speak with Mr. Tassone regarding the validity of the population database or about the calculated fragment lengths (PCR 1387-1389). Finally, Mr. Tassone could not speak with Dr. Goldman about Shirley Zeigler's findings and testimony because Mr. Tassosne didn't know she existed or had possession of necessary documents at the time he spoke with Dr. Goldman.

It is also important to examine the fact that Mr. Taylor was charged with Sexual Battery of Ms. Vest. Dr. Floro testified at trial, "Well, I will answer in a way that I recovered specimen in the vagina containing sperm, so there was ejaculation in the vagina." (R Vol. XVIII,

p350). However, as acknowledged by this Court above: “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.”

At the evidentiary hearing, the State introduced Exhibit 7 (PCE Vol. I, p57-64). These pages represent the calculated fragment lengths of the four loci measured by Dr. Pollock and Shirley Zeigler. Item 67-E, lane 9 and 10 represent the DNA sample from the swab (PCR 1690) (Exhibit KKK at trial). At locus D17S79 for 67-E Dr. Pollock reported a band detected at lane 9 (female fractions) and no band detected at lane 10 (male fractions). However, Shirley Zeigler detected a band at both lane 9 and lane 10 for 67-E. While both Shirley Zeigler (PCR 1279) and Dr. Pollock (PCR 1689) agreed this was a discrepancy in their findings. Dr. Pollock stated he did not report the finding of the band at lane 10 because the bands detected at 67-E belonged to the victim, were not foreign to her, and, therefore, had no probative value (PCR 1689-1690, 1693, 1726, 1728).

Of course, there was probative value. Mr. Taylor was charged with Sexual Battery. Yet, no male DNA was found on the swab. Dr. Pollock is supposed to be a scientist;

scientists are not supposed to make subjective or legal determinations. They are to report what they find, regardless of the results or their value. The State was aware that no male DNA was found on exhibit 67-E, yet they failed to provide the documents in sufficient time for the defense to take advantage of that result, nor did they correct the testimony at trial. In fact, the State elicited testimony regarding sperm knowing there was no valid DNA identifying Mr. Taylor.

Since the State’s response to Mr. Tassone’s Demand for Discovery did not indicate that the DNA evidence contained exculpatory information, Mr. Tassone was essentially sandbagged into: (1) not calling Dr. Goldman to testify, (2) not having Dr. Goldman present during the trial, (3) withdrawing his Motion for Continuance, (4) being unable to discern what information Shirley Zeigler could supply, and (5) being unable to call her as a witness to impeach Dr. Pollock's trial testimony.

The facts establish that the State suppressed records and the names of vital individuals that weren’t provided until shortly before and during trial (PCE Vol. II, p221-223) and, consequently, counsel could make no use of this information. This information was fundamental to the defense to establish: (1) Dr. Pollock’s testimony was false

and went uncorrected by the State[11], (2) Dr. Pollock's opinion about DNA matching Steven Taylor would be impeached by another FDLE analyst. In addition, Shirley Zeigler's name was not provided until Dr. Pollock's cross-examination at trial. Thus, the information was not disclosed in time for its effective use at trial. United States v. Campagnuolo, 592 F.2d 852, 860-861 (5th Cir. 1979)(It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial, and that the effective implementation of Brady v. Maryland must therefore require earlier production in at least some situations.)

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A FRYE HEARING, OBJECT TO ADMISSION OF DNA EVIDENCE AND DATABASE, AND OBJECT TO POLLOCK'S TESTIMONY ABOUT DNA?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

[11] Napue v. People of the State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed.2d 1217 (1959); Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Assuming no Brady violation occurred, as described in Issue II above, trial counsel was ineffective in failing to request a Frye[12] hearing, object to admission of DNA evidence, and object to Dr. Pollock's testimony about DNA.

In denying this claim, the trial court stated, “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.” (PCR 2033). In addition, the trial court held, “To the extent the Defendant claims that trial counsel failed to challenge the admissibility of the DNA evidence pursuant to Frye, the Defendant's claim is denied...(PCR 2033)” and “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.” (PCR 2034). (emphasis added).

The trial court's finding of a procedural bar on ineffective counsel pertaining to the admissibility of evidence is patently wrong. Postconviction is the only means to attack ineffective assistance of counsel and it is

[12] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

not procedurally barred. However, the second finding above is the crux of this issue anyway—ineffective assistance.

The trial court's reliance upon Armstrong v. State, 862 So.2d 705 (Fla. 2003) for denying Appellant's claim is misapplied. This Court in Armstrong never stated nor even suggested that counsel had no obligation under Frye, only that "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."

> 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. Id. at fn 7. (emphasis added).

Appellant contends that the only true difference between the application of Frye in Appellant's case and that of his co-defendant, Murray, is that Murray's attorneys were more knowledgeable and effective. Appellant went to trial in October 1991. Murray went to trial in

February 1994. Brim wasn't decided until 1997, and Armstrong was decided in 2003. Yet Murray received the benefits of more refinements and additions which had evolved since Appellant's trial because Murray escaped and Murray's attorneys raised those issues at his trial, while Appellant's counsel did not.

However, Appellant contends that since Murray was Appellant’s co-defendant, Murray should not be rewarded by the application of Brim, supra, and Appellant precluded from its application merely because Murray's counsel was more effective than Appellant's and because Murray's escape provided time for Frye to evolve. The factors in Brim should equally apply to Appellant, especially since the two analysts in Appellant's case disagreed, as they did in Murray. In fact, this Court found the DNA unreliable in Murray on the same issue - differing expert opinions:

> The State's argument that the two inconsistent reports meet the requirements of "a second independent review" is unavailing. If the purpose of the second review is to assure the reliability of the testing, this is hardly accomplished when the analyst conducting the initial testing and his supervisor conducting the "independent review" reach opposing conclusions. **The results from the DNA testing become more uncertain, rather than more conclusive. This defeats the entire purpose of a second independent review and renders the initial review meaningless.** Accordingly, as the defense experts explained, one of the elements of a second independent review is to ensure that the results of the

> initial review were reliable, and should the two analysts disagree, the tests should be deemed inconclusive in the absence of further analysis. (emphasis added).

Murray v. State, 838 So.2d 1073, 1081 (Fla. 2002).

That being said, in the instant case, the trial court applied no test of the prevailing law at the time of trial to measure counsel's performance pursuant to Frye. Yet, a test did exist. In Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988), the court acknowledged a leading commentator set forth the requirements of Frye.

> One leading commentator has summarized Frye as requiring courts to determine: (1) the status, in the appropriate scientific community, of the scientific principle underlying the proffered novel evidence; (2) the technique applying the scientific principle; and (3) the application of the technique on the particular occasion. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States A Half Century Later, 80 Columbia Law Rev. 1197, 1201 (1980). Id. at 843.

Although the Court in Andrews incorrectly applied the relevancy test, rather than the Frye test, it assessed Andrews' concerns utilizing the standard above and found the evidence met the Frye test. Id. at fn 6. Since Andrews, the Frye test was confirmed as the method to be utilized in Florida by this Court Stokes v. State, 548 So.2d 188 (Fla. 1989), and Flanagan v. State, 625 So.2d 827 (Fla. 1993) to determine the admissibility of new novel science. This

Court referred to Judge Ervin's concurring opinion in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991) for an "excellent and thorough discussion of this issue." Judge Ervin cited to the same authority as did the court in Andrews, as expressed above, for the required application of Frye in Florida. Id. at 1112.

There were many cases throughout the country where DNA and databases were questioned at and around the time of Appellant's trial: Martinez v. State, 549 So.2d 694 (Fla. 5th DCA 1989)(Statistics are admissible when there is sufficient basis of an adequate scientific and factual basis); State v. Pennell, 584 A.2d 513 (Del.Super.Ct.1989) (admitting Cellmark's DNA test results showing match of blood of victim and blood found in carpet stain in defendant's van, but rejecting Cellmark's probability evidence as not shown to be reliable or resting on sound scientific base); State v. Schwartz, 447 N.W.2d 422, 428 (Minn.1989) (accepting use of forensic DNA typing but declaring test results inadmissible because laboratory did not follow appropriate standards and controls or make its testing data and results available); People v. Castro, 144 Misc.2d 956, 970, 974, 545 N.Y.S.2d 985 (N.Y.1989) (DNA forensic identification evidence meets *Frye* standard but, because testing laboratory failed to perform accepted

scientific techniques and experiments in several major respects, evidence of "match" excluded); Caldwell v. State, 260 Ga. 278, 290, 393 S.E.2d 436 (1990) (DNA test results admissible, but evidence of probabilities derived from data base of testing laboratory inadmissible, but more conservative estimate of probabilities admissible); Commonwealth v. Curnin, 565 N.E. 2d 440 (Mass. 1991)(... we conclude that there is no demonstrated general acceptance or inherent rationality of the process by which Cellmark arrived at its conclusion that one Caucasian in 59,000,000 would have the DNA components disclosed by the test that showed an identity between the defendant's DNA and that found on the nightgown.); United States v. Two Bulls, 918 F.2d 56 (8th Cir. 1990)(The trial judge should rule as a matter of law (1) whether the DNA evidence is scientifically acceptable, (2) whether there are certain standard procedures that should be followed in conducting these tests, and (3) whether these standards were followed in this case).

As late as 1994, the FBI data base was not generally accepted in the scientific community. State v. Anderson[13],

[13] Dr. Randall Libby (Appellant's expert) was one of the expert witnesses for the defense in Anderson and was qualified as an expert in molecular biology and forensic DNA testing.

115 N.M. 433 (N.M. App. 1993)(because we do not find general scientific acceptance of the FBI database, we reverse the trial court's order admitting the DNA evidence and remand for further proceedings.); Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994)(Having reviewed the expert testimony in the instant case, as well as scientific and legal writings, and judicial opinions from other jurisdictions, we conclude appellant has demonstrated that the method by which FDLE arrived at population frequencies of one in 30 million and one in 60 million, using the FBI data bases, is not generally accepted in the relevant scientific community.)

Additionally, there were a number of articles questioning the validity of DNA in a criminal proceeding: The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stanford L.Rev. 465 (1990); Lewontin and Hartl, Population Genetics in DNA Typing, 254 Science 1745 (1991); Mayserak, DNA Fingerprinting Problems for Resolution, 36 Medical Trial Technique Quarterly 441 (Summer 1990); Thompson & Ford, DNA Typing: Acceptance and Weight of the New Genetic Identification Tests, 75 Vir.L.Rev. 45 (1989); and Thompson & Ford, Is DNA Fingerprinting Ready for the Courts? New Scientist, March 31, 1990; Risch & Devlin, Probability of

Matching DNA Fingerprints, 255 Science 717, February 7, 1992; and Imwinkleried, The Debate in the DNA Cases Over the Foundation for the Admission of Scientific Evidence: The Importance of Human Error as a Cause of Forensic Misanalysis, 69 Wash. U.L.Q. 19 (1991).

It was not until 1995, four years after Taylor's trial, that the Florida Supreme Court took judicial notice: “that DNA test results are generally accepted as reliable in the scientific community” and then, the Court did so: “*provided* that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination.” *Hayes* v. *State*, 660 So, 2d 257, 264 (Fla. 1995). Therefore, the only conclusion at the time of Taylor's trial is that DNA and the FBI database was not generally accepted in Florida, and was subject to a Frye test. At the evidentiary hearing, Dr. Libby (defense expert) testified that RFLP was still in debate in 1991 (PCR 1582).

The trial court's order in this case did not apply any standards required by Frye at the time of Appellant's trial to counsel's performance. Therefore, Appellant attempts to do so below.

DEFIFICENT PERFORMANCE

Pleadings - Appellant's postconviction motion (PCR 781-892) set out the following allegations to establish counsel's ineffective assistance in failing to request a Frye hearing, failure to object to admission of DNA evidence, and failure to object to Dr. Pollock's testimony about DNA and/or the FBI database:

- Trial counsel was aware of the State's intention to use DNA evidence at Mr. Taylor's trial. (PCR 789).
- At the time Mr. Taylor was tried (October 1991), the use of DNA evidence in criminal prosecutions in Florida was in its infancy. (PCR 789).
- Taylor's case was one of the first cases in which the Florida Department of Law Enforcement (FDLE) conducted testing in its own laboratory. (PCR 789).
- Preservation of evidence was compromised due to inadequate collection and storage resulting in degradation. (PCR 793).
- Contamination occurred when the lab pulled out reference samples and questioned items, then simultaneously placed them in gel. (PCR 789).
- Faint probes were relied upon. (PCR 789).

- Base pairs beyond standard cut off for declaring a match. (PCR 789).
- Band sharing. (PCR 789).
- Change of protocol midway through testing. (PCR 789).
- Conflicting results between two different FDLE analysts. (PCR 789).
- Sizing programs utilized provided for manual overrides. (PCR 789).
- Dr. Pollock's knowledge regarding the FBI population database was insufficient. (PCR 789).
- The FBI database was materially flawed. (PCR 789).
- The genetic loci (alleles) are unreliable. (PCR 795).
- Male and female fractions are improperly appearing on the same loci. (PCR 795).
- Evidence suggests the possibility of an improper transfer of Taylor's DNA. (PCR 795).
- Degradation problems are present in other loci. (PCR 795).
- Dr. Pollock’s results are inconsistent and incompatible with standard protocol accepted and practiced by qualified experts in DNA evidence. (PCR 796).
- Dr. Pollock's procedures for subjecting the evidence in question to DNA analysis were fundamentally flawed

and the results were scientifically unreliable. (PCR 796).

Evidentiary Hearing -

Mr. Tassone - Mr. Taylor's case was Mr. Tassone's first DNA case (PCR 1393). In addition, counsel was not knowledgeable about Frye hearings, and he did not research the issue (PCR 1393). Mr. Tassone testified that he "probably" didn't know that novel science was subject to a Frye test (PCR 1395). In addition, Mr. Tassone testified: "I do not recall doing any research or having any knowledge about the Frye test at the time of Mr. Taylor's case (PCR 1398)."

Mr. Tassone also expressed his knowledge about his obligation to request a Frye hearing: "Based on what I read of the ABA guidelines and what in my opinion has been adopted by the United States Supreme court in Rompilla versus Beard[14] I should have asked for a Frye test." (PCR 1397).

Mr. Tassone would have wanted to know that Shirley Ziegler found two of the four DNA probes used were inconclusive (PCR 1380-1381). Mr. Tassone testified Dr. Goldman did not visit the FDLE lab or review their

[14] Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)

procedures (PCR 1388). Mr. Tassone had no recollection whether he spoke with Dr. Goldman about Dr. Pollock's deposition (PCR 1388). Mr. Tassone had not requested nor received FDLE lab protocols (PCR 1389). Neither Mr. Tassone nor Dr. Goldman knew about Shirley Zeigler's differing opinion prior to trial (PCR 1389). Mr. Tassone testified that he probably didn't inform Dr. Goldman about the requirements of Frye when requesting his opinion (PCR 1396). Mr. Tassone expressed that Dr. Goldman may have had a different opinion regarding FDLE DNA procedures had Dr. Goldman been informed of the requirements of Frye (PCR 1396). Mr. Tassone testified he should have requested a Frye hearing (PCR 1397). Mr. Tassone had no recollection discussing databases with Dr. Goldman (PCR 1398-1399). Mr. Tassone did not request or see any proficiency tests of FDLE lab analysts, but would have wanted to see them (PCR 1401, 1404). Mr. Tassone testified that the court admitted Dr. Pollock as an expert in DNA analysis and serology, but not for statistics or databases (PCR 1404-1405). Mr. Tassone acknowledged that although Dr. Pollock, in fact, testified about statistics, he did not object (PCR 1405).

At the evidentiary hearing, Mr. Tassone indicated that he had concerns about Dr. Pollock’s qualifications (PCR

1394), but didn't know why he didn't object to Dr. Pollock being admitted as an expert (PCR 1395).

In addition, during closing argument the State pointed out to the jury that Mr. Tassone didn't object to Dr. Pollock's qualifications, thereby bolstering Dr. Pollock's opinion.

> Well, the witness who testified as an expert qualified by us as an expert frankly accepted by the defense as an expert all he failed to do was stipulate. I don't even think there was an objection, recall that there was not objection. He said, I can't stipulate he's an expert but regardless the Court determined that he was an expert (R711).

When Dr. Pollock started to testify about the FBI database and statistical probabilities, Mr. Tassone again did not object. The trial court found Dr. Pollock as an expert in "forensic serology and expert in DNA analysis (R569)," not statistical probabilities or databases.

In addition, the trial court stated that he would state on the record why he was admitting Dr. Pollock as an expert, but never did. When Mr. Tassone was asked why he didn't remind the court, he testified that he didn't recollect why, but that he should have (PCR 1395).

It was quite clear from Mr. Tassone's evidentiary hearing testimony that he had little, if any, knowledge about how to attack novel science or the requirements of

Frye, and failed to investigate the issue. In addition, Mr. Tassone did not posses all of the documentation or information regarding the DNA procedures, documents, database, protocols, or persons associated with the testing done by FDLE, and, as a result, neither did Dr. Goldman. Mr. Tassone acknowledged that he was deficient in applying the American Bar Association standards.

Calculated Fragment Lengths (PCE Vol. I, p57-64) -

The Calculated Fragment Lengths reports by Dr. Pollock p57-60 and Shirley Zeigler p61-64 represent the computer sizing of the autorads.

At trial, Dr. Pollock testified that four loci (loci, alleles, and probes are interchangeable terms) were utilized in testing the DNA found in item I-28 and 67-E. He stated 28-I (cuttings allegedly from a turquoise blouse) matched Steven Taylor (R Vol. XIX, p585). In addition, Dr. Pollock testified the probably that another random individual would match at the same locus is one in six million (R Vol. XIX, p593).

Dr. Pollock's printout of the Calculated Fragment Lengths (State Exhibit 7, Vol. I, p57-60) establishes the four loci tested were D2S44, D17S79, D1S7, and D4S139. Shirley Zeigler's printout of the Calculated Fragment Length (State Exhibit 7, Vol. I, p64-64) was a second

measurement of the same loci. Zeigler's measurement was a technical review required by FDLE protocol.

At the evidentiary hearing, the State asked Dr. Pollock whether the DNA testing methodology he set up at FDLE "adhered to acceptable methodology that was used in the scientific community, in the forensic scientific community?" Dr. Pollock responded, "Well, not precisely what we were doing in Florida, but the general FBI procedure was generally accepted, yes." (PCR 1698)(emphasis added). After acknowledging the FBI methodology was generally accepted, Dr. Pollock testified, "So in my procedure I crossed out that part of the FBI procedure where it says above 10 KB not interpreted." (PCR 1686).

However, in loci D1S7 and D4S139 for item 28I, no bands were detected in the male fractions (State Exhibit 7, Vol. I, p57-60). Conversely, Shirley Zeigler testified at the evidentiary hearing that locui D1S7 and D4S139 were inconclusive (PCR 1265-1266), and if Dr. Pollock testified they were a match, it was against protocol (PCR 1266). Dr. Libby testified at the evidentiary hearing that finding a result in the female fraction of D1S7 and D4S139 was not an expected result and should render an inconclusive opinion, which coincided with Shirley Zeigler's opinion.

When questioned about claiming a match where no bands were detected in the male fraction, but found male DNA in the female fraction, Dr. Pollock testified that there was no protocol against finding a match (PCR 1725). However, FDLE Protocol A2 & A5 below suggests differently because the band wasn't where it was expected to be. Dr. Pollock testified at trial that D1S7 and D4S139 matched Mr. Taylor even though the band appeared in the female fraction for a male suspect, which appears to be against FDLE protocol. Ironically, Dr. Pollock testified at the evidentiary hearing, “We would generally expect the sperm DNA to come out in the male fraction." (PCR 1702). But even if Dr. Pollock is correct that the protocol doesn't preclude such a finding, his own testimony was that what was being done in Florida wasn't generally accepted in the scientific community. (PCR 1698).

In addition, Dr. Pollock found a match on loci D4S139 at lanes 5 and 7, even though the base pairs were in excess of 10,094, which was in violation of FDLE (FBI) Protocols. Dr. Pollock testified that FBI was too conservative and he crossed out that part of the protocol (PCR 1685-1686), located at A 4 below. Not only was A 4 crossed out, practically the entire FBI/FDLE protocol, Defendant's Exhibit 17, PCE Vol. III, p451-585) has either been crossed

out or had added changes. The entire FDLE version of the FBI protocol has basically been changed. Dr. Pollock stated at the evidentiary hearing that what was being done in Florida at that time was not precisely generally accepted in the scientific community. (PCR 1698).

FBI (FDLE) protocol clearly states that base pairs in excess of 10094 are inconclusive. Also, if the allelic control bands are not found in the visually expected position, the autorad cannot be assessed further. It only seems logical if the autorads cannot be assessed if the control bands are not in an expected position, then when the bands for the unknowns are not in an expected position, they cannot be assessed either as suggested in A 5 below and supported by the testimony of Shirley Zeigler and Dr. Libby.

XV. ASSESSMENT OF AUTORADIOGRAPY DATA

There are four major steps in the assessment of autoradiograph (autorad) data. Each of these steps will be described.

A. Visual evaluation of autorads

1. Examine the lane containing the allelic control specimen K562. There must be either one or two bands, depending on which RFLP loci has been probed. If the allelic control specimen does not exhibit the expected number of bands for the locus being probed, the autorad cannot be assessed further.

2. Visually inspect the allelic control band(s) for their position relative to the adjacent size markers. Depending on the locus being probed, **the allelic control band(s) should be located in an expected position on the autorad. If the allelic control band(s) are not found in a visually expected position, the autorad cannot be assessed further.**

3. Visually inspect the lanes that contain size markers. The bands in these lanes must be of sufficient intensity to enable them to be used as size references for the allelic control, the known, and the questioned specimen bands. If regions of the size ladder lanes are not visible, specimen bands cannot be sized in these regions.

4. Visually inspect the lanes that contain known or questioned specimen DNA to assess the quality of the fragment bands. Determine if the bands in these lanes are extremely broad or exhibit pronounced band curvature. These band irregularities can signal potential mobility shifts. **~~If any fragment band for a specimen has migrated to a position that is greater than the position of the 10094 bp size marker band, the evaluation of that specimen at the locus is considered inconclusive.~~**

5. Based on the assessments of band quality and **band position**, decide which of the specimens will be subjected to the computer assisted band sizing procedure.

(PCE Vol. III, p471)(emphasis added).

In addition, Dr. Libby testified that loci D17 was also inclusive.

A I don't have a problem with the sizing on D17 but my comment is that it is not -- it's really inconclusive since the victim and the suspect both have the same size upper allele. So it's unclear who could have contributed to that. I would have not used that in a match calculation. (PCR 1632).

FBI Database - At the evidentiary hearing, Dr. Libby testified that in 1991, the FBI database was unreliable.

> Q By the way, with regard to the FBI data, did you also find that situation occurring where different analysts came up with the same -- different answers?
>
> A I've seen different sizings, are you speaking out of the database now?
>
> Q Uh-huh.
>
> A I've seen different sizes in their database.
>
> Q Was that in the 1991 database?
>
> A About that era.
>
> Q Has that affected the reliability of utilizing that database by outside labs?
>
> A Well, I think it cast a question over how useful is the database in terms of inferring statistical frequencies when, in fact, one is not sure if those sizings are accurate. (PCR 1524-1525).

As for item 67-E (vaginal swab), assuming no Brady violation, Mr. Tassone was ineffective in failing to establish before the jury that no male DNA was found on the swab, and therefore the State failed to prove that either Mr. Taylor or Mr. Murray sexually battered Ms. Vest.

Furthermore, Mr. Tassone was ineffective in failing to object to Dr. Pollock testifying about statistical probabilities. At trial, the court found Dr. Pollock “an expert in forensic serology and expert in DNA analysis...”

(R Vol. IX, p569). Mr. Tassone did not object. During Dr. Pollock's testimony he testified that the probability of Mr. Taylor's match as a conservative number of one in six million, and the probability of just the Caucasian database as one in 23 million. (R Vol. IX, p594. Dr. Pollock was not admitted as an expert in genetics or statistics and Mr. Tassone should have objected. Hall v. State, 568 So.2d 882 (Fla. 1990). In addition there was no testimony regarding how the database was collected, who was in the database, the regions where the samples were taken from, or the method that was utilized. Further, there was no testimony as to how the frequency of the statistics for each loci was determined or the mathematical formula used. Mr. Tassone should have objected to Dr. Pollock's testimony.

PREJUDICE -

At trial, the evidence associating Mr. Taylor with the offenses came from the testimony of a jail house snitch, Timothy Cowart; circumstantial evidence concerning Taylor's dirty hands; and DNA evidence. Absent the DNA evidence, there’s a reasonable probability the guilty verdict would have been different.

At the evidentiary hearing, Dr. Pollock (PCR 1668) and Shirley Zeigler (PCR 1262) both testified that the protocols that FDLE utilized were developed by the FBI.

However, Dr. Pollock modified the FBI protocols (PCR 1668) on his own accord. Assuming for argument’s sake that the FBI protocols and database were generally accepted in the scientific community, the DNA results should have been excluded because at least three of the loci were in violation of FBI protocols and should have been declared inconclusive. However, Appellant contends the FBI database was unreliable. In Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994) the appellate court found the FBI database unreliable. The hearing on the issue in Vargas took place in the same circuit as Appellant's case and occurred before Appellant's trial.

In Pickel v. State, 4D07-240 (Fla. 2nd DCA 2009) Judge Farmer assessed the effect of DNA: “In the world of trial evidence, DNA may well be the whole meghilla.” Mr. Tassone's failure to request a Frye hearing and present evidence as demonstrated above allowed the State to introduce flawed DNA and database evidence against Mr. Taylor.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT NO BRADY, GIGLIO, PROBABLE TAMPERING OF EVIDENCE, LACK OF FOUNDATION, AND BROKEN CHAIN OF CUSTODY OCCURED, AND COUNSEL WAS NOT INEFFECTIVE?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

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. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The standard of review is *de novo*.

To establish a Giglio violation, the defendant has the burden to show (1) the testimony given was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. Giglio v. U.S., 405 U.S. 150 (1972). The standard of review is *de novo*.

The Appellant's postconviction motion (PCR 781-892) and evidence presented at the evidentiary hearing alleged and established there was probable tampering of evidence,

lack of foundation, and a break in the chain of custody for the introduction of DNA evidence.

Appellant alleged the State misled the court and jury by introducing a white blouse rather than a green/turquoise blouse containing DNA evidence, thereby committing Brady and Giglio violations. In addition, and as an alternative claim, Appellant alleged trial counsel failed to object to the introduction of evidence and therefore was ineffective.

Brady and *Giglio* Claims -

The factual issue raised here is whether trial Exhibit 61 (blouse) was, in fact, the source of item I28 identified by Dr. Pollock during the trial as cuttings from a turquise/green blouse. Note, DNA was obtained from a cutting allegedly from a green/turquoise blouse, labeled as item I28.

Exhibit 61 was a blouse obtained from the victim's residence. During trial, Officer Powers identified item HH (Exhibit 61) as being a blouse collected from the victim's residence. (R Vol. XVIII, p288). Powers did not testify as to the color of the blouse, but did testify that the blouse was "..on the floor beside the bed." (R Vol. XVIII, p288). Mr. Tassone objected to its introduction on the grounds of relevance, which was granted. (R. Vol. XVIII, p288-289).

During Ms. Hanson's (FDLE analyst) trial testimony,

she stated she had performed testing on Item HH (introduced as Exhibit 61 without objection by Mr. Tassone)(R Vol. XIX, p537). However, she did not identify the color of the Exhibit, nor did she testify as to any connection between Exhibit 61 and item 28I (28I was testified to by Dr. Pollock).

Dr. Pollock testified at trial that he had examined his exhibit 28I as follows:

> That's my exhibit number 28I, which was identified as a stain from a blouse, this was a turquoise colored blouse with the staining areas was a couple of centimeters squared, and I extracted DNA from that particular exhibit and that was suitable for further analysis and was suitable for comparison with the DNA extracted from the known blood standard. (R Vol. XIX, p563).

None of the testimony offered by Officer Powers, Ms. Hanson, or Dr. Pollock associated Exhibit 61 with any connection to Dr. Pollock's item 28I, as either coming from the victim's residence, that Exhibit 61 and item 28 I are from the same cloth, or the color of Exhibit 61.

In denying this claim, the trial court's order is vague and confusing as to the Brady and Giglio violations. The trial court found “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.

(PCR 2024).

In its order on this issue, the trial court relied upon trial testimony and non-record documentation (FDLE bench notes, FDLE report, and Mr. de la Rionda's letter to the clerk) to make the following finding: “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 2042).

Appellant contends that the trial court has made a finding upon a rationalization of a predetermined result to find that Exhibit 61 was, in fact, a green/turquoise blouse. There is no direct or deductive evidence to conclude that the item marked at trial as exhibit HH (introduced as Exhibit 61) was, in fact, a green/turquoise blouse. Note, just because non-record FDLE documents indicated FDLE examined a turquoise blouse and because Mr. de la Rionda created a document allegedly indexing exhibits from Appellant's and Murray's trials years after without any corroboration, does not indicate Exhibit 61's color. In addition, there was no competent substantial evidence to establish that Exhibit 61 was the source of item 28I.

However, at the evidentiary hearing, Officer Powers testified the item he identified at trial was a white blouse (PCR 1193). Office Powers admitted on cross-

examination that he didn't specifically remember what he picked up that day. Yet, after reviewing his report and his testimony he believed the item he identified at trial was a white blouse. (PCR 1194-1195). Even Mr. Tassone understood item HH to be a white blouse after reviewing the court documents and Powers' report.

In its order denying Appellant's Brady and Giglio claims, the trial court also relied upon Mr. de la Rionda's letter to the clerk, State's Exhibit 1 (PCE Vol. I, p1-4). However, that exhibit was prepared on April 14, 1994, years after Appellant's and co-defendant Murray's trial. In addition, there was no testimony at the evidentiary hearing that Appellant's trial counsel was present when the state created its document or was provided a copy of State's Exhibit 1 to determine its accuracy. Furthermore, according to State's evidentiary hearing Exhibit 1 (PCE Vol. I, p4), trial Exhibit 61 at Appellant's trial was introduced as Exhibit 50 at Murray's trial. This transition of exhibit numbers clearly indicates that the exhibit had been handled by someone (breaking the chain of custody) since Appellant's trial and there was no appropriate paper trail or chain of custody to confirm whether Mr. de la Rionda's document is accurate.

Appellant contends that the trial court's denial of

the Brady and Giglio claim is erroneous. If Office Powers, in fact, identified a white blouse at trial, there is no question that this was a material fact, the State knew of the error, failed to provide that information to Mr. Tassone, and failed to correct the error. If the blouse was in fact white, it can only be concluded that the State changed the exhibit numbers, especially since Mr. de la Rionda prepared and filed a document describing Exhibit 61 as a "green blouse" in State's Exhibit 1.

Ineffective Assistance of Counsel Claim - Even assuming no Brady or Giglio violation occurred, trial counsel was not relieved from testing the State's case and requiring the rules of evidence be adhered to.

The trial court's order denying Appellant's postconviction Motion totally ignored Appellant's alternative argument of ineffective assistance of counsel claim on this issue.

During trial, Mr. Tassone failed to object to the introduction of Exhibit 61 during Ms. Hanson's testimony and failed to object to the testimony of Dr. Pollock regarding his findings on his item 28I. Relevance was not established between Exhibit 61 and item 28I, because no foundation connecting the two had been shown. Dr. Pollock was permitted, without objection, to testify about DNA

found on his item 28I as belonging to Appellant without the first iota of personal knowledge as to where item 28I came from. Dr. Pollock was permitted, without objection, to testify as to hearsay regarding the origin of that item. (R Vol. XIX, p583).

At the evidentiary hearing, Mr. Tassone testified he had no recollection of seeing State's item HH (Exhibit 61) (PCR 1356). Mr. Tassone also testified that after reading the trial testimony and reviewing Officer Powers' report (Exhibit 10 on Powers' report was a white blouse), he believed the item being identified by Officer Powers was in fact a white blouse (PCR 1358). After reviewing Mr. Powers', Ms. Hanson's, and Dr. Pollock's testimony, Mr. Tassone acknowledged that the record did not indicate any foundation for Dr. Pollock's testimony (PCR 1356-1366). Mr. Tassone had no recollection as to why he didn't object to either the introduction of Exhibit 61 or to Dr. Pollock's testimony regarding item 28I (PCR 1364).

No testimony was presented connecting item 28I to Exhibit 61. Therefore, Dr. Pollock's testimony regarding the origin of his item 28I was purely inadmissible hearsay and Mr. Tassone should have objected. Further, since there was no testimony how item 28I was collected, where it was collected, or any connection to Appellant's case, any

testimony by Dr. Pollock regarding his testing on item 28I was not relevant until a proper foundation had been laid. Therefore, Mr. Tassone should have objected to Dr. Pollock's testimony regarding item 28I. S.P. v. State, 884 So.2d 136 (Fla. 2nd DCA 2004); Whittington v. State, 656 So.2d 1346 (Fla. 1st DCA 1995); Brooks v. State, 918 So.2d 181, 211 (Fla. 2005)(Justice Pariente, concurring and dissenting in part).

As a result, Appellant was prejudiced by the admission of Exhibit 61 and the testimony of Dr. Pollock regarding his item 28I. Had Mr. Tassone objected, the State may not have been able lay the proper foundation, and therefore, Dr. Pollock would not have testified regarding DNA. Counsel was ineffective in failing to object.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS PREPARED FOR TRIAL AND THEREFORE NOT INEFFECTIVE?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The trial court denied this issue and stated, “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." When explaining its ruling, the trial court listed many questions and answers regarding DNA that were presented at trial. (PCR 2043-2044). At page 20 of the court's order, it states that the substance of Mr. Tassone's conversation with Dr. Goldman provided enough "ammunition" for Mr. Tassone to effectively cross examine the State's expert, Dr. James Pollack.

Appellant contends the ammunition (court's word, not Tassone's) to which the court refers in its order amounted to no more than **blanks**. In addition, trial counsel didn't have a gun (Shirley Zeigler) to shoot with. Furthermore, the trial court completely ignored the allegation contained in Appellant's postconviction motion that counsel failed to request a continuance and/or a Richardson[15] hearing. (PCR 805).

First, the court's recitation of the questions and answers provided at trial was nothing more than a discussion of the general science of DNA in the scientific

[15] Richardson v. State, 246 So.2d 771 (Fla. 1971).

community. In addition, Mr. Tassone failed to provide any expert testimony to support his alleged attack on DNA. None of those question provided supportive impeachment of Dr. Pollock's findings. Since Mr. Tassone nor Dr. Goldman knew of or spoke to Shirley Zeigler prior to trial they could not know that she would testify that two of the four loci Dr. Pollock found as a match to Mr. Taylor in her opinion were inconclusive (PCR 1370), or that Dr. Pollock violated two of the protocols established by the FBI (PCR 1266).

Second, trial counsel filed a written request for a continuance on October 4, 1991, three days before trial. (Exhibit 17, Vol. III, p436-438). The motion expressed that Dr. Goldman had not completed reviewing the records he had received, and he had a conflict with the trial date (PCE Vol. III p436-437). On October 7, 1991, the first day of trial, counsel withdrew his request for a continuance. (PCE Vol. III, p387). At the evidentiary hearing, Mr. Tassone had no independent recollection as to why he withdrew his Motion for Continuance (PCR 1387).

Third, it wasn't until Mr. Tassone was cross-examining Dr. Pollock that he found out that the initials SLZ represented Shirley Zeigler, another analyst with FDLE who had rerun the calculated fragment lengths (PCR 1380). Mr.

Tassone did not request a continuance or a Richardson hearing. When queried about this decision at the evidentiary hearing, Mr. Tassone had no recollection why he didn't (PCR 1381).

Had Mr. Tassone requested a continuance to depose Ms. Zeigler, it is quite likely it would have been granted, especially since the documents which were repeatedly requested were not provided in a timely fashion. Hill v. State, 535 So.2d 354, 355 (Fla. 5th DCA 1988) ("fairness, state and federal constitutional due process rights and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony")(emphasis added); Sumbry v. State, 310 So.2d 445, 446 (Fla. 2d DCA 1975) (defendant's due process rights were violated by the trial court's denial of a motion for continuance where existence of "two potential defense witnesses who could testify concerning the critical issue of identity" was disclosed to the defense on the morning of the trial); Smith v. State, 525 So.2d 477, 480 (Fla. 1st DCA 1988)(this court stated that “[a] denial of a motion for continuance will be reversed when the record demonstrates ... that adequate preparation of a defense was placed at risk by

virtue of the denial."); Beachum v. State, 547 So.2d 288 (Fla. 1st DCA 1989) (trial court's failure to grant continuance due to witness' absence constituted palpable abuse of discretion in that court found witness to be necessary for proper defense, despite fact that appellant had three months prior to trial to locate this witness yet waited until four days before trial to move for issuance of a subpoena); Lightsey *v. State*, 364 So.2d 72 (Fla. 2d DCA 1978) (trial court erred in denying continuance where due to state's tardy response to discovery demand, defendant was unable to depose certain witnesses or complete an investigation into the facts prior to trial). Brown v. State, 426 So.2d 76, 80 (Fla. 1st DCA 1983)(Adequate time to prepare a defense is inherent in the right to counsel and is founded on due process principles.); Griffin v. State, 598 So.2d 254 (Fla. 1st DCA 1992); Pickel v. State, 4D07-240 (Fla. 4th DCA 2009)(**As a matter of elemental justice we must recognize that the nature of DNA makes any failure to disclose such evidence well before trial strikingly consequential.)**(emphasis added).

Case law overwhelmingly supports a continuance regarding sufficient time to prepare and disclosure of information by the State, especially in DNA cases. Appellant contends that if it is error for a court to deny

a continuance in this type of situation, then counsel must be deficient in failing to request the continuance, especially when no strategy was involved, even though different legal standards apply. If true, than the only question left is prejudice.

Prejudice - Mr. Tassone established his unpreparedness at the evidentiary hearing when he testified this was his first DNA case (PCR 1382); he new very little, if anything, about the requirements of Frye (PCR 1393); he probably didn't know that Frye was related to novel science (PCR 1395); and he didn't do any research on the subject (PCR 1398).

Had Mr. Tassone requested and obtained a continuance to depose Ms. Zeigler, counsel would have obtained the proper weapon and ammunition to research novel science and learn about the requirements of Frye. At the very least, he would have discovered evidence with which to impeach Dr. Pollock's findings and to establish that Dr. Pollock violated two of FDLE's protocols.

As for a Richardson and Brady violation, Appellant concedes that they would have been to no avail at the time of trial. However, not for the reason stated by the trial court in its order, but because without deposing Ms. Zeigler, counsel could not establish a material breach of

discovery; hence the need for a continuance and further support for Issue II above.

Appellant contends that trial counsel was ineffective by failing to request a continuance in order to depose Shirley Zeigler, which would have provided substantial support for a Frye hearing, revealed missing documents, and impeachment of Dr. Pollock's findings.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THAT TIMOTHY COWART'S EVIDENTIARY HEARING TESTIMONY AMOUNTED TO NEWLY DISCOVERED EVIDENCE, OR VIOLATED BRADY AND GIGLIO?

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. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The standard of review is *de novo*.

To establish a Giglio violation, the defendant has the burden to show (1) the testimony given was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. Giglio v. U.S., 405 U.S. 150 (1972). The standard of review is *de novo*.

To obtain a new trial or new sentencing based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the exercise of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Marek v. State, 14 So.3d 985 (Fla. 2009).

In addition, “we review the trial court's application of the law to the facts de novo.” Id. at 990.

In its order denying this claim, the trial court found no Brady (PCR 2050), Giglio (PCR 2051), or ineffective assistance of counsel existed (PCR 2049). However, the order failed to consider the remaining claim of newly discovered evidence. Appellant's postconviction motion claimed in the alternative: “To the extent that this information was previously unknown, it constitutes newly discovered evidence.” (PCR 826).

In denying this issue, the trial court found “this newly revised portion of Mr. Cowart's testimony to be lacking in credibility.” (PCR 2048). Although recanted testimony is exceedingly unreliable, Armstrong v. State, 642 So.2d 730 (Fla. 1994), no exact standard has been set

out by this court regarding “clarifying testimony.”

The newly revised portion of Mr. Cowart's testimony that the court found lacking in credibility was: “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.” (PCR 2047).[16] As such, if Mr. Cowart's evidentiary hearing testimony (that "he" refers to Mr. Murray) lacks credibility, then logically, Mr. Cowart's trial testimony must be credible.

In its order, the court makes reference to Mr. Cowart’s previous statements on the subject. However, the court fails to explain why Mr. Cowart's trial testimony is not confusing and why his explanation at the evidentiary hearing for the confusion was not credible. The following was stated at trial by Mr. Cowart:

> Q: I want you to tell the jury what Mr. Taylor told you about this case.
>
> 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.
>
> A: That it was a messy job, that the lady surprised him inside of the trailer, and he

[16] It is important to note the trial court found no other portion of Mr. Cowart’s testimony as “lacking credibility.”

> stabbed her and then choked her and then had to strangle her with a cord to make sure she was dead.

(R. Vol. XIX p508-09). If Mr. Cowart's testimony was the Appellant's statement verbatim, as requested by the State, then it is illogical that Appellant would have said words like “him” and “he” if Appellant were referring to himself. It would only make sense if Appellant were referring to someone else, like Mr. Murray. This explanation was vehemently expressed by Mr. Cowart at the evidentiary hearing.

At the evidentiary hearing, Mr. Cowart was asked to describe what Mr. Taylor said happened, not repeat what Mr. Taylor said, which is what state required at trial. Mr. Cowart's response was as follows:

> Q Did Mr. Taylor tell you what happened that day?
>
> A Yes, sir.
>
> Q Would you please tell the court what it is he told you what happened?
>
> A I'm still lost.
>
> Q Well, did Mr. Taylor tell you about the offense?
>
> A Yes, sir. Is that what you're referring to?
>
> Q Yes, sir.
>
> A The actual case?

Q Right.

A Is that what you want me to do?

Q Tell me what he said happened.

A He told me that he went to do a burglary with a friend of his, he didn't mention the name, I found out the name later while we were talking, Gerald Dwayne Murray. They went to do a burglary, they were high, he took the guy up to the trailer, the guy got out of the trailer.

Q The guy, what guy is that?

A Gerald Dwayne Murray.

Q Got out of the what?

A Car, truck, the vehicle, he didn't specify, he just said we went up there to do this here. And he said, you know, the guy was in the house, you know, 30, a good while and I got worried.

Q Did Mr. Taylor say where he was at that time?

A He was in the car or in the vehicle waiting.

Q Okay.

A And he opened the door and this other dude just went berserk on this lady, beat her, choked her, stabbed her, raped her, just exactly what happened.

(PCR 1292-1293).

BY MR. REITER:

Q On number 19 were you repeating the words that Mr. Taylor told you verbatim?

A Yes, sir.

(PCR 1295-1296).

Q Prior to your trial were you going to show up?

Prior to this trial in Taylor were you going to show up?

A His first murder trial?

Q For Mr. Taylor's trial.

A No, sir.

Q Okay. How is it that they got a hold of you?

A Somebody contacted my family in Georgia and was telling they was going to get me with contempt of court for not showing up in court.

Q Was your family threatened?

A They was told that I'd be -- you know, they needed to get in touch with me, if they was harboring me they could get in trouble, there was a subpoena out for me to go to court.

Q Were you told by someone in the State Attorney's Office how you had to testify?

A Not exactly how I had to testify, but to testify to certain things.

(PCR 1296-1297).

On cross-examination, Mr. Cowart testified that his sworn statement and deposition were not correct. He told the State Attorney prior to his trial testimony that the Appellant told him that Mr. Murray choked, stabbed, and raped Ms. Vest (PCR 1314). At the end of cross-examination Mr. Cowart stated:

Q And then, "And that's what he told me to do

was to testify truthfully and honestly and don't hold nothing back and don't add anything to it, just tell the truth and answer the questions honestly."

A Yeah.

Q Did you do that?

A Yes, sir, but read your own statement where it says to tell the truth, don't hold anything back, you'll ask the question and it have to be answered yes or no and I won't get to explain what I was meaning in that yes or no.
You can ask a question about a certain thing, you can smile and walk away if you want to, I don't understand why you're mad at me about it. I'm telling the truth, I'm trying to do the right thing.

A. I'm not mad at you, sir, the record will speak for itself. Did you finish answering your question?

A I suppose, sir.

(PCR 1347). No motive was presented as to why Mr. Cowart would lie during the evidentiary hearing, other than "trying to do the right thing."

Further, the trial court's order fails to consider Mr. Cowart's newly discovered clarifying testimony in conjunction with all of the other evidence. Robinson v. State, 865 So.2d 1259 (Fla. 2004)(Newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion, the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then

evaluate the “weight of both the newly discovered evidence and the evidence which was introduced at the trial”).

Given the circumstantial nature of the evidence against Appellant, Mr. Cowart's clarifying testimony may very well have been the deciding factor to establish that it was Mr. Murray—and not Appellant—who killed Ms. Vest.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S COMMENT ON PRESUMPTION OF INNOCENCE AND THE INSTRUCTIONS ON PRESUMPTION OF INNOCENCE?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The trial court's order denied this claim because: "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" (PCR 2046).

However, Appellant claimed the fundamental right to be presumed innocent of the charges upon which a criminal defendant stands trial until the impaneled jury properly weighs the evidence and determines guilty beyond a reasonable doubt. (PCR 821-822).

Trial counsel did not object to either the prosecutor's statement that the presumption of innocence is gone because evidence was presented or to the instructions regarding presumption of innocence. The fact remains that Appellant's fundamental right to said presumption was violated.

At foot note 2 in Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), the court stated:

> We consider the prosecutor's comments impermissible because they undermined two fundamental aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and (2) is extinguished only upon the *jury's* determination that guilt has been established beyond a reasonable doubt.

The Mahorney court went on to further point out the following:

> Of particular significance in this regard is this court's opinion in *Brinlee v. Crisp,* 608 F.2d 839 (10th Cir.1979), *cert. denied,* 444 U.S. 1047, 100

> S.Ct. 737, 62 L.Ed.2d 733 (1980), which specifically identified the "constitutionally rooted presumption of innocence" as one of those basic rights whose violation may provide a ground for vacation of a state conviction independent of the more general due process concerns underlying fundamental fairness analysis. *Id.* at 854. *See generally* *Cool v. United States,* 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (referring to "constitutionally rooted presumption of innocence"); *Zygadlo v. Wainwright,* 720 F.2d 1221, 1223 (11th Cir.1983) ("[t]he constitution grants every defendant a presumption of innocence"), *cert. denied,* 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984). In light of such precedent, our review of petitioner's prosecutorial misconduct claim, which rests squarely upon the presumption of innocence, is not constrained by the fundamental fairness principle recognized in *DeChristoforo.* Id. at 472.

The State's comment and the instructions were a misstatement of Appellant's constitutional right to presumption of innocence. That right remains with a defendant, not when the evidence is in, but after all the instructions are given and during jury deliberations they determine the presumption has been removed beyond a reasonable doubt, and not before. Because trial counsel did not object, Appellant was prejudiced.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

That his convictions and sentences, including his sentence of death, be vacated and a new trial provided.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Steven White, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on January 25, 2010.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

_/s/ Michael Reiter_____
Michael Reiter