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

REPLY BRIEF OF APPELLANT

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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?

At page 31 of the State's Answer Brief it states as follows: "In essence, the State's position is that a defendant should not be allowed to plead something in postconviction so general as trial counsel was ineffective because the DNA was actually inadmissible and then, on postconviction, be allowed to attack the admissibility on any ground whatsoever without notice from the postconviction pleading of how specifically the evidence was inadmissible." Yet, at the hearing Appellee failed to object to any evidence presented on that ground, or any other ground for that matter.

Appellee goes on to say, at page 34: "Contrary to Taylor's argument (IB 32) that his 2005 postconviction motion alleged the currently contested matters with sufficient specificity, this Court has repeatedly made clear that postconviction claims, to be considered on their merits, must be alleged with specificity."

First, it needs to be noted that the trial court did not strike <u>any</u> of the <u>evidence</u> presented at the evidentiary

hearing, only the closing argument. Secondly, in their answer brief the State completely fails to address any of the alleged claims Appellant raised in his closing argument that weren't already alleged in his postconviction motion. Obviously, one point of contention between the litigants is whether the postconviction motion stated sufficient specificity to preserve his arguments on appeal. Appellant contends that he specifically stated facts in his postconviction motion, (PCR 781-892) and pointed out those facts contained in the motion in his initial brief at p32-32 and p64-66.

Appellee also argues 3.851 applies and not Fla.R.Civ.P. 1.190. If Appellee is correct that Fla.R.Civ.P. 1.190 does not apply to Fla.R.Crim.P. 3.850 or 3.851 cases, then all cases cited by Appellant in support of his argument that utilized Rule 1.190 in 3.850 and 3.851 cases must be wrong. For example, according to Appellee's argument, this Court in Bryant v. State, 901 So.2d 801 (Fla. 2005) was wrong when it relied upon Fla.R.Civ.P. 1.190.

Interestingly, Appellee fails to either mention or attempt to distinguish any of the cases cited by Appellant supporting the use of Fla.R.Civ.P. 1.190: 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); Bryan, supra.

First, Appellant contends that his postconviction motion is controlled pursuant to Fla.R.Crim.P. 3.850, and not 3.851. Second, if Fla.R.Crim.P. 3.851 does apply, Appellant's postconviction motions were sufficiently plead to support his claims and closing argument. Third, inasmuch as Appellant's motion was sufficiently pled, the trial court erred in striking Appellant's closing arguments. Finally, even if the motion was insufficient on its face, the trial court erred in denying Appellant's motion to amend the pleading pursuant to Fla.R.Civ.P. 1.190(d) and (e). The question of abuse of discretion when granting or denying a motion for leave to amend pleading to conform with the evidence, is whether surprise of prejudice existed. Three Palms Associates v. U.S. No. 1 Fitness, 954 So.2d 540 (Fla. 4th DCA 2008); Carnival Cruise Lines, Inc. v. Nunez, 646 So.2d 831 (Fla. 3rd DCA 1994). In this instance the trial court abused its discretion by denying Appellant's Motion to Amend the Pleadings to Conform with the Evidence because there was no surprise or prejudice to the Appellee.

The bottom line is that Appellee complains that Appellant did not utilize "magic words" in their pleadings.

Nowhere in their argument does the Appellee state that Appellant's attack on the DNA science, procedures, database, or experts was a surprise or that they were prejudiced. They knew from day one Appellant was going to attack all of it.

If justice and due process are to have any meaning in capital postconviction proceedings, then the dictates in Fla.R.Civ.P. 1.190(b) and (e) must be applied.

ISSUE II

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

The State argues that Appellant failed to plead with specificity the exculpatory documents withheld from Appellant. To some extent, Appellee is correct. The documents that were withheld were not listed item by item. However, the facts contained in the missing documents were alleged at page 9-25 of Appellant's postconviction motion. It is clear from the record that the State provided the defense—only days prior to trial—the following: bench notes, calculated fragment lengths, and FBI database (State's exhibit 7, Vol. I, p49). The FDLE/FBI protocols weren't provided until postconviction (Defense exhibit 19, Vol. III, p451).

While Appellee acknowledges (AB 37) arguments in the alternative are permitted if made with specificity, Appellee's answer brief ignores the context of the facts contained in pages 9-25 of the postconviction motion establishing that the documents were not provided; hence, the statement in the postconviction motion: *to the extent the State withheld documents regarding the DNA testing*, the State violated *Brady* and *Giglio.*

Appellee contends that the court did not err in finding: "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 Vol. XI, p2042-43) (Emphasis added).

While the issue of sufficiency of the pleadings may be debatable, it is inconceivable that the court would find that Appellant failed to prove at the evidentiary hearing the requisite prongs of *Brady* and *Giglio*.

Appellant's initial brief, at pages 42-49 and 51-55, sets out the testimony and documentation presented at the evidentiary hearing establishing *Brady* and *Giglio* claims. That testimony and documentation went unaddressed by the

Appellee's answer brief or by the trial court's order.

At page 42 of Appellee's answer brief they state: "Not only was Zeigler's existence disclosed through the lab report, and thereby no Brady violation proved, there has been no showing that the prosecutor knowingly presented any false trial testimony concerning Zeigler, and thereby no Giglio violation has been proved."

The State also suggests that because Mr. Tassone could not specifically remember at the hearing when he first heard Shirley Zeigler's name, Appellant's conclusion is not supported that at the trial was the first time he knew her name. However, Appellee ignores State's exhibits #3 and #4, which indicate Mr. Tassone requested items from the State on September 17, 1991, and the State requested the same items from Dr. Pollock on September 27, 1991. The calculated fragment length report-State exhibit #7-shows the initials SFZ.

Mr. Tassone did not ask Dr. Pollock who Shirley Zeigler was during Dr. Pollock's deposition, obviously because he didn't know about her. However, during trial Mr. Tassone questioned Dr. Pollock about Zeigler as follows:

> **Q. And who is S -- I believe it's SLZ or SZ or there is some other initials on review the DNA sample data?**

A. Well, there are not initials on this audioradiograms other than mine. The initials SFZ are I believe it's SFZ stand for Shirley Zeigler who is another analyst in our laboratory.

In addition, at the evidentiary hearing Mr. Tassone testified that if he already had possessed the results of the audioradiograms, he wouldn't have requested them again.

Appellant contends, given the context of the question and answer, as well as the timing of the audioradiogram's receipt, it is reasonable to infer the first time Mr. Tassone heard the name "Shirley Zeigler," was at trial.

Appellee contends no *Brady* occurred because Appellant had possession of the initials prior to trial; however, Appellee ignores 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.) Appellee's only complaint against *Campagnuolo* is that it's not our circuit. However, the 11th Circuit cites to *Campagnuolo's* language in Flores v. Satz, 137 F.3f 1275 (11th C.A. 1998) and Mize v. Hall, 532 F.3d 1184 (11th C.A. 2008).

Appellee also contends that the mere existence of Shirley Zeigler does not constitute a *Giglio* claim. Appellant agrees. However, Dr. Pollock was only quasi truthful and certainly evasive on cross-examination at trial:

> **Q. All right. Did you and this other individual ever come up with different measurements for a DNA fragment?**
>
> **A. Well, the computer generated numbers as any scientific measurement will almost never be exactly the same number. Normally we're measuring DNA in terms of thousand of base pairs. So, for example, one determination may be two thousand, and the other may be two thousand 50, those two determinations are not necessarily different, they're compared with one another and then if those values fall within our match criteria then they are considered to be a computer match.**

The answer should have been "yes." Dr. Pollock completely failed to inform counsel that with regard to loci D17S79 for the male fraction 67E he reported no result (State's exhibit 7 p58), while Ms. Zeigler obtained a result in the male fraction of 67E (State's exhibit 7 page 62). At the evidentiary hearing, Dr. Pollock stated he didn't report that as a result because in his <u>opinion</u> there was no foreign DNA to the victim. Dr. Pollock either evaded the question, or he was untruthful. Why is that important? Because Appellant was convicted of sexual battery, and there was no DNA result on the vaginal swabs belonging to

the Appellant.

Failure to provide Shirley Zeigler’s name in sufficient time prior to trial prevented Appellant from being able to impeach the misleading testimony of Dr. Pollock. In addition, withholding Shirley Zeigler’s name in sufficient time prior to trial prevented Appellant from establishing the unreliability of DNA in 1991, as well as Pollock's violations of protocols. If Appellant had Shirley Zeigler’s testimony before trial, the DNA results would not have been presented to the jury, and the remaining circumstantial evidence would not have been sufficient to sustain a conviction.

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 DR. POLLOCK'S TESTIMONY ABOUT DNA?

At page 57 of Appellee's answer brief, it was argued that any claim of a per se rule of parity between co-defendants is procedurally barred. Appellant concedes that specific argument in this case. Appellee correctly recognized at page 57 of their brief, Appellant had cited to Murray v. State, 838 So.2d 1073, (Fla. 2002), as precedential authority only.

Appellee's argument attempts to support the trial court's ruling that Armstrong v. State, 862 So.2d 705 (Fla. 2003) controls this case. Coincidentally, Appellee's argument contains the same flaw as the trial court: it assumes no *Frye* standard or test existed in 1991. Nowhere within Appellee's brief do they even suggest what the *Frye* requirements were in 1991. Appellant contends that in 1991, *Frye* required the court to make at least the following findings: (1) acceptance by the appropriate scientific community of the scientific principle underlying the proffered novel evidence; (2) acceptance of the technique applying the scientific principle; and (3) appropriate application of the technique on the particular occasion.

Even if the Appellee were correct that in 1991, *Frye* did not require any standard or test, shouldn't the laboratory be held to their own protocols? Absolutely.

FDLE protocols were violated by Dr. Pollock as described in Appellee's initial brief at pages 70-75. Although Murray's case was decided in 2002, this Court's finding applied equally as well in 1991 as it did in 2002:

> **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.**

Murray, 838 So.2d 1073, 1081 (Fla. 2002). The above finding by this Court in Murray is not new. It is an axiomatic application of the scientific method in existence well before Appellant's case: "Scientific Method - A method of research in which a hypothesis is tested by means of a carefully documented control experiment that can be repeated by any other researcher." Webster's New World College Dictionary, 2010, Wiley Publishing, Inc.

Although Appellant does not argue that this Court's ruling in *Murray* should be applied as a parity for co-defendants, Appellant certainly relies upon *Murray* as precedent for common sense and general scientific logic. The circumstances regarding DNA that occurred in *Murray were* extremely similar to the circumstances in Appellant's case. This Court's ruling should be the same[1].

Appellee attempts at pages 65-66 of their brief to explain Dr. Pollock's (State's expert) statement regarding generally accepted procedures -- "Well, not precisely what we were doing in Florida, but the general FBI procedure was

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[1] Appellee's comment that Murray was subsequently convicted without DNA in a new trial is without concern for any issue in this case, as it was so well pointed out by Appellee that parity of co-defendants does not apply.

generally accepted, yes," (PCR 1698) -- amounted to no more than a self-serving manipulation of the facts. It was quite clear at the evidentiary hearing that Dr. Pollock took it upon himself, without any authoritative FDLE approval, to change FBI protocols. His statements that others were doing the same amounted to no more than self-serving approval of his own actions[2]. The State presented no testimony, no articles, no FBI personnel, or any other evidence at the evidentiary hearing to support Dr. Pollock's changes to FDLE/FBI protocols as being generally accepted in the scientific community. Although Appellee attempts to bolster Dr. Pollock's credentials from 2007-2010, it must be remembered that in 1991, Dr. Pollock's only knowledge concerning DNA was what the FBI taught him, only slightly over a year before opening the FDLBE lab. There was no evidence presented at the evidentiary hearing that Dr. Pollock had any more authority or experience than Shirley Zeigler.

Also at page 65 of their brief, Appellee states: "Therefore, the State disputes Taylor's statements and suggestions (IB 71-72) that Dr. Pollock found matches 'in violation of FDLE (FBI) Protocols.'"

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[2] But even if the changes were appropriate, Dr. Pollock did not follow the protocols that existed at that time.

Appellant isn't the only one who suggests that Dr. Pollock violated FDLE protocols. Compare Dr. Pollock's own testimony to the FDLE protocols—the comparison supports such violations. In addition, another analyst (Shirley Zeigler) who worked side by side with Dr. Pollock testified that he violated FDLE protocols.

At page 66 of their brief, Appellee (not the court) attempts to place their own characterization upon the testimony of Shirley Zeigler that "she equivocated," by saying "as far as I can remember, yes." (How species is the characterization of "equivocated?" Anyone who testifies in court usually answers a question with the information he or she has as best they can remember.) Zeigler's statement was in reference to her opinion that Dr. Pollock violated protocol by finding a match on two probes that she found inconclusive based upon protocols. At pages 66-67 of their brief, Appellee makes a big deal about Dr. Pollock's and Shirley Zeigler's similar findings when measuring the fragments. Although most, not all, of the numbers were similar in value, it is the interpretation and conclusion of those numbers that is important. Pollock and Zeigler had different conclusions concerning two of the four probes. No matter how diligently Appellee attempts to minimize Zeigler's testimony and bolster Dr. Pollock's testimony,

the facts cannot be disputed; they disagreed about their 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." Murray, 838 So.2d at 1081

At page 59 of their brief, Appellee basically asserts that articles about a subject do not bind counsel on what strategy to use. Appellant agrees. However, most, if not all, of the articles cited by Appellant were also cited by Appellate Courts in support of their holdings. If an Appellate Court chooses to rely upon such articles, isn't it at least fair to expect counsel to investigate the value of those articles in a death case? Appellant hasn't claimed that counsel was ineffective in his choice of strategy. Appellant has claimed that counsel, by his own admission, failed to investigate any aspect of *Frye,* and therefore, could not have a strategy.

In 1991, Dr. Pollock's expertise regarding DNA was questionable, and he certainly was not qualified to testify about statistics or databases. Beginning at page 67, Appellee attempts to support Dr. Pollock's expertise to testify about the database and statistical calculations. Yet the court in Vargas, Supra, didn't agree with Dr.

Pollock's assessment when he testified in 1991. Strangely enough, Appellee is attempting to utilize 2007 evidentiary hearing testimony and citing cases after 1991 in support of their argument. Appellee took exception when Appellant attempted the same.

Appellee makes the following statement at pages 73 and 74 of its brief:

> **If Mr. Tassone had produced Ms. Zeigler for the trial, then undoubtedly the postconviction claim would attack Tassone for producing a witness who did not dispute Dr. Pollock's DNA finding.**
>
> **In any event, after years of postconviction proceedings, Taylor has failed to muster an expert who presented credible findings that directly contradict Dr. Pollock's findings, and, for this reason alone, he has failed to meet his Strickland burdens.**

What an absurd statement. It is disingenuous for Appellee to say that Shirley Zeigler did not dispute Dr. Pollock's DNA findings. To suggest that the numbers representing the fragment lengths are "findings," rather than their conclusions regarding those numbers, is ridiculous. Just as this Court has found that reporting a DNA match without the statistic is meaningless, the numbers of calculated fragment lengths are meaningless without an opinion whether those numbers represent a match according to protocol. Shirley Zeigler is a credible expert who worked side by side with Dr. Pollock and completely

disputed Dr. Pollock's opinion on two of the DNA probes according to protocol and opined that Dr. Pollock violated FDLE protocols. For this reason alone, this Court should grant Appellant a new trial.

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 OCCURRED, AND COUNSEL WAS NOT INEFFECTIVE?

As to the Brady and Giglio claims, Appellant will rely upon his initial brief.

As to ineffective assistance of counsel (IAC), Appellee argues Appellant has failed to establish IAC for the following reasons: (1) there was no change in the physical exhibit and that essentially Gary Powers was incorrect when he suggested that the blouse was white (Answer Brief at page 76), (2) the court gave credibility to the assistant state attorney's letter to the clerk listing evidence after the trial (Answer Brief at p 77), and (3) Ms. Hanson's deposition testimony that she performed analysis on the blouse marked as 28I (Answer Brief at page 78).

Any change in the physical exhibit is irrelevant to the IAC claim herein. Counsel failed to object to Dr.

Pollock's testimony regarding item 28I. There was no testimony at trial by anyone who connected item 28I to the offense charged or any other item introduced into evidence. Neither the State, in its brief, nor the Court, in its order, stated how Dr. Pollock's testimony regarding item 28I was relevant or admissible.

At page 78 of their brief, the Appellee attempts to persuade this Court of some logical connection between item 28I and exhibit 61 by reiterating some of the testimony presented. However, there was no testimony by Dr. Pollock, or anyone else, how item 28I was collected, or where it was collected, or if there was 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. Counsel's failure to object was not only deficient performance but surely prejudiced Appellant because the jury was permitted to hear about the DNA acquired from a stain on a fabric for which no direct testimony was presented connecting that fabric to the crime.

ISSUE V

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

Appellee state's at page 80 of their brief that Appellant essentially repeats several allegations Taylor makes in ISSUES II and III and then frames those allegations in terms of Tassone's trial preparation. I suppose if Appellant did not reframe those allegations, Appellee would have argued the claim was barred because it wasn't specific.

Moreover, Appellee's repeated and misguided characterization of Shirley Zeigler's testimony at pages 85 and 86 of their brief is indicative of Appellee's incongruent arguments throughout. For example, at page 85 of their brief, Appellee states: "Concerning Shirley Zeigler, discussed at length supra, Taylor has shown no postconviction evidence that, in 1992, Tassone should have known any information that would have caused all competent attorneys to have delayed the trial." However, at page 42 of their brief the Appellee states: "Moreover, Taylor has affirmatively proved that, indeed, Zeigler's existence through her initials was disclosed prior to jury selection. Thus, this claim is actually an IAC claim based on Mr.

Tassone's decision to go to trial rather than persist with his pending motion for continuance..."

Either the knowledge of Shirley Zeigler gave rise for a continuance or it didn't. Sorry, you can't have it both ways.

At page 86 of Appellee's brief, Appellee speaks about prejudice and mentions Dr. Pollock's credentials. In 1991, Dr. Pollock basically had no DNA credentials. All of his one-and-a-half years of experience was provided by the FBI. FDLE protocols were provided by the FBI, for which Dr. Pollock had no input, and which he subsequently changed without any authority from FDLE or the FBI.

Appellee attempts to belittle Dr. Libby's testimony because he is an academic, but not due to the content of his testimony. Shirley Zeigler's testimony regarding the DNA was far more congruent with Dr. Libby than with Dr. Pollock. Discrediting a witness's testimony because he is not a forensic expert is an abuse of discretion. Footnote 10, Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994).

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?*

Inasmuch as Appellee's brief adds little to the Court's order, Appellant will rely upon his initial brief for this issue.

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?

Inasmuch as Appellee's brief adds little to the Court's order, Appellant will rely upon his initial brief for this issue.

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 June 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