ORIGINAL

IN THE

SUPREME COURT OF FLORIDA

GILBERT DUDLEY III Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO.: SC11-2292 Lower Tribunal No(s).: 5D10-2863

INTIAL BRIEF OF THE PETITIONER

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PRELIMINARY STATEMENT

In this brief, the petitioner, Gilbert Dudley, III, is referred to by name or as the petitioner. The respondent is referred to as the State, the prosecutor, or the respondent. The victim will be referred to as V.O. Citations to the original record on appeal are made by the letter "R" followed by the appropriate page number. Citations to the two volume trial transcripts are made by the letter "Tr." followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

Dudley was charged with two counts of sexual battery on a mentally defective person in violation of § 794.011(4)(e), Fla. Stat. (2007), for incidents occurring on two separate occasions. (R 37)

Evidence concerning the victim's mental abilities

During her testimony at trial, V.O. demonstrated that she could spell her name, knew her initials, date of birth, age, and her address. (Tr. I, pg. 31) In addition, she knew that Deltona was situated in Volusia County, explained what she liked to do for fun, and testified that she knew the difference between a truth and a lie. (Tr. I, pgs. 32-33)

V.O.'s mother testified that V.O. has mild cerebral palsy and was "childlike" and "not like everyone else." (Tr. I, pg. 64, 70) Her mother was able to describe some of V.O.'s capabilities. She testified that V.O. cared for her room and that she was "immaculate about her room" (Tr. I, pg. 72); she was responsible for all of the laundry in the whole house, including sorting, drying, and folding (Tr. I, pgs. 72, 89); and she likes to read books, shop, and dance. (Tr. I, pg. 83) V.O. planned to attend Daytona State College to take courses to help with her disability. (Tr. I, pg. 93)

V.O.'s mother also described V.O.'s limitations: she wasn't allowed to cook (Tr. I, pgs. 70-72); she didn't think V.O. would know to call 911 (Tr. I, pg. 70); she

would not leave her alone for the weekend because she was afraid of the dark (Tr. I, pg. 71); and she had to be committed twice to a mental health institution (Tr. I, pgs. 73-74).

A psychologist, Dr. Graham, interviewed V.O. to determine if she were eligible for Social Security benefits. (Tr. I, pg. 111) The interview lasted less than forty-five minutes. (Tr. I, pg. 115) He asserted that he knew V.O. was mentally impaired very quickly due to her slow speech and inability understand simple questions. (Tr. I, pg. 100) He concluded that she was functioning in the moderate range of mental retardation. (Tr. I, pg. 104) The results of an IQ test revealed that V.O. scored 61 on her verbal scale, 50 on her performance, and 51 on her full scale. *Id.* He further opined that she could not manage her own funds, function independently, and would probably never drive a car. (Tr. I, pg. 108-109) He concluded that V.O. suffered from a mental defect that rendered her permanently incapable of appraising the nature of her conduct. (Tr. I, pgs. 110-111)

Karen Hook, V.O.'s special education teacher, testified about her experience with V.O. while in her class. (Tr. I, pgs. 48-62) She explained that V.O. participated in Special Olympics (Tr. I, pg. 49); would receive a special diploma for completing a functional curriculum (Tr. I, pg. 50); and that she learned basic skills including cooking, cleaning, life skills, and social skills. (Tr. I, pg. 50) Hook

stated that V.O. required constant prompting to stay on task and struggled with any change to a routine. (Tr. I, pg. 55)

Hook also taught V.O. and her class advocacy skills. During cross-examination, Hook was asked the following (II 61):

ATTORNEY:	Is she the kind of person, in your experience, where she would react negatively to something she didn't like?
HOOK:	Yes.
ATTORNEY:	She has no problem telling you if she doesn't like something?
HOOK:	She wouldn't tell me she didn't like it, there would just--there may be crying, stomping her feet, upset to the point where we may have to leave the store.
ATTORNEY:	Is she, in your experience with her, if there is something she doesn't like, does she just internalize it and not say anything about it?
HOOK:	Not usually, no. (Tr. I, pg. 61)

Evidence concerning the sexual conduct

When describing her sexual conduct with Dudley, she testified that Dudley put his "popsicle" inside of her and explained "popsicle" meant "dick." (Tr. I, pgs. 35, 37) He also touched her "boobs" and put his penis in her butt, but did not put his penis in her mouth. (Tr. I, pg. 37)

At one point, she suggested that Dudley forced her to have sex and said that he "told [her] if she didn't do it, he was gonna punch me." (Tr. I, pg. 36) However, she also claimed that he asked her, "Do you want to have some sex?"

(Tr. I, pg. 38) She also stated that he asked, "Do you want to have a boyfriend? Come on, baby, let me teach you how to do this." *Id.* During cross-examination, she acknowledged that at her deposition she stated the first time they had sex Dudley asked her "[d]o you want me to teach how to have sex?" She responded "Yes. So when I get a boyfriend I would know what to do." (Tr. I, pg. 44)

V.O. was sexually experienced before she had sex with Dudley. She had anal sex with an emotionally handicapped young man during a previous encounter. (Tr. I, pgs. 41, 46) Upon learning of the incident, the young man's mother explained to them what sex was. (Tr. I, pgs. 45, 46) V.O.'s mother testified that this incident occurred in 2005 and that she put V.O. on birth control afterwards. (Tr. I, pgs. 76-77)

Dr. Graham concluded that V.O. could not give "intelligent, knowing and voluntary consent to engage in sexual activity with the defendant." (Tr. I, pg. 111) However, during cross-examination, he explained his answer by stating, "she may have consented in the form of agreeing, but it's not consent in the typical way that you and I would conceptualize consent." (Tr. I, pg. 111)

Dr. Graham admitted that he was not asked to evaluate her understanding of sex and never spoke with V.O. about specific sexual conduct. (Tr. I, pg. 112) When asked if he thought she could make decisions for herself, he responded as follows:

DR. GRAHAM: That means she can make some very simple concrete decisions for herself.

ATTORNEY: Such as?

DR. GRAHAM: I would have to know more about her overall level of functioning. You know, she might make decisions about what colors she would want to wear, what she would like to have to eat. Maybe would she like to go to a show. Various forms of activity. But these would be very simple concrete areas that she could make a decision about.

ATTORNEY: But nothing more complicated than that, in your opinion?

DR. GRAHAM: I would doubt it. (Tr. I, pgs. 116-117)

During closing argument, the State did not suggest that V.O. did not consent in the traditional sense of forcible rape. Instead, the State argued that V.O. did not have the capability to consent because she was mentally defective. (Tr. II, pg. 211)

PROSECUTOR: You're going to have to decide for yourself if she could consent and if she was mentally defective. Did I prove to you that she is a person that suffers from a mental disease or defect that renders her temporarily or permanently incapable of appraising the nature of her conduct? That's what I have to prove to you. (Tr. II, pgs. 211-212)

PROSECUTOR: If the 18-year-old mentality (sic) retarded stepdaughter is sexually pursuing you, then does that mean that you can then have sex with her? No. No. Not if she suffers from a mental defect and it interferes with her nature, her ability to really appraise her conduct right?...And I have proven to you beyond a reasonable doubt that she could not give knowing and intelligent consent to engage in sexual activity. (Tr. II, pgs. 244-245)

PROSECUTOR: I'm asking you to return a verdict of guilty as charged on Count I and Count II because she could

> not understand the nature of what she was doing and she could not give knowing and intelligent consent to the defendant, and he knew, he knew better than most the extent of her mental defectiveness. (Tr. II, pg. 246)

A jury convicted Dudley on both counts, but the trial court set aside the verdict after the trial and found that the State's evidence at trial was insufficient to support the jury finding that the victim was "mentally defective" as defined in the § 794.011(1)(b), Fla. Stat. (2007). The trial court followed the statutory definition from State v. Torresgrossa, 776 So. 2d 1009 (Fla. 5th DCA 2001) and pointed to its factual similarities. (R 75-76) In addition, the court added its own interpretation of the type of evidence that would prove a mental defect:

> The nature of these prosecutions that is most surprising to this court is the evidence that is never presented – the most relevant, compelling evidence – the testimony of the victim as to what his or her appraisal of the nature of the conduct is. In this case, for instance, the psychologist who testified for the State evaluated the young woman for thirty minutes over two years before the trial in this case and the reason he saw her was to conduct a disability examination at the behest of Social Security. The examination consisted primarily in giving the Wechsler Adult Intelligence Scale to determine her IQ. He was not requested to evaluate "anything concerning this sexual issue" and he did not. However, based on his observations and his testing, he concluded that the young woman would have been unable to appraise the nature of her conduct. How much more convincing his testimony would have been if he had been able to testify that he questioned her about her knowledge of sex in general and her feelings about specific incidents. Then he could properly evaluate her ability to appraise the nature of her conduct.
>
> The jury and this court were given the opportunity not sought by the psychologist to evaluate the young woman's ability to appraise the nature of her conduct. Her mother testified that during a heated

> argument between the mother and her boyfriend, defendant herein, her daughter whispered in her ear, "Mr. G. has been having sex with me." The mother, obviously believing the daughter knew what she was talking about, immediately called 911. The daughter testified in graphic detail about the sexual acts that took place and referred to the male organ in the vernacular. Had the psychologist talked to the mother or daughter about the matter would this opinion have been the same? (R 77-78)

The State appealed and the Fifth District Court of Appeal disagreed with the trial court and found that the State presented sufficient evidence to prove the victim was "mentally defective." In reaching its decision, the Fifth District certified conflict with the First District's decision in Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996) and receded from it's own opinion in Torresgrossa.

In certifying conflict, the Fifth District was concerned with what it found to be an "unreasonably narrow reading of the term 'mentally deficient'" by the First District Court of Appeal in Mathis v. State. In the opinion, the court summarized the issue taken with Mathis and stated, "to the extent that Mathis can be read as equating 'mental deficiency' with competence to testify, or to mean a total or complete lack of mental capacity or understanding, we disagree and conflict with Mathis." State v. Dudley, 64 So. 3d 746 (Fla. 5th DCA 2011)

To be more precise, the Fifth District stated, "Mathis equates 'mental deficiency' with 'legal insanity,' and further suggests that anyone with a sufficient mental capacity to competently testify in court cannot be found 'mentally deficient.'" *Id.* The district court added that its earlier opinion, State v.

Torresgrossa, could be read to agree with the Mathis definition of "mental deficiency" and receded from Torresgrossa as to that narrow point. *Id.*

The district court aligned itself with the Fourth District Court of Appeal and approved of the analysis in Bowman v. State, 760 So. 2d 1053 (Fla. 4th DCA 2000). Bowman disagreed with Mathis and stated:

> We do not see a problem, as the Mathis court may have, with a victim being found able to understand the moral obligation to testify truthfully, and still being mentally defective under the statutory definition. It is not unusual for a child who is actually or mentally five years old to sufficiently understand the moral obligation to tell the truth so as to be competent to testify...The fact that such a child is competent to testify, however, is not inconsistent with being mentally defective under section 794.011(1)(b), Florida Statutes. *Id.* at 1055

The Fifth District Court offered its interpretation of "mentally defective" by referring to the Merriam-Webster Dictionary and suggested that the definition of "deficient" should be considered. Ultimately, the court explained that "[deficient] does not mean 'devoid of' or 'totally lacking.' Similarly, the statutory definition of 'mentally deficient'...connotes significantly diminished judgment, but not a complete and total lack of mental awareness."

SUMMARY OF ARGUMENT

The Fifth District's interpretation of "mentally defective" to mean "significantly diminished judgment, but not a complete and total lack of mental awareness" is too vague and broadens the scope of victims the statute intended to protect. The First District's comparison of the term insanity is much more appropriate and accurately represents the intent of the legislation. However, Petitioner acknowledges that more clarification is warranted.

The petitioner suggests that in the context of this statute, "mentally deficient" carries the same meaning as "incapable of consent to sexual activity." Such a meaning is similar to that suggested in Mathis and is consistent with most of the cases interpreting the statute. The real issue in the case below was whether V.O. had the capability of consenting to sexual activity with the petitioner. The question of consent and if she were "mentally defective" required the same inquiry. However, the new standard suggested in the opinion on review misinterprets the statute and confuses the meaning even more.

The trial court interpreted the statute correctly and properly set aside the jury verdict because the State did not present competent evidence that the alleged victim was mentally defective and incapable of consenting to sexual intercourse. The State did not elicit the testimony from the alleged victim sufficient to prove its burden. Nor did the State present expert testimony from an expert that addressed

these issues with her. The failure to do so warranted a dismissal of the charges and this Court should reinstate the trial court's order setting aside the verdict.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The 5th District Court of Appeal erroneously interpreted Fla. Stat. § 794.011(1)(b) to merely require that a victim have "significantly diminished judgment" to be considered "mentally defective."

Standard of Review

This case concerns a matter of statutory interpretation and construction, which is a question of law subject to a *de novo* standard of review. See City of Parker v. State, 992 So. 2d 171, 176 (Fla. 2008).

Argument

Appellant was charged and convicted of §794.011(4)(e) Fla. Stat. (2007), which states:

> (4) A person who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the following circumstances, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115:
>
> (e) When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

Subsection (1)(b) provides the definition of "mentally defective":

> (b) "Mentally defective" means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.

Although the statute defines "mentally defective", appellate opinions have not consistently determined what constitutes sufficient evidence to prove "mentally defective."[1]

The first case interpreting its meaning is Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996), in which the First District suggested that "mentally defective" was similar to that of insanity. *Id.* at 180. Mathis cited Hall v. State, 568 So. 2d 882, 885 (1990) which explained insanity, "accused is not criminally responsible if, at the time of the alleged crime, [he] was by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or consequences or was incapable of distinguishing right from wrong." The opinion did not provide any other interpretation besides holding that the evidence presented at trial was insufficient to prove mental defect.

A subsequent opinion from the Fourth District hinted that it disagreed with the reasoning in Mathis. In Bowman v. State, 760 So. 2d 1053, (Fla. 4th DCA 2000) the court suggested that the Mathis conclusion that the victim was not mentally defective was influenced by the fact that the victim was found competent to testify—a position that seemed untenable to the Mathis court. *Id.* at 1055. To the contrary, the Fourth District could foresee a scenario where a child was

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[1] The term "mentally defective" apparently is not a medical term. *See Bowman v. State*, 760 So. 2d 1053 (Fla. 4th DCA 2000)(a psychologist testified that "mentally defective" was not a psychological term and she could not define it.)

competent to testify, but could still be considered "mentally defective." *Id.* Appellant does not disagree with this point.[2]

In State v. Torresgrossa, 776 So. 2d 1009 (Fla. 5th DCA 2001), the Fifth District found that the alleged victim was not mentally defective despite a psychologist's opinion that the alleged victim was "mildly mentally retarded and incapable of realizing the nature of her conduct." *Id.* at 1010. However, the Court noted that it was undisputed that the victim had "consensual sexual relations with a previous boyfriend." *Id.* Furthermore, the alleged victim "described the act of sexual intercourse, was aware that she was having sexual relations with Torresgrossa and described the number and types of activities in which they engaged." *Id.* Finally, she had a prescription for birth control and "knew that their purpose was to ensure that she did not get pregnant." *Id.*

In Schimele v. State, 784 So. 2d 591 (Fla. 4th DCA 2001), the court found sufficient evidence that the victim was mentally defective and distinguished Mathis. *Id.* at 593. Significantly, an expert examined the victim and specifically

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[2] The criticism of Mathis needs to be addressed as well. The Mathis interpretation does not necessarily mean a "total lack of mental capacity" or a "total lack of mental awareness" as the Fifth District suggested in the opinion below. Dudley at 752. The reference to testimonial competency merely explained that it was impossible to draw automatic conclusions about a person's ability to understand the nature of one's conduct based upon an IQ score or one's "mental and developmental age." Mathis at 180-181. This is exactly the problem with the "laundry list" approach that court adopted in the opinion below.

questioned him about his understanding of sex. *Id.* The defendant agreed that the expert's opinion established that the victim did not have the ability to consent, but argued that it did necessarily mean he was mentally defective. The Fourth District disagreed and alluded to the similar nature of mentally defective and an inability to consent. "[T]he victim had 'a mental disease or defect rendering [him] incapable of appraising the nature of his...conduct' at the time of the incident—*and thus that his consent could not have been* 'intelligent, knowing, and voluntary consent'." *Id.* at 594. (*Emphasis* added.)

Appellant suggests that the appropriate analysis for determining the meaning of "mentally defective" is to evaluate whether the victim is capable of consenting to sexual activity. This common thread guided the decisions in Torresgrossa, and Schimele. Likewise, this analysis is consistent with Mathis insofar as Mathis should be read to stand for the proposition that the statute was intended to protect victims with severe mental deficiencies, like the criminally insane.[3] Therefore, "mentally defective" should be interpreted as such.

As such, the relevant inquiry for appellate courts is whether there is sufficient evidence that the victim was incapable of appraising the nature of sex and whether the victim was capable of consenting to sexual activity. The courts should look no further than the evidence that directly proves or disproves these

[3] It also does not conflict with Bowman, although Bowman stands for the simple proposition that one could be competent to testify, but also "mentally defective."

ultimate questions. As the trial court's order noted, the victim should be asked and an expert should inquire from the victim and provide an opinion to the jury.

Hudson v. State, 939 So. 2d 146 (Fla. 4th DCA 2006), is the case that has caused the most confusion and persuaded the court below. It held that expert testimony was not required to prove that a victim was "mentally defective" as long as there is other competent and substantial evidence. *Id.* at 148. However, Hudson also drew the comparison between a mental defect and an inability to consent. *Id.*

The opinion on appeal did not focus on the evidence supporting the victim's ability to consent or appraise the nature of sexual conduct. Instead, it followed a "laundry list" approach that compared a series of ancillary factors that suggest a mental deficiency, but do not go to the heart of the matter – whether the victim was capable of consent and able to appraise the nature of sexual conduct. In State v. Dudley, 64 So. 3d 746 (Fla. 5th 2011), the court found "the facts from Hudson, Schimele and Bowman more closely match the facts in this case, and both Mathis and Torresgrossa are distinguishable." *Id.* at 750. In finding that there was sufficient evidence, it lowered the bar and held that "mentally deficient...connotes significantly diminished judgment, but not a complete and total lack of mental awareness." *Id.* at 752.

The first hint of this "laundry list" approach is evident in Bowman when the court concluded that the evidence was stronger than in Mathis, highlighted the

victim's substantially lower IQ (36), and his inability to run an errand or cross the street unsupervised. *Id.* at 1055. While these facts should be considered, they do not, by themselves, warrant a conclusion that a person is mentally defective.

Similarly, Hudson summarized the evidence in one paragraph and gave the impression that comparable evidence is sufficient to conclude a "mental defect". Hudson at 148. In all likelihood, the State read Hudson and decided that presenting this "laundry list" approach to the jury would be sufficient to prove the case. At the same, it misdirected the State from posing a simple question to the victim: "What do you know about sex?"

The court below was also misguided by this approach and ignored the glaring void of evidence regarding the victim's understanding of sex or ability to consent. The court was impressed by the boilerplate testimony provided by an expert that acknowledged that he did not discuss sex with the victim. Dudley at 749. The order setting aside the verdict hit the nail on the head in posing a question regarding this expert, "Had the psychologist talked to the mother or daughter about the matter would this opinion have been the same?"

Appellant suggests that whether a person is "mentally defective" under the statute is closely akin to the question of whether the person has the mental capability to consent to sex. "Consent" under the statute "means intelligent, knowing, and voluntary consent and does not include coerced submission." It is

hard to imagine a person that is mentally deficient that can intelligently consent to sex. Conversely, if a person is incapable of intelligent, knowing, and voluntary consent, they are logically mentally deficient (assuming *some* type of mental defect).

Like the definition of insanity, when determining if a victim is mentally defective, the following question should be asked: should the victim be held responsible for his or her actions? Alternatively, should the person that had sex with her be held responsible?

Appellant respectfully suggests that the statute requires credible evidence that the victim was incapable of appraising the nature of her conduct. In most cases, this would require an evaluation by a qualified expert that could render an opinion as to the victim's ability to appraise the nature of the sexual conduct. However, the best evidence (assuming a capacity to testify) is the victim's own testimony about his or her understanding of sex.

The opinion below redefines "mentally deficient", lowers the burden of proof in future prosecutions, and approves of tiptoeing around the ultimate issue. As such, it should be rejected and future prosecutions should be required to present sufficient evidence specifically addressing a victim's ability to consent and appraise the nature of sex.

II. The State did not sufficiently prove that the alleged victim was incapable of appraising the nature of sexual conduct and sustain a conviction under Fla. Stat. § 794.011(4)(e).

Standard of Review

An appellate court has *de novo* review of the record to determine whether sufficient evidence supports the jury's verdict. See State v. Eversley, 706 So. 2d 1363, 1364 (Fla. 2d DCA 1998).

Argument

The victim, V.O., was capable of consent and realizing the nature of her conduct. The evidence demonstrated that she was sexually experienced. She had a prior sexual encounter with her babysitter's son. (Tr. I, pgs. 41, 46) In addition, her mother ensured that she routinely receives birth control shots. (Tr. I, pgs. 89-90) Her mother's desire to place her on birth control confirms that even her mother had reason to believe that she would have sexual intercourse and possibly become pregnant. Although the State believes that her mother's concern for her daughter's unwanted pregnancy suggests a mental defect, Appellee suggests this concern is shared among many mothers and is only proof that her daughter was routinely having sex.

The expert opinion misled the jury and served no legitimate purpose since he never discussed sex with V.O. (Tr. I, pg. 112) His evaluation was for an unrelated issue – to determine her eligibility for Social Security benefits. (Tr. I, pg. 111)

Their meeting had nothing to do with evaluating her ability to appraise the nature of sexual conduct. He simply administered a test designed to determine if she could achieve academically and hold a job to support herself. The trial court realized that his testimony went beyond the scope of his interview and appropriately rejected it since it lacked credibility. (R 71-78) His recitation of boilerplate language did not magically satisfy the State's burden of proof.

In contrast, Dr. Poetter, the expert in Torresgrossa, reviewed the alleged victim's sexual history before opining about her ability to appreciate the nature of her sexual conduct. She opined that the alleged victim's prior sexual encounter with her boyfriend was "consensual," but that her sexual encounter with the defendant was less than consensual because the defendant manipulated her because of her mental age. Dr. Graham was unaware of V.O.'s sexual history. Lacking the knowledge of her sexual past, Dr. Graham did not have critical information needed to render a valid opinion. Indeed, Dr. Graham's opinion would likely change if he were aware of this information.

Also noteworthy is the expert opinion provided in Schimele, which was well founded since he talked to the alleged victim about sex and his sexual history. In fact, the expert, Dr. Ram, testified that the victim's understanding of sex was "pretty cloudy." *Id.* at 593. He also explained how the victim's history of experiencing a "lap dance" and viewing sexually explicit movies affected his

opinion. *Id.* In contrast, Dr. Graham never discussed sex with V.O. during their Social Security interview and did not incorporate her sexual history into his opinion. The Schimele court emphasized the importance of Dr. Ram's opinion and distinguished Mathis because of Dr. Ram's testimony. *Id.* However, Dr. Graham's opinion lacks the foundation that Dr. Ram constructed and consequently is not worthy of consideration.

The State's tactics clearly followed the "laundry list" approach to proving a mental defect. This approach misses a critical point. At the core of the issue is whether V.O. was able to appraise the nature of her conduct (that is, having sex with Dudley). The comparison of collateral facts does not directly prove or disprove this question. It also does not change the analysis from whether the State presented competent evidence to prove this fact.

Instead of presenting collateral and circumstantial evidence, the State should have (if it could have) presented evidence striking the heart of the issue. The State did not ask nor did V.O. explain what she thought it meant to have sex or provide her understanding of sex. The State did not ask, nor did her teacher or mother explain, V.O.'s knowledge of sex. Moreover, the State's expert never asked her a question about sex. Nothing precluded the State from attempting to elicit this testimony, yet the fact remains that none of it was ever presented.

Petitioner suggests that the reason the State failed to elicit this testimony and chose to tiptoe around the ultimate issue was because the facts did not support its case. The lower court recognized this and pointed out the flaw in the order setting aside the verdict. (R 77-78)

The evidence before the jury was not sufficient to prove the alleged victim was mentally defective. The State failed to present competent and substantial evidence to establish this element of the crime. Although she suffers from a disability, the evidence showed that the alleged victim was quite capable of appraising the nature of her conduct and consenting to sexual activity despite the State expert's conclusion.

CONCLUSION

Petitioner requests that this Court reverses the opinion below and rejects its interpretation of "mentally deficient." In addition, this Court should clarify the meaning of the term and adopt the position posited in this brief to help guide future prosecutions and ensure that no future injustice will occur.

The trial court properly set aside the verdict since the State failed to present sufficient evidence that the victim suffered from a mental defect. Since the State failed to meet its burden, the State is prohibited from prosecuting Petitioner for this offense again and he should be forever discharged. Petitioner respectfully requests that the order setting aside the verdict be reinstated.

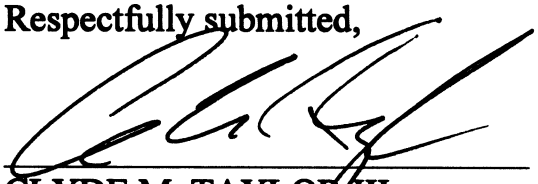
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
Criminal Appeals Division
444 Seabreeze Blvd., Suite 500
Daytona Beach, FL 32118-3951

By U.S. mail delivery this 20 day of June 2012.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

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