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**Perry Alexander v. State of Florida**

**SC06-615 | SC07-1168**

THE NEXT CASE ON THE CALENDAR  
THIS MORNING IS TAYLOR V. STATE  
OF FLORIDA.

[INAUDIBLE CONVERSATIONS]

>> LET THEM CLEAR OUT BEFORE  
WE.

I THINK WE CAN HEAR NOW.

>> MAY IT PLEASE THE COURT I'M  
DAVID GEMMER REPRESENTING PERRY  
TAYLOR.

THREE AREAS I WANT TO COVER.  
PROBABLY WON'T COVER THEM, IT  
WAS THE SEXUAL BATTERY ISSUE,  
THE MENTAL HEALTH MITIGATION  
ISSUE, AND THE QUESTION OF  
PUTTING MR. TAYLOR ON THE STAND  
IN THE GUILT PHASE.

AS FAR AS THE SEXUAL BATTERY  
ISSUE -- YOU HAVE TO UNDERSTAND  
MR. BONITO THE PROSECUTOR IN  
THE 1989 TRIAL SURPRISINGLY  
FRANK AND CANDID TOLD THE COURT  
IN AN ARGUMENT ON THE MOTION  
FOR JUDGE ACQUITTAL IF HE  
HADN'T HAVE MADE ANY STATEMENTS  
I WOULD'VE HAD A SHOEPRINT IN A  
DUGGOUT.

I WOULDN'T HAVE CHARGED HIM  
WITH ANYTHING.

THEN IN TAYLOR 1 THIS COURT'S  
OPINION WHERE THE COURT LOOKED  
AT THE QUESTION OF WHETHER  
THERE WAS EVIDENCE TO REFUTE  
THE CIRCUMSTANTIAL CASE THAT  
THERE WAS CONSENT, MR. PERRY  
TAYLOR TESTIFIED AND CONFESSED  
TO THE ACTIONS THAT HE DID AND  
SAID THAT ALL THE SEXUAL ACTS  
WERE CONSENSUAL AND THIS COURT  
SAID, WELL, ASSUMING THAT WE  
STILL HAVE THE MEDICAL  
EXAMINER'S TESTIMONY THAT THE  
INJURIES TO THE SEXUAL ORGANS  
WERE SUFFICIENT TO ESTABLISH A  
RAPE THERE.

THEN WE HAVE EVERETT SOCIETY

CITED IS THE STATE'S ANSWER  
CASE IN THIS -- BRIEF IN THIS  
CASE THAT INJURY ENOUGH IS  
ENOUGH TO INIGATE CONSENT IF  
YOU LOOK AT THE EVERETT CASE  
AVAILABLE FROM THE COURT THE  
DEFENDANT ADMITTED IN THAT CASE  
THAT HE HAD NO CONSENT FOR THE  
RAPE AND THE RAPE OCCURRED  
BETWEEN, BEGINNING WITH OTHER  
ACTS OF VIOLENCE, THEN THE  
SEXUAL BATTERY, AND THEN  
FURTHER ACTS OF VIOLENCE,  
WHEREAS IN THIS CASE WE HAVE A  
COMPLETELY CONSENSUAL ENCOUNTER  
UP UNTIL THE MOMENT THAT THE  
EITHER THE KICKING OR THE  
CHOKING BEGAN.

>> COULD I --, I SORT OF FOLLOW  
WHAT YOU ARE SAYING AND WHAT  
YOU'VE ALLEGED.

YOU'RE CLAIMING THAT THE  
TESTIMONY NOW OF DR.^MILLER IS  
FIRST YOU ARE SAYING IT IS  
NEWLY DISCOVERED EVIDENCE, IS  
THAT CORRECT?

>> I CALL IT NEWLY DISCOVER I'D  
CALL IT A BRAVE VIOLATION OF  
GIGLIO.

>> SO THAT'S SORT OF THE  
THRESHOLD IS DR.^DID DR.^MILLER  
NOW SAY IF I WERE CALLED TO  
TESTIFY TODAY, OR I WAS, I KNEW  
IT BUT I SUPPRESSED IT, YOU  
KNOW, ON PAGE 54 OF THE JUDGE'S  
ORDER, THE JUDGE SAYS THAT THE  
CLAIM OF NEWLY DISCOVERED  
EVIDENCE, WHAT EVERYONE CALLED  
ON BASED ON A SUPPOSED  
RECANTATION BY DR.^MILLER, WHAT  
CAUSED THE VICTIM'S VAGINAL  
INJURIES ARE NOT A PROPER  
STATEMENT.

THE VAGINAL INJURIES COMING  
FROM A KICK WERE KIND OF A KIND  
OF ONE IN A MILLION SHOT.

THE COURT ASKED MILLFER THE  
LACERATIONS HE FOUND WOULD  
INVOLVE PENETRATION HE SAID  
THEY WOULD.

DR.^LYNCH, THE STATE'S EXPERT  
TESTIFIED THAT THE INJURY TO  
THE VAGINA WOULD INDICATE SOME  
SORT OF PENETRATION THAT CAUSED

THE INJURY, AND WHEN ON ABOUT THAT IT DR.^LYNN SAID THAT IN HER EXPERT OPINION, SOMETHING LARGE WAS PUT INTO THE VAGINA THAT CAUSE ADTEARING AND RIPPING AND SHE DID NOT BELIEVE A KICK WOULD CAUSE T. SO THE COURT -- SO GOING BACK TO THE COURT FINDS THAT THE EVIDENCE THE COURT'S FINDING OF SEXUAL BATTERY SO THE COURT -- HOW DO YOU GET BY THE COURT'S -- IN THIS CASE, FINDING THAT EVEN THOUGH YOU COULD ARGUE THAT DR.^MILLER VACILLATED NOW, THAT IT'S NOT NEWLY DISCOVERED EVIDENCE, IT'S NOT A BRADY VIOLATION, IT'S CERTAINLY NOT A GIGLIO VIOLATION SO NOW WE GO BACK TO HOW IT IS INEFFECTIVE SO COULD BACK TO HOW YOU ARE GOING TO DEAL WITH THE TRIAL JUDGE'S.

>> WELL, WORK BACKWARDS FROM DR.^LYNCH.

SHE WAS A LINE OB/GYN.

SHE WAS NOT A FORENSIC OB/GYN.

SHE WAS NOT A PATHOLOGIST AND

SHE ADMITTED THAT.

SHE HAD ONLY HAD LESS THAN A DOZEN RAPE EXAMINATIONS UNDER HER BELT IN HER YEARS OF PRACTICE.

>> NOW YOU ARE GOING TO CREDIBILITY AND WHETHER THE JUDGE SHOULD'VE CREDDED HER TESTIMONY OR THE OTHER SIDE'S AND THE JUDGE ALREADY DECIDED THAT WE CAN'T REVISIT CREDIBILITY ISSUES.

>> YOU HAVE TO REVISIT IF THERE IS NO BASIS IN, --

>> THERE IS A BASIS --

>> THERE'S A BASIS IN DR.^LYNCH'S TESTIMONY REGARDLESS OF HER QUALIFICATIONS.

THE JUDGE CREDITED THAT TESTIMONY.

>> BUT THIS COURT'S, WELL ACTUALLY THE FOURTH DISTRICT CASE THAT I CITE IN MY BRIEF THAT SAYS IF YOU ARE GOING TO HAVE AN EXPERT TESTIFY, YOU

HAVE TO AT LEAST HAVE HIM TESTIFY, THE EXPERT IN THE THING THAT THEIR TESTIFYING ABOUT.

>> AND LET, LET'S LEAVE DR.^LYNCH OUT OF IT.

DR.^MILLER TESTIFIED AT THE EVIDENTIARY HEARING, YEAH, NOW I GUESS THERE'S A ONE IN A MILLION CHANCE. HOW IS THAT A SUCH A DEPARTURE FROM THE PRIOR TESTIMONY FROM 0 TO 1 IN A MILLION THAT IT'S EITHER NOW NEWLY DISCOVERED OR GIGLIO.

>> IN THE 1979 IN 2000 RECORD THROUGH 1955 INITIALLY DR.^MILLER INTERRUPTED ME AND SAYS YOU KNOW NOBODY ASKED ME BEFORE.

THEY DID ASK HIM BUT HE SAYS NOBODY ASKED ME BEFORE BUT YOU KNOW IT COULD'VE BEEN A KICK.

AFTER I READ DR.^WRITE'S TESTIMONY IN DEPOSITION, IT COULD'VE BEEN A KICK, AND HE SAYS IT'S A REASONABLE POSSIBILITY.

MAYBE EVEN A PROBABILITY. AND WHEN IT GOT DOWN TO THE ONE IN A MILLION SHOT HE IS SAYING IF YOU KICK, IT'S NOT LIKE -- ONLY ONE IN A MILLION TIMES IS SOMEBODY GOING TO BE, IS IT GOING TO BE THIS KIND OF INJURY IT'S SAYING BASICALLY A LUCKY SHOT SO TO SPEAK.

>> AND I GUESS --

>> QUINT DENT.

>> I AM THINKING OF YOU PRESENTING THIS EVIDENCE TO A JURY, AND I'M TRYING TO UNDERSTAND SOMETHING.

THE DEFENDANT GOES VOLUNTARILY SHE, WE WERE GOING TO HAVE SEX TOGETHER AND THEN SHE STARTED GIVING ME ORAL SEX, AND IT BECAME, SHE PINCHED ME OR BIT ME AND I WENT BALLISTIC.

THAT WAS HIS DEFENSE.

RIGHT SO NOW WE GO BACK TO THIS YOUNG, I DON'T KNOW HOW OLD WAS THE VICTIM?

THE VICTIM --

>> 40 I BELIEVE.

>> HOW DID SHE DIE?

>>> SHE WAS KICKED TO DEATH AND I AM SURE THE STATE WILL BE GLAD TO --

>> SO I AM THINKING NOW YOU ARE GOING TO TELL ME, THE JURY THAT THE KICKING INCLUDED KICKING HER REPEATEDLY IN THE VAGINAL AREA.

I DON'T KNOW HOW -- I AM TRYING TO UNDERSTAND HOW THAT HELPS YOUR CASE.

>> BECAUSE THAT'S NOT RAPE. KICKING --

>> YOU SAY IT GOES TO SEXUAL BATTERY CONVICTION.

>> YEAH, ABSOLUTELY AND IT GOES TO THEN TO THE AGGRAVATING FACTOR IT GOES TO FELONY MURDER THEORY AND PLUS, IF THE JURY HAD EVIDENCE THAT WOULD'VE MADE IT BELIEVE THAT MR.^TAYLOR'S TESTIMONY TO THE SEXUAL ENCOUNTER --

>> WHEN WAS THE CONVICTION?

>> I'M SORRY?

>> WHAT YEAR WAS THE CONVICTION.

>> 1989.

>> ALL RIGHT, SO NOW WE GO BACK TO, I GUESS THE BEGINNING QUESTIONS, WHICH IS WHAT IS DR.^MILLER'S -- WHAT IS HIS TESTIMONY AND HOW IF HE DID NOT GIVE AN OPINION TO THE STATE THAT WAS FAVORABLE TO THE DEFENSE, IT WASN'T SOMETHING HE HID.

THE STATE CERTAINLY DIDN'T KNOW ABOUT THIS OTHER QUESTION, HOW DOES IT FIT IF IT ANY OTHER -- ANY OTHER CLAIM OF NEWLY DISCOVERED EVIDENCE, OR FALSE TESTIMONY SO CAN YOU ANSWER -- ASSUMING YOU GIVE THE BEST SPIN TO NOW WHAT DR.^MILLER SAYING THAT IT'S ONE OF THOSE THINGS.

IT'S NOT -- LET'S JUST GO WITH THE THREE OF THOSE THINGS HOW IS IT ONE OF THE 3?

>> DR.^MILLER IS A STATE AGENT.

HE'S CHARGEABLE -- HIS  
KNOWLEDGEABLE --

>> HE DIDN'T SAY I KNEW THIS  
AND I KEPT IT FROM THE STATE OR  
WHATEVER.

HE JUST SAYS I HAVEN'T REALLY  
THOUGHT ABOUT THAT ANGLE I HAVE  
NOW READ DR.^WRIGHT'S TESTIMONY  
AND IT'S GIVEN ME SOME FURTHER  
THOUGHT BUT THAT'S NOT, THAT'S  
SOMETHING THAT HAPPENED  
SUBSEQUENTLY AS IF YOU HAD A  
MENTAL HEALTH EXPERT WHO GOES  
YOU KNOW I TESTIFIED TO THIS  
AND I THOUGHT ABOUT IT MORE AND  
I MIGHT ADD TO THIS DA.

>> HE DID CONSIDER AND NEGATE  
WHAT IN 1989 WHAT HE LATER SAYS  
COULD'VE HAPPENED IN 89 ON PAGE  
87 ON THE RECORD, -- OF THE  
RECORD FROM THE STATE, THE  
INJURY OBSERVED WITHIN A  
REASONABLE DEGREE OF MEDICAL  
PROBABILITY IS THAT CONSISTENT  
WITH KICKING?

>> NO, AND THAT'S THE EXTERNAL.

THEN AS FAR AS THE INTERNAL,  
INJURIES, TO REASONABLE DEGREE  
OF MEDICAL PROBABILITY COULD  
THOSE HAVE BEEN INFLICTED BY  
KICKING?

NO.

AND WITH A REASONABLE DEGREE OF  
MEDICAL PROBABILITY, WOULD  
PENETRATION HAVE BEEN NECESSARY  
TO INFLICT THE INJURIES TO THE  
INTERIOR?

AND YES, AND THAT IS NOT THE  
SAME AS SAYING, WELL, YOU  
KNOW,.

>> HOW DOES THAT CHANGE WITH  
THE TESTIMONY?

COULD THE KICKING HAVE CAUSED  
THE INTERNAL INJURY?

>> ABSOLUTELY, THAT'S THE  
TESTIMONY OF DR.^WRIGHT.  
OR MEDICAL EXAMINER EXPERT.

>> SO THE BOOT WOULD HAVE TO  
ENTER THE VAGINAL AREA.

>> THE BOOT PENETRATED.

>> THAT'S ONE OF MY OTHER  
ISSUES THAT THE BOOT BECAUSE  
THE WOMAN HAD NINE CHILDREN,

AND DR.^MILLER TESTIFIED SHE  
HAD --

>> JUST ANSWER MY SIMPLE  
QUESTION.

WOULD THE BOOT HAVE HAD TO  
PENETRATE THE VAGINA?

>> NO.

>> TO MAKE ENTRY.

OKAY LET ME BACK UP.

WHAT IS THE NATURE OF THE  
SEXUAL BATTERIADS CHARGED HERE?

WAS IT SIMPLE VAGINAL  
PENETRATION BY THE PENIS OR WAS  
ORAL SEX ALSO CHARGED.

>> IT WAS JUST AGGRAVATED  
SEXUAL BATTERY AND IN THE  
MOTION -- ARGUMENT ON THE  
MOTION --

>> -- DOCUMENT.

>> I BELIEVE IT WAS JUST,.

>> WAS IT JUST HIS PENETRATING  
HER WITH HIS PENIS OR WAS IT  
ALSO HIM FORCING HER TO PERFORM  
ORAL SEX.

>> I DON'T KNOW -- I BELIEVE  
THE ORAL SEX WAS INVOLVED I  
THINK I BELIEVE IT WAS  
PENETRATION BY A LARGE OBJECT  
AND HONESTLY I DON'T HAVE THAT  
ANSWER AT MY FINGER TIPS AND I  
WOULD HAVE TO RELY ON THE  
CHARGING DOCUMENT.

>> PENETRATION BY A LARGE  
OBJECT, SO DID THE STATE  
PROCEED ON A THEORY THAT HIS  
PENIS WAS, WAS THAT THE OBJECT  
OR WAS THERE SOME OTHER OBJECT?

>> NO, THE DEFENSE HAD TO  
PROCEED ON THAT BECAUSE THEY  
COULDN'T GET DR.^MILLER TO  
ADMIT THAT IT COULD'VE BEEN A  
KICK AS FAR AS THE INTERNAL  
INJURIES.

>> LET'S JUST GO BACK -- I'M  
STILL, TO GET YOUR POSITION ON  
THIS, ARE YOU SAYING THIS IS A,  
THAT YOU -- WE HAVE TO LOOK AT  
DR.^MILLER'S TESTIMONY AND  
CONCLUDE THAT HE RECANTED WHAT  
HE SAID AT THE TIME OF TRIAL  
FOR THIS TO BE NEWLY DISCOVERED  
BECAUSE AGAIN IT CAN'T BE BRADY  
OR GIGLIO BECAUSE HE ONLY

LOOKED AT THIS SUBSEQUENTLY TO  
SAY WELL MAYBE AFTER I LOOKED  
AT WHAT DR.^RICE SAID, YOU  
KNOW, MAYBE THIS -- I SHOULD'VE  
SAID IT THIS WAY?

SO IT WASN'T BE THE OTHER TWO.  
I MEAN THE STATE DIDN'T  
KNOWINGLY --

>> YEAH.

>> BECAUSE THAT'S YOUR --

>> I'M AEROING.

>> THE STATE DIDN'T PRESENT  
FALSE TESTIMONY.

BECAUSE DR.^MILLER DIDN'T THINK  
HIS TESTIMONY WAS FALSE IT WAS  
A OPINION HE ARRIVED TO IN GOOD  
FAITH.

>> HIS POSITION CHANGED FROM  
ONE THING IN 1989 TO 1992 WHEN  
HE IS TESTIFYING ABOUT THE  
EXTERNAL INJURY, LOOKS AT THE  
PHOTOGRAPH HE SAID YOU KNOW?  
I'M MISTAKEN IT WASN'T THAT  
THAT EXTERNAL PERINEAL INJURY  
IS TOO FAR AWAY FROM THE  
VAGINA.

COULDN'T HAVE BEEN CAUSED BY  
STRETCHING.

AND SO I WAS WRONG.

THAT SHOULD HAVE BEEN OBVIOUS  
AND AVAILABLE.

NO SEXUAL GRATIFICATION.

THERE IS NO EVIDENCE THAT THE  
PLACING OF THE HAND THERE WAS  
FOR SEXUAL GRATIFICATION AND  
THIS COURSE IN SPECIAL  
CONCURRENCE ADOPTS THE SPECIAL  
CONCURRENCE IN THE DISTRICT  
COURT.

AKIN WAS A CASE WHERE YOU  
ELIMINATED THE REQUIREMENT FOR  
SEXUAL GRATIFICATION AS FAR AS  
SEXUAL ORGAN CONTACT.

THEY ELIMINATED THAT BUT  
WITHHELD RULING ON WHETHER  
SEXUAL GRATIFICATION WAS STILL  
AN ELEMENT OR NOT.

IT WAS AN ELEMENT AT THE TIME  
OF INSERTION.

AND SO THAT WAS STILL A  
LEGITIMATE DEFENSE.

IT WASN'T UNTIL THIS COURT RULED THAT IT WAS NOT A DEFENSE, SO YOU HAVE LACK OF SEXUAL GRATIFICATION. NO SHOWING OF ARGUMENT EVER THAT THAT WAS INTENT. AFTER THAT WE HAVE THE FACT THAT THERE WAS NO INSERTION, ARGUING ON THE BASIS THAT THE INJURIES WERE ALL VISIBLE EXTERNALLY. NOW THE WOMAN HAD A PROLAPSED VAGINA, AND SO SOME OF THE PARTS THAT NORMALLY ARE INTERIOR WERE EXTERIOR AND MORE READILY VISIBLE AND READILY AVAILABLE BY CONTACT FROM THE KICK. AND FINALLY WE HAD ACCIDENT, AND IN THIS CASE, AGAIN, ACCIDENT OR MISHAP AND THERE WAS NO INTENT TO PENETRATE AND THE ONE IN A MILLION SHOT THAT WOULD BE THAT SOMEONE WAS DOING THAT, THEY HAVE NO INTENT TO PENETRATE. SO IT IS TRULY AN ACCIDENTAL PENETRATION AND THAT DEFENSE IS ALWAYS AVAILABLE AND SHOULD HAVE BEEN RECOGNIZED. WE ESTABLISHED THAT MR. SENARTY DID NOT ACTIVELY INVESTIGATE THE LAW AT THE TIME OF THE TRIAL IN 1989 AND THEREFORE WAS NOT PREPARED TO RAISE ANY OF THOSE DEFENSES AS TO THE RIP.

>> YOU ARE MOVING ON TO REBUTTAL. YOU HAVE COVERED THREE OR FOUR TOGETHER. ARE THERE ANY OTHER ONES YOU WANT TO DISCUSS?

>> JUST BRIEFLY ON THE MENTAL HEALTH ISSUE, DR. DEE WAS A NEUROPSYCHOLOGIST. HE TESTIFIED THERE INDEED ARE THE TWO, THE TWO STATUTORY MENTAL HEALTH MITIGATORS, BEING UNDER EXTREME EMOTIONAL DISTRESS AND BEING UNABLE TO PERFORM HIS ACTIONS TO THE REQUIREMENT OF THE LAW. THAT WAS NOT INTRODUCED HERE. NO TESTIMONY IN THE ORIGINAL TRIAL. DR. DEE TESTIFIED THERE WAS BRAIN DAMAGE BUT THE STATE

RECOGNIZED THE NEED FOR A  
NEUROPSYCHOLOGIST.  
THIS IS IN THE PENALTY PHASE.  
DON'T YOU NEED NEUROPSYCHOLOGY  
IN YOUR TESTING TO FIRM THIS UP,  
AND HE SAID YES, AND SO THE  
STATE KNEW THAT THE  
NEUROPSYCHOLOGY WAS AVAILABLE  
AND NEEDED.

MR. LOPEZ, JUDGE LOPEZ, NOT A  
JUDGE AT THE TIME, KNEW OR  
SHOULD HAVE KNOWN, SAID HE NEVER  
USED A NEUROPSYCHOLOGIST AND  
NEUROPSYCHOLOGY BUT THAT DOES  
NOT EXCUSE HIM, BUT EVEN THE  
STATE KNOWS NEUROPSYCHOLOGY WAS  
A WELL ACCEPTED DISCIPLINE AT  
THAT TIME AND SHOULD HAVE BEEN  
USED.

EVERY WITNESS IN THE MENTAL  
HEALTH DEPARTMENT, EVERY WITNESS  
CONCEDED THAT THE  
NEUROPSYCHOLOGY TESTING IS THE  
STANDARD AND IT WAS NOT WITNESS  
TO REBUT THESE FINDINGS.

THE EXPERTS THE STATE USED,  
DR. TAYLOR ADMITTED HE IS NOT  
QUALIFIED TO MAKE ANY KIND OF  
DETERMINATIONS IN  
NEUROPSYCHOLOGY TERMS.  
HE IS ONLY A PSYCHIATRIST.  
HE SAYS THERE'S NO BRAIN DAMAGE.  
WHY IS THERE NO BRAIN DAMAGE?  
NOBODY TOLD ME ABOUT ANY BRAIN  
DAMAGE.

>> THE TRIAL JUDGE SAID THE  
DEFENDANT'S PSYCHOLOGICAL  
HISTORY OF AGGRESSION WITH  
COMPULSIVENESS COUPLED WITH  
PSYCHOLOGICAL TESTING IS  
INDICATIVE OF BRAIN INJURY.

>> YES.  
SO THAT BODY WAS MADE.  
WHAT DID THIS ADDITIONAL  
TESTIMONY ADD THAT WOULD HAVE  
PROVIDED --

>> THE LOCUS TO THAT BRAIN  
INJURY IS THE TWO STATUTORY  
MENTAL HEALTH MITIGATORS THAT,  
BECAUSE OF THE BRAIN INJURY HE  
WAS UNDER EXTREME EMOTIONAL  
DISTRESS, AND HE HAD THESE  
UNCONTROLLABLE FITS THAT CAME  
OVER HIM.

HE WITNESSED ONCE DURING -- WHEN THE LUNCH BREAK OCCURRED, DURING HIS TESTIMONY.

>> THAT IS MORE -- YOU ARE SAYING BOTH STATUTORY FACTORS?

>> THE ABILITY TO CONFORM FACTIONS IN THE PREMISE OF THE LAW BASED ON THIS HISTORY OF THE TEACHER ETC, AND MR. LOPEZ SAID, "WELL I DIDN'T GO FOR ANOTHER EXPERT BECAUSE WE'LL HAVE ONE." THAT IS BECAUSE YOU DO GET MORE THAN ONE.

IT IS UNCONSTITUTIONAL, IF THERE WAS THE RULE EXTENT THAT MADE IT DIFFICULT OR IMPOSSIBLE FOR HIM TO GET A NEUROPSYCHOLOGIST TO DO THE FOLLOWUP.

DR. TAYLOR QUALIFIED AND DR. LYNCH, NOT A PATHOLOGIST, NOT A FORENSIC --

>> DR -- SAID THERE WAS A NEED FOR NATURAL PSYCHOLOGICAL TESTING?

>> HE SAID, "DR. BERLIN, DON'T YOU NEED TO HAVE NEUROPSYCHOLOGICAL TESTING TO FOLLOW UP?"

>> THAT WAS BEFORE YOU TESTIFIED.

THE TESTIMONY THAT HE ADVISED TRIAL COUNSEL THAT THERE WAS AN ISSUE, THE NEED FOR NEUROPSYCHOLOGICAL TESTING.

>> WE DON'T HAVE HIM TESTIFY AT THE EVIDENTIARY HEARING AND I NOW BELIEVE ANYONE HAS AN ARGUMENT ABOUT THAT SO PRESUMABLY, REGARDLESS OF WHETHER BERLIN TOLD LOPEZ THAT THE STANDARD UNDER WIGGINS AND RAGSDALE IS YOU SHOULD RECOGNIZE WHEN YOU HAVE, WHEN YOU HAVE MENTAL HEALTH MITIGATORS AVAILABLE AND YOUR EXPERT IS GIVING -- YOU GET ANOTHER EXPERT AND YOU GET THE EXPERTS THAT WILL DO IT, THAT CAN DO IT AND THE NEUROPSYCHOLOGIST IS QUALIFIED TO DO THAT KIND OF INVESTIGATION.

>> MAY IT PLEASE THE HONORABLE COURT.

MY NAME IS KATHERINE BLANCO,

REPRESENTING THE STATE OF  
FLORIDA.

YOUR HONORS, BEFORE I BEGIN TO  
ADDRESS EACH OF THE ARGUMENTS OR  
ATTEMPT TO ADDRESS EACH OF THE  
ARGUMENTS, I WOULD LIKE TO  
ADDRESS TWO QUESTIONS FROM THE  
PANEL SPECIFICALLY QUESTIONED BY  
JUSTICE ALLEN AND JUSTICE  
PARIENTE.

JUSTICE BELL, YOU INQUIRED ABOUT  
THE CHARGING DOCUMENT AND HOW  
IT DID CHARGE SEXUAL BATTERY.  
YOUR HONORS, THE STATES CITES TO  
THE RECORD BY PAGE 1057 THROUGH  
1058 FOR THE CHARGING DOCUMENT  
AND THE CHARGE JUST BRIEFLY AS  
TO THE SEXUAL BATTERY -- ALLEGED  
SEXUAL BATTERY -- UPON GERALDINE  
BIRCH BY VAGINAL PENETRATION  
AND/OR ORAL PENETRATION OR UNION  
WITH HIS SEXUAL ORGAN OR  
PENETRATION WITH OBJECTS, AND IN  
THE PROCESS I HAVE USED ACTUAL  
PHYSICAL FORCE CAUSING PERSONAL  
INJURY SO YES IT WAS CHARGED.  
PENIS TO VAGINA, PENIS TO THE  
VICTIM'S MOUTH, PENETRATION TO  
THE VICTIM'S VAGINA BY AN OBJECT AND  
THAT LEADS TO --

>> WAS IT ARGUED?

>> IT WAS CERTAINLY ARGUED YOUR  
HONOR.

IT WAS INSTRUCTED TO THE JURY.  
THE JURY WAS GIVEN THE  
OPPORTUNITY NOT ONLY ON THE  
SUBSTANTIVE BUT ON THE ATTEMPT  
TO, SO THE STATE NEVER WAIVED  
FROM IT.

AS A MATTER FACT, WITH RESPECT  
TO THE ORAL SEXUAL OFFENSE, THE  
PROSECUTOR ARGUED AT LENGTH THAT  
A WOMAN WHO ALLEGEDLY HAD  
CONSENTED TO PERFORM ORAL SEX ON  
HER PARTNER WOULD NOT THEN -- AS  
IT WERE, A WILLING SEXUAL  
PARTNER.

SHE WOULD NOT CLAMP DOWN ON THE  
MALE PARTNER'S PENIS, AND  
INDICATIVE OF THE FORCE THAT WAS  
USED, THE PATCHES OF HAIR THAT  
WERE PULLED FROM HER HEAD, THE  
BOTTOM OF HER DENTURES OF COURSE  
WERE BROKEN AND OUT OF HER

MOUTH, AND OF COURSE THE FEROCIOUS INJURIES.

THE LACERATION OF COURSE TO HER HEART, HER LUNGS.

HER SPLEEN WAS PULVERIZED, HER KIDNEYS WERE DETACHED, NEARLY EVERY RIB WAS BROKEN.

HER THROAT, HER VOICEBOX WAS CRUSHED AND IT IS A VERY SIGNIFICANT INJURY AND LEADING TO THE QUESTION THAT JUSTICE PARIENTE ASKED WITH REGARDS TO DR. MILLER, VERY BRIEFLY I WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO THE POSTCONVICTION RECORD, VOLUME 12, TWO PAGES OF THIS POSTCONVICTION RECORD, 1953 IS THE FIRST PAGE AND THE POSTCONVENTION COURT INQUIRING OF DR. MILLER.

THE COURT, GENERALLY SPEAKING, THE LACERATIONS THAT YOU FOUND WOULD INVOLVE PENETRATION.

ANSWER: IN MY OPINION THEY WOULD.

ALSO YOUR HONORS, AT PAGE 1975, THIS IS AT CROSS-EXAMINATION, THIS QUESTION AND ANSWER IN THE VOLUME 12 CROSS-EXAMINATION. DR. MILLER YOUR OPINION HAS NOT CHANGED THAT YOU BELIEVE THAT THE TESTS YOU REFERRED TO IN YOUR AUTOPSY REPORTS -- EXCUSE ME THAT YOU REFERRED TO IN YOUR AUTOPSY REPORT, THE RADIATING TEARS WERE CAUSED BY PENETRATION AND NOT BY AN OBJECT, A LARGE OBJECT INTO THE VAGINA OF THE VICTIM.

ANSWER: YES.

OF AN OBJECT LARGE ENOUGH TO STRETCH ENOUGH TO PRODUCE THOSE TEARS.

SO YOU STILL HAVE DR. MILLER CONFIRMING THAT IN FACT THERE WERE LACERATIONS INSIDE THE VAGINA.

AND, OPPOSING COUNSEL HAS TAKEN TO TASK DR. LYNCH'S TESTIMONY AND DR. LYNCH, WHO DOES RECONSTRUCTIVE SURGERY AND IS AN ASSOCIATE PROFESSOR AT THE UNIVERSITY OF FLORIDA, SHE IS ALSO A PRACTICING OB-GYN AND

BOARD CERTIFIED, SO TO SAY SHE IS A LYING GYNECOLOGIST IS QUITE MISLEADING.

BUT SHE ALSO TESTIFIED THAT THE INJURIES WERE INSIDE WHAT IS TERMED THE VAGINA SO THERE YOU HAVE YOUR PENETRATION AND YOU HAVE AT THE VERY LEAST ATTEMPTS SO THE STATE THEORY WAS NEVER WAVERED, THAT IT WAS ALWAYS ALLEGED IN THE ALTERNATIVE, ARGUES IT WAS INDEPENDENTLY SUPPORTED BY AND THE ATTEMPT NOW TO RELITIGATE THE SEXUAL BATTERY AND FELONY MURDER WITH THE SEXUAL BATTERY IS CERTAINLY PROCEDURALLY BARRED.

>> JUST SO I UNDERSTAND, JUST UNDERSTANDING THIS THEORY OF THE CASE WAS WHAT? DID IT BEGIN CONSENSUALLY? BECAUSE THERE WERE WITNESSES THAT SAID THAT THEY HAD HEARD HER SAY, GIVE ME MONEY AND WE CAN GO -- THAT THEY WENT OVER THERE. SHE WENT VOLUNTARILY.

DOES THE STATE SAY THIS STARTED OUT VOLUNTARY AND THEN IT ESCALATED?

>> THE STATE ALWAYS QUESTIONED THAT YOUR HONOR.

THE STATE QUESTIONED THAT BY QUESTIONING THE FACT THAT THE DEFENDANT WAS SEEN ACTUALLY FOLLOWING THE VICTIM, THAT IN FACT, IF SHE WERE A PROSTITUTE, AS THE DEFENDANT TESTIFIED, THAT SHE OFFERED HIM SEX IN EXCHANGE FOR DRUGS AND MONEY, THAT NUMBER ONE SHE WOULD HAVE -- AND TWO THAT SHE WOULD NOT HAVE BITTEN DOWN ON THE DEFENDANT'S PENIS, LIKE YOU SAID, AND THE FEROCIOUS INJURIES SHE SUSTAINED WERE THE RESULT OF AN UNWILLING VICTIM. THIS IS A WOMAN WHO WAS NOT WILLING TO GIVE ORAL SEX TO THIS MAN, WHO WAS FORCED TO DO IT. THIS WAS A WOMAN WHO WAS FORCED.

>> THE THEORY WAS SHE WAS FORCED TO DO THAT AND HE THEN RAPED HER AND THE OTHER INJURIES OCCURRED SUBSEQUENTLY?

>> CERTAINLY YOU HAVE THE

DEFENDANT'S STATEMENTS, SO THE INITIAL STATEMENTS WHERE HE DENIED ANY INVOLVEMENT. THE SECOND STATEMENT DOES NOT MENTION VAGINAL INTERCOURSE. LATER HE DOES SAY THERE WAS A BRIEF ATTEMPT AT VAGINAL INTERCOURSE, THEN ACCORDING TO HIM MS. BIRCH SAID NO, SHE WOULD PERFORM ORAL ON HIM INSTEAD, SO THE DEFENDANT THEN SAID, "I BECAME ENRAGED."  
SHE WOULD NOT LET LOOSE AND WHEN SHE FINALLY LET LOOSE HE HAD ALREADY -- SHE WAS NOT SPEAKING, SHE WAS JUST MAKING SOUNDS AND THEN HE KICKED HER.  
THE STATE'S THEORY ALWAYS WAS THAT THIS WAS NEVER CONSENSUAL, THIS WAS FORCED.  
THAT HE TOOK ADVANTAGE OF THIS WOMAN, BUT THAT EVEN AS IT INITIALLY BEGAN AS CONSENSUAL CERTAINLY AT SOME POINT BECAME NON-CONSENSUAL BY EVIDENCE -- AS EVIDENCED BY THE BRUTALITY. CERTAINLY UNDER APPEAL THIS COURT UNDER FELONY MURDER WAS SEXUAL BATTERY BEING UNDERLINED FOR THE FELONY MURDER.  
>> SHOULD I DIGRESS ONE MOMENT, MR. GEMMER HAS SUGGESTED THAT THE DOCTOR'S TESTIMONY, WITH RESPECT TO THE MENTAL HEALTH, MEANT STATUTORY MENTAL-HEALTH LITIGATORS AND DIRECTORS, THE COURT'S ATTENTION TO PAGE NINE OF THE TRIAL JUDGE'S ORDER, WHERE HE PRESENTED A COMPREHENSIVE SUMMARY OF THE TESTIMONY OF THE POSTCONVICTION WITNESSES AT ABOUT THE MIDDLE OF THE PAGE.  
THIS IS THE TRIAL JUDGE SPEAKING WITH RESPECT TO HIS FINDINGS AND SUMMARY OF THE TESTIMONY, DR. DEE TESTIFIED HE COULD NOT COMMENT ON THE ABILITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF THE CONDUCT BUT HE TESTIFIED WITH THE NATURE OF THE BRAIN DAMAGE OF MR. TAYLOR, IT WOULD BE VERY DIFFICULT FOR HIM TO PERFORM HIS CONDUCT TO

THE DICTATES OF THE LAW.  
SO, YOU SEE THAT EVEN THEN YOU  
DON'T HAVE A STRONG, FROM THE  
DEFENSE PERSPECTIVE A STRONG  
ASSERTION THAT STATUTORY  
MENTAL HEALTH MITIGATORS WOULD  
HAVE BEEN SATISFIED, NOT ONLY  
THAT YOU ALSO HAVE DR. DONALD  
TAYLOR, WHO IS A PSYCHIATRIST,  
BOARD CERTIFIED PSYCHIATRIST,  
TESTIFYING, WHICH WE DID NOT  
HAVE AT THE 1992 PENALTY PHASE,  
THE STATE DID NOT CALL A MENTAL  
HEALTH WITNESS, BUT NOW ON  
POSTCONVICTION THEY PRESENT  
DR. DEE AND PSYCHIATRIST  
DR. DONALD TAYLOR, WHO TESTIFIED  
THAT HIS CONCLUSIONS ARE THAT  
THE DEFENDANT DOES NOT HAVE  
BRAIN DAMAGE.  
AND SO YOU CERTAINLY HAVE NO  
COMPETING TESTIMONIES, WHEREAS AT  
THE TIME OF THE PENALTY PHASE,  
THE 1992 PENALTY PHASE, YOU HAVE  
REPRESENTED BY A VERY  
EXPERIENCED FORMER PROSECUTOR  
AND DEFENSE COUNSEL, MANUEL  
LOPEZ, JUDGE LOPEZ NOW.  
HE WAS VERY AWARE OF HIS  
RESPONSIBILITY IN PRESENTING THE  
PICTURE OF THIS PARTICULAR  
DEFENDANT.  
HE PRESENTED SEVERAL WITNESSES  
TO SUPPORT NOT ONLY HIS THEORY  
IN MITIGATION BUT HE ALSO  
PRESENTED ARGUMENTS IN AN  
ATTEMPT TO MINIMIZE THE  
AGGRAVATION THE STATE HAD  
PRESENTED.  
SPECIFICALLY YOU HAVE GOT THE  
PRIOR VIOLENT FELONY CONVICTION  
AND HE ARGUED IN TIME, BUT WAS  
NOT TRULY REMOTE WHEN YOU LOOKED  
AT THE TIME THE DEFENDANT WAS  
INCARCERATED BUT ALSO THE FACT  
THE DEFENDANT HAD BEEN CONVICTED  
AS AN ADULT, SO WE ARGUE THAT TO  
THE TRIAL COURT IN AN EFFORT TO  
SHOW THAT SOMEHOW THAT  
AGGRAVATING FACTOR SHOULD BE  
MINIMIZED.  
WITH RESPECT TO THE HEINOUS,  
ATROCIOUS AND CRUEL FACTOR HE  
ALSO ARGUED, AN ARGUMENT TO

BE MADE, UNDERSTANDING CERTAINLY  
CONVICTION HAD BEEN PROMPTED BY  
THE COURT ON DIRECT APPEAL WITH  
RESPECT TO THE SEXUAL BATTERY  
THAT WAS -- THE HEINOUS,  
ATROCIOUS AND CRUEL FACTOR.  
HE ARGUED THERE WAS A SUGGESTION  
PERHAPS THE VICTIM WAS RENDERED  
UNCONSCIOUS AND UNAWARE OF THE  
BEATINGS OR THE MAGNITUDE OF THE  
BEATINGS.

>> BUT THIS WAS AT THE  
RESENTENCING?

>> THIS WAS AT THE 1992  
RESENTENCING YOUR HONOR.

>> SHE PROBABLY WAS UNCONSCIOUS.

>> JUSTICE PARIENTE, ACTUALLY --  
JUDGE LOPEZ, MR. LOPEZ AT THE  
TIME, HAD ARGUED THAT THAT WAS  
AN INFERENCE THAT COULD BE MADE,  
GIVEN DR. MILLER'S TRIAL  
TESTIMONY.

>> IN TERMS OF LOOKING AT WHAT  
KIND OF JOB THE DEFENSE LAWYER  
DOES, CERTAINLY ARGUING  
SOMETHING THAT DOES NOT HAVE ANY  
BASIS IN THE EVIDENCE DOES NOT  
MAKE THEM INEFFECTIVE COUNSEL,  
BUT HE PUT ON, HE PUT ON TO ME  
THE ONLY WAY THAT THIS CASE  
BECOMES A DIFFERENT CASE IS, AND  
WE HAVE HAD SOME OF THESE CASES  
WHERE THERE IS, SOMETIMES IT  
MIGHT START OUT AS A VOLUNTARY  
SEXUAL ACT AND THEN SOMETHING  
OCCURS TO ENRAGE A DEFENDANT,  
WHO HAS A FRONTAL LOBE INJURY  
AND WHEREAS A NORMAL PERSON  
MIGHT GET MAD AND WALK AWAY,  
SOMEBODY THAT DOES HAVE BRAIN  
DAMAGE, FRONTAL LOBE INJURY, IT  
IS A SYNDROME AND WE KNOW THAT  
IS WHAT CAUSES RAGE REACTION,  
WILL THEN BECOME VIOLENT AND IT  
SEEMS THAT THAT HAPPENED.

BUT, WHAT YOU ARE SAYING IS THAT  
THAT IS WHAT THEY TRIED TO DO TO  
THE MENTAL HEALTH EXPERTS THAT  
THEY HAD AT THE TIME.

>> WELL, THEY CALLED DR. BERLIN  
AND POSTCONVICTION, BOTH THE CCR  
RETAINED -- THEY AGREED  
DR. BERLIN WAS VERY WELL  
RESPECTED AND CERTAINLY

RECOGNIZED HIS CREDENTIALS.  
AND JUDGE LOPEZ CALLED  
DR. BERLIN, WHO ESTABLISHED THAT  
INDEED THERE WAS A DISCREPANCY  
AND HE GAVE AN MPI, THE  
DEFENDANT TESTED OUT AND HIS  
AVERAGE WAS I BELIEVE 104.  
HIS HIGHEST WAS 116 AND HIS  
LOWEST WAS 91 AT POSTCONVICTION.

>> THAT IS A SIGNIFICANT FINDING  
WHEN YOU HAVE A PERFORMANCE IQ  
THAT HAS A BIG GAP WITH THE  
VERBAL.

THAT IS A SIGN THAT THERE IS,  
THERE IS A POSSIBILITY OF BRAIN  
DAMAGE AND FURTHER TESTING IS  
NECESSARY.

>> VERY INTERESTINGLY,  
DR. DONALD TAYLOR, DURING HIS  
MEDICAL RESIDENCY, HE WAS TESTED  
AND THERE WAS A BIG DISCREPANCY  
IN HIS SCORES.

HE IS CERTAINLY A PRACTICING  
PSYCHIATRIST.

>> BRAIN DAMAGE DOESN'T  
NECESSARILY MEAN -- SOMETHING IS  
LINKED UP WITH BEHAVIOR.

>> CERTAINLY, AND YOU HAVE  
DR. BERLIN WHO HAS REFUSED THE  
RECORDS.

THIS DEFENDANT WAS IN FOSTER  
CARE FROM THE TIME HE WAS AGE 7  
TO 14.

DR. BERLIN HAD THE BENEFIT OF DR  
-- REPORT.

THAT PENALTY PHASE WAS REVERSED  
FOR A NEW RESENTENCING HEARING  
BASED ON IMPROPER COMMENT OR  
ARGUMENT YOUR HONORS, SO DR --  
THEN TEST REPORTS WERE AVAILABLE  
FOR DR. BERLIN SO THEY DID HAVE  
THE BENEFIT OF TWO MENTAL HEALTH  
EXPERTS.

HE WAS NOT RECALLED IN PART,  
MAYBE ATTRIBUTABLE PERHAPS TO  
THE BELIEF THAT THE DEFINITION  
OF CRAZY MAY BE REPEATING THE  
SAME THING AND EXPECTING THE  
SAME RESULTS SO THEY WENT WITH A  
DIFFERENT EXPERT.

THE DEFENSE WENT WITH  
DR. BERLIN, WHO WAS VERY  
RESPECTED.

>> WERE THE RECORDS OF WHAT

HAPPENED TO HIM IN FOSTER CARE,  
WERE THOSE INTRODUCED INTO THE  
PENALTY PHASE?

>> HE WAS IN FOSTER CARE AT THE  
RUTLEDGE HOME.

ONE OF THE FOSTER CARE CHILDREN,  
WHO OF COURSE WAS AN ADULT AT  
THE TIME OF THE TRIAL, TESTIFIED  
AT THE '92 PENALTY PHASE, AND  
THE DEFENDANT'S BROTHER ALSO  
TESTIFIED.

HE WAS ALSO AT THE MENDEZ CENTER  
FOR A WHILE.

THERE WAS A DISCUSSION BY  
DR. BERLIN.

AND POSTCONVICTION A WITNESS WAS  
CALLED ABOUT THE MENDEZ CENTER,  
THAT IT WAS PRIMARILY -- IT WAS  
FOR CHILDREN THAT HAD  
OPPOSITIONAL DEFIANCE DISORDERS,  
THAT THEY WERE PLACED THERE FOR  
TREATMENT AND THE WITNESS CALLED  
POSTCONVICTION AND SAID I CAN  
SEE -- HE WAS AN ELEMENTARY  
SCHOOL-AGE CHILD AT THE TIME.

WHEN I WOULD SEE HIM, HE HAD  
ALREADY CALMED DOWN FROM HIS  
QUICK TO ANGER.

WHATEVER EPISODES HE HAD AND  
THEN HE WAS ALWAYS -- AT THAT  
POINT IN TIME BUT THE DEFENSE  
NOT ONLY PRESENTED THE MENTAL  
HEALTH TESTIMONY FROM DR. BERLIN  
AND AGAIN, ALTHOUGH CERTAINLY  
THE PROSECUTOR CROSS-EXAMINED  
HIM, THE STATE DID NOT PRESENT  
ANY COMPETING MENTAL HEALTH  
EXPERTS IN POSTCONVICTION WHERE  
YOU HAVE DR. TAYLOR SAYING NO,  
HE DID NOT FIND BRAIN DAMAGE BUT  
IN ADDITION YOU HONOR WITH  
RESPECT TO THE FOSTER HOME  
EXPERIENCE, AND IT IS ADDRESSED  
IN THE SENTENCING ORDER, THERE  
IS A RECOGNITION THAT HE WAS  
PUNISHED FOR BEDWETTING AND IN  
POSTCONVICTION, WHAT THE CCR  
ADDED, THEY ADDED A WITNESS WHO  
WAS AT THE SAME FOSTER HOME FOR  
SIX YEARS, WHO WAS ALSO BEAT  
WHEN HE, WHEN THE CHILDREN GOT  
INTO TROUBLE OR WHEN  
MRS. RUTLEDGE, WHO WAS THE  
HOMEOWNER AND RULED ACCORDING TO

THE WITNESS, RULED WITH AN IRON FIST.

THIS WAS MR. HOWARD URY WHO WAS QUITE SUCCESSFUL.

HE HAS HELD DOWN A JOB FOR A NUMBER OF YEARS.

HE WORKS FOR THE MEDIA CORPORATION IN TAMPA, AND HE HAS GONE ON TO BECOME A VERY SUCCESSFUL YOUNG MAN.

AND SO, THAT WOULD BE A VERY BIG DOUBLE EDGED SWORD, TO BRING IN SOMEONE THAT HAS PROVED TO BE A VERY OUTSTANDING CITIZEN AND WAS RAISED FOR SIX YEARS IN THE SAME ABUSIVE FOSTER HOME.

NOW, I PUT QUOTES AROUND THAT BECAUSE MR. URY, MR. PERRY TAYLOR GOT SPANKINGS BUT HE DOES NOT KNOW THE EXTENT OF THEM, BUT HE WAS SINGLED OUT FOR

BEDWETTING INCIDENTS, SO YOU HAVE, YOU DO HAVE TESTIMONY AT THE RESENTENCING OF THE FOSTER HOME EXPERIENCE, OF THE MENTAL HEALTH ISSUES, OF HIS BROTHERS.

WITNESSES TESTIFIED TOO, AND HIS GRANDMOTHER ALSO TESTIFIED.

HIS GRANDMOTHER TESTIFIED IN '92 IN THE RESENTENCING HEARING SO ANYTHING THAT CCR SAID PERHAPS IT WOULD HAVE BEEN BETTER TO HAVE HIS MOTHER TESTIFY.

HIS MOTHER IN NO WAY SHAPE OR FORM WAS GOING TO TESTIFY ON HIS BEHALF.

SHE DID NOT WANT TO BE THERE.

BUT, THE FACT THAT SHE HAD NEGLECTED HER CHILDREN WAS MADE READILY APPARENT AT THE '92 RESENTENCING HEARING.

AND NOW THE BEST THEY CAN ASK FROM THE DEFENDANT'S BROTHER IN POSTCONVICTION -- AND DR. TAYLOR ADDRESSES THAT AND SAYS YOU'VE MAY HAVE HARSH A CHILDHOOD BUT NOT EVERYBODY RENDERS YOU PERMANENTLY BRAIN DAMAGED.

AND SO, THE ISSUES THAT ARE BEFORE THE COURT IN POSTCONVICTION ARE ESSENTIALLY A RELITIGATION OF THE SUFFICIENCY OF THE EVIDENCE CLAIM WHICH THIS COURT HAS PREVIOUSLY ADDRESSED,

WHICH PROCEDURALLY IS BARRED TO THE EXTENT THAT IT TRIED TO BE SHOEHORND IN UNDER TRIAL COUNSEL OR NEWLY DISCOVERED EVIDENCE.

THE TRIAL COURT IN POSTCONVICTION REJECTED THOSE CLAIMS, MADE SPECIFIC FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THIS RECORD AND THE TRIAL COURT IN POSTCONVICTION CERTAINLY DID A METICULOUS JOB OF ADDRESSING THE ISSUES THAT WERE RAISED IN PROVIDING THIS COURT WITH A VERY COGENT FINAL ORDER, AND I WOULD ASK THE COURT TO AFFIRM THE DENIAL OF POSTCONVICTION RELEASE.

THANK YOU.

>> I BELIEVE YOU HAVE USED YOUR TIME BUT I WILL GIVE YOU A COUPLE OF MINUTES FOR REBUTTAL.

>> BACK TO THIS COURT'S OPINION IN TAYLOR ONE, THE ONLY REASON, AND WE WERE DISCUSSING CIRCUMSTANTIAL EVIDENCE, IN EVERY REASONABLE HYPOTHESIS, HOW DID YOU OVERCOME REASONABLE HYPOTHESIS?

IT IS BECAUSE DR. MILLER TESTIFIED ABOUT THE INJURIES TO THE GENITALS.

>> HOW WAS THIS CIRCUMSTANTIAL EVIDENCE?

>> BECAUSE YOU DON'T HAVE ANY EVIDENCE OF A RAPE.

>> I THOUGHT THE DEFENDANT ADMITTED THERE WAS A CONSENSUAL ENCOUNTER.

HIS POSITION WAS THERE WAS A CONSENSUAL ENCOUNTER.

WHEN YOU TALK ABOUT A CIRCUMSTANTIAL CASE, THE DEFENSE SAYS I AM NOWHERE NEAR THAT, THAT IS NOT THE CASE BECAUSE YOU TALK ABOUT CIRCUMSTANTIAL EVIDENCE, AND THAT WAS WHAT TAYLOR DISCUSSED, HOW YOU OVERCOME THE THEORY OF INNOCENCE, THERE WAS CONSENT AND THE COURT SAYS IT IS BECAUSE, BECAUSE THE INJURIES.

>> AS BEING FROM THE JUNGLES AND AN ARGUMENT AND THE JUDGE TOLD

MR -- YOU HAVE GOT NOTHING ON  
SEXUAL ORGANYRY.

THE ONLY THING YOU HAVE GOT IS  
BY OBJECT.

>> AS FAR AS THE RELIABILITY, HOW  
IT COULD OCCUR WITHOUT BEING A  
DELIBERATE ACT.

>> IT IS POSSIBLE THAT IT CAME  
DURING THE ORAL SEX AND WAS  
NIPPING IN THE SENSE OF BEING  
LOOSE AND CATCHY AS OPPOSED TO A  
DELIBERATE BITE, AS A RESISTANCE  
TO INVOLUNTARY ORAL SEX.

DR. LYNCH SAYS THE OPENING WAS 1  
INCH, AND THEREFORE YOU COULD  
NOT GET A SHOE IN, BUT YOU CAN  
GET A BABY THROUGH, AND IF YOU  
CAN'T GET A SHOE IN YOU CAN'T  
GET A HAND IN, AND THE STATE'S  
THEORY, IT WAS RAPE BY HAND, AND  
SO YOU DON'T HAVE EITHER ONE,  
AND THEN YOU ARE BACK TO THE  
UNLUBRICATED PENIS. THAT WAS OUR  
TARGET IN THE ORIGINAL TRIAL.

WHEN ASKED WHETHER HE DENIED  
WHETHER PERRY DENIED VAGINAL SEX  
IN THE CONFESSION, MCNAMARA SAYS,  
"HE TOLD ME ABOUT THE ORAL SEX," SO  
IT WASN'T A DENIAL OF VAGINAL  
SEX, IT WAS AN ADMISSION OF ORAL  
SEX AND WHAT THE DETECTIVE SAYS, "SIR  
DID YOU COMMIT VAGINAL SEX?  
DID YOU HAVE SEX, DID YOU HAVE  
SEX WITH HER?"

PERRY SAID, "YES, ORAL SEX," AND  
THEN LATER ON IT REFLECTS ON  
SOME MORE, THERE WAS THAT THING  
THAT REALLY WAS NOT SEX, IT WAS  
ATTEMPTED SEX IN THE VAGINAL  
AREA.

>> TO STAND ON THE TESTIMONY  
WITH REGARD TO WHAT THE JUDGE  
SAID, THE JUDGE IS INCORRECT,  
DR. DEE WAS FULLY SUPPORTIVE OF  
THE MENTAL HEALTH MITIGATORS  
CLAUSE HE ALSO FOUND MEMORY  
FUNCTIONING -- THE IQ SHOWS  
FAULT.

THERE IS EVEN GREATER DISPARITY  
IN THE FUNCTIONING VERSUS THE  
TWO KINDS OF MEMORY THAT ARE  
MEASURED BY THE  
NEUROPSYCHOLOGICAL TESTING.  
DR. TAYLOR -- KNOWN BRAIN DAMAGE

BECAUSE THEY DID NOT ASK ABOUT IT.

THEY DID NOT ASK SUFFICIENTLY ABOUT IT AND HE ADMITTED, IF YOU HAVE BRAIN DAMAGE YOU MIGHT NOT REMEMBER A 5-YEAR-OLD INJURY.

THE BROTHER TESTIFIED TO AT LEAST TWO BANISTER FALLS THAT REQUIRED GOING TO THE HOSPITAL, THE HOSPITAL WHERE RECORDS LONG SINCE DISAPPEARED, AND HE SUFFERED A CONCUSSION AND A BROTHER SAYS AFTER THAT HE STARTED HAVING MIGRAINES AND HIS BEHAVIOR CHANGED. HE STARTED HAVING THESE SPELLS WHERE YOU COULD SEE HIS FACE CHANGE, JUST AS DR. DEE SAID, SO THOSE HEAD INJURIES ARE WHAT STARTED THE WHOLE PROBLEM WITH THE FRONTAL LOBE UNCONTROLLABLE RAGE.

>> AND YOU HAVE EXHAUSTED ADDITIONAL TIME.

THANK YOU VERY MUCH.

THE COURT WILL TAKE IT UP UNDER CONSIDERATION.

THE COURT WILL STAND IN RECESS UNTIL 8:30 TOMORROW MORNING.

ALL RISE.