CAPITAL CASE

DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PERRY ALEXANDER TAYLOR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 88-CF-015525**

v.

PERRY TAYLOR,
Defendant.
_____/

DIVISION: J/B

ORDER DENYING CLAIMS ONE, TWO AND THREE OF DEFENDANT'S FIRST SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF AND RESERVING RULING ON CLAIM FOUR

THIS MATTER is before the Court on Defendant's First Successive Motion for Postconviction Relief, filed on July 14, 2016, pursuant to Florida Rule of Criminal Procedure 3.851. On August 1, 2016, the State filed its response to Defendant's motion. On August 30, 2016, the Court held a case management conference. On September 8, 2016, Defendant filed a reply to the State's response. After considering Defendant's motion and reply, the State's response, as well as the court file and record, the Court finds as follows.

CASE HISTORY

On May 11, 1989, a jury found Defendant guilty of murder in the first degree (count one) and sexual battery/great force (count two). The jury further unanimously recommended that a death sentence be imposed on count one and, on May 12, 1989, the trial court imposed a death sentence on count one and life sentence on count two, consecutively. The Florida Supreme Court affirmed Defendant's convictions, but reversed and remanded for a new penalty phase on count one. *See Taylor v. State*, 583 So. 2d 323 (Fla. 1991).

On May 21, 1992, a jury recommended by a vote of 8-4 that death be imposed and, on June 23, 1992, the trial court imposed death as to count one. Defendant's death sentence was affirmed.

See Taylor v. State, 638 So. 2d 30 (Fla. 1994). On November 14, 1994, the United States Supreme Court denied certiorari review. *Taylor v. Florida*, 513 U.S . 1003 (1994).

Defendant filed his initial motion for postconviction relief on March 12, 1996, and after various amendments and evidentiary hearings, the postconviction court denied his motion for postconviction relief on February 6, 2006. (*See* order, attached). The Florida Supreme Court affirmed. *See Taylor v. State*, 3 So. 3d 986 (Fla. 2009). Defendant now files the instant motion.

FIRST SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

CLAIM ONE

DR. MILLER'S AFFIDAVIT AND TESTIMONY ARE NEWLY DISCOVERED EVIDENCE WHICH UNDERMINE THE RATIONALE FOR THE COURT'S REJECTION OF HIS POSTCONVICTION TESTIMONY THAT, CONTRARY TO HIS TRIAL TESTIMONY THAT THE VICTIM'S INJURIES WERE CAUSED BY SEXUAL ASSAULT, THE CAUSATION WAS A KICK.

In claim one, Defendant alleges newly discovered evidence. Specifically, Defendant attaches an affidavit from Lee Robert Miller, M.D., the assistant medical examiner who testified at Defendant's trial as well as his previous postconviction proceedings. In his affidavit, Dr. Miller asserts that on June 7, 2004, he testified it was "reasonably possible, perhaps probable" that the victim's vaginal injuries were caused by the penetration of the toe of a shoe, and it was a "one in a million shot." Dr. Miller further asserts that his postconviction testimony and use of the phrase "one in a million" in reference to a kick that could have caused the victim's genital injuries was a regrettable and "unfortunate choice of words." Dr. Miller further avers, "I can only reiterate my previous [postconviction] testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted in the vagina is a very reasonable probability."

Defendant asserts that in the previous postconviction proceedings, Dr. Miller agreed with the defense's postconviction expert, Dr. Wright, that the victim's genital injuries were probably caused by a kick and not by a stretch injury as Dr. Miller testified at trial. Defendant further asserts the postconviction court, as well as subsequent reviewing courts, misinterpreted and latched onto Dr. Miller's "one in a million" testimony to find Dr. Miller's postconviction testimony did not differ from his trial testimony and deny Defendant relief on his postconviction claims. In his motion, Defendant asserts Dr. Miller "now makes clear that he considers the victim's genital injuries were possibly, perhaps probably, caused by a kick, an act which negates the sexual battery in this case." Defendant also alleges, "Dr. Miller's affidavit establishes that his off-hand remark that the kick was 'one in a million' was misconstrued by the trial court and every reviewing court thereafter."

Defendant further alleges Dr. Miller's affidavit is newly discovered evidence because Dr. Miller was not aware of the incorrect interpretation of his postconviction testimony and, despite good faith efforts to do so, postconviction counsel was not able to contact Dr. Miller until June 2015. Defendant asserts the outcome of the proceedings would have been different where he would have been convicted of a lesser offense and not subject to the death penalty.

In its response, the State asserts Defendant's claim is untimely, successive and procedurally barred. The State posits Defendant has known since at least 2004 that Dr. Miller agreed the victim's vaginal injuries could have been caused by a kick. The State cites to the record, Dr. Miller's June 7, 2004, postconviction testimony and Dr. Miller's affidavit (wherein Dr. Miller reiterates his previous postconviction testimony). The State contends the instant motion is untimely as it is filed more than one year after Dr. Miller's June 7, 2004, postconviction testimony. The State further argues Defendant is essentially re-alleging his previous postconviction claim that Dr. Miller recanted his trial testimony and agreed the victim's vaginal injuries could have been

caused by a kick. Therefore, the State contends, this claim is also procedurally barred. The State also argues that Defendant's "real complaint is with the way courts have interpreted the evidence from the previous post-conviction evidentiary hearing," but that does not constitute newly discovered evidence. The State requests that the Court summarily Defendant's claim.

In his reply, Defendant posits that a kick would not constitute sexual battery, and if the trial court had been properly informed the injuries were likely from a kick and not insertion of a large object, there would have been insufficient evidence of sexual battery to survive a motion for judgment of acquittal at trial. Defendant further argues that without the underlying conviction for sexual battery, Defendant's general first degree murder conviction cannot be sustained solely based on premeditation as there is no indication on what theory the jury based its conviction.

In order to obtain relief based on newly discovered evidence, the Florida Supreme Court has set forth the following two-prong test:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (internal citations omitted). In his affidavit, Dr. Miller reiterates and clarifies his previous postconviction testimony. Dr. Miller asserts he regrets using the phrase "one in a million" in reference to a kick that could have caused the victim's genital injuries. Dr. Miller further asserts, "I can only reiterate my previous [postconviction] testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted in the vagina is a very reasonable probability." However, the Court finds such evidence is not of such a nature that it could not have been known through the exercise of due diligence nor would it probably produce an acquittal on retrial. Defendant's

attempt to clarify, tweak or expand upon Dr. Miller's postconviction testimony simply does not constitute newly discovered evidence. Similarly, Defendant's allegation that courts have consistently misconstrued Dr. Miller's postconviction testimony also does not qualify as newly discovered evidence. Because Defendant's conviction and sentence became final on November 14, 1994, and Defendant's allegations do not fall within any of the time limitation exceptions set forth in rule 3.851(d)(2), Defendant's allegations in claim one are procedurally barred as untimely.

Additionally, Defendant is essentially re-alleging that Dr. Miller has recanted his trial testimony and is again agreeing that the victim's vaginal injuries could have been caused by a kick. However, Defendant has previously raised allegations regarding Dr. Miller's trial and postconviction testimony, and both the postconviction court and the Florida Supreme Court have already addressed and rejected such allegations. In affirming the postconviction court's ruling, the Florida Supreme Court even addressed Dr. Miller's testimony as construed in the manner alleged by Defendant herein and his previous postconviction proceedings, and the court held as follows:

> **DR. MILLER'S TESTIMONY**
>
> Taylor raised multiple claims concerning Dr. Miller's trial testimony concerning the extensive injuries suffered by the victim. The trial court addressed these claims together, finding Taylor's allegations of recantation by Miller as to the victim's sexual injuries to be an inaccurate characterization of Miller's testimony. The trial court denied these claims, finding no newly discovered evidence, that trial counsel was not deficient, and that any possible deficiencies did not have the cumulative effect of denying Taylor a fair trial.
>
> At trial, Dr. Miller testified that the injuries to the victim's vagina were, within a reasonable degree of medical probability, caused by something "inserted into the vagina which stretched the vagina enough for it to tear over the object that was inserted in there." Dr. Miller further testified that the injuries were inconsistent with someone having kicked the victim. Relying on this evidence, we noted on review that "the medical examiner's testimony contradicted Taylor's version of what happened.... The medical examiner testified that the extensive injuries to the interior and

exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina." *Taylor*, 583 So.2d at 329.

At the postconviction evidentiary hearing, Dr. Miller testified that the injuries sustained were mostly confined to the labia minora and radiated inward, while some were inside the labia minora in "what anyone would describe as the vaginal canal." However, Dr. Miller further testified that the injuries could possibly have been the result of a kick if the blow had been struck where the toe of the shoe actually went into the vagina, stretching it, that any shoe would have been able to penetrate the victim's vagina due to extraversion, but that ultimately the injuries were caused by stretching and not direct impact. Miller testified that the possibility of a kick causing the injury was "a one in a million shot" and that his opinions as expressed at trial had not changed. He attributed any differences in his testimony to differences in the questions being asked and, in some instances more elaboration in exploring possibilities. Taylor contends that had Miller's testimony about a kick possibly causing the vaginal injuries been presented at trial he could not have been convicted of sexual battery or felony murder. Taylor alleges that (1) this is new evidence that requires a new trial, (2) the State withheld this evidence, (3) the State allowed Dr. Miller to present false testimony, or (4) his trial counsel was deficient for not having discovered this evidence before trial.

Newly Discovered Evidence

In ruling on this issue, the trial court found Taylor's claim of a "supposed recantation" by Dr. Miller of his trial testimony was "not an accurate statement of [Dr. Miller's] testimony." Hence, the trial court concluded Taylor had not actually established the existence of important new evidence of his innocence of sexual battery. We agree.

. . . .

In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, because the record refutes Taylor's contrary interpretation of the testimony, Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission

insufficient to overturn the trial court's conclusion that sufficient "new evidence" had not been established.

Additionally, we note the jury was not instructed to and did not differentiate between first-degree premeditated murder and first-degree felony murder in determining Taylor's guilt. There is no indication that Taylor was convicted of first-degree murder predicated solely upon the felony of sexual battery. This Court previously detailed the massive injuries sustained by the victim to support the State's alternative theories of premeditation and felony murder:

> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury.

Taylor, 583 So.2d at 329.

Accordingly, even if Dr. Miller's alleged change in testimony were considered sufficient to call into question Taylor's sexual battery conviction, it would not be sufficient to outweigh the evidence that Taylor committed premeditated murder or to cast doubt on his conviction for first-degree murder based upon premeditation. Ultimately, then, even if we were to construe Dr. Miller's testimony at the evidentiary hearing the way Taylor seeks, there remains an abundance of evidence the jury could have used to convict Taylor of

> *premeditated first-degree murder. Hence, we conclude the trial court did not err in denying this claim.*

Taylor v. State, 3 So. 3d 986, 993–94 (Fla. 2009), *as revised on denial of reh'g* (Jan. 29, 2009) (emphasis added). Defendant's allegations are successive, untimely and procedurally barred.

No relief is warranted on claim one.

CLAIM TWO

> **DR. MILLER'S AFFIDAVIT AND TESTIMONY ESTABLISHES THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ELICIT DR. MILLER'S TESTIMONY AT TRIAL [THAT] THE [] KICK [W]AS A LIKELY CAUSE OF THE VICTIM'S INJURIES.**

In claim two, Defendant asserts counsel was ineffective for failing to retain a forensic pathologist who could correctly determine causation of the injuries as a kick, not sexual battery, and guide counsel in his examination of Dr. Miller. Defendant asserts that in postconviction proceedings, Dr. Miller cited trial counsel's failure to ask him the right questions as the reason he did not testify at trial that the injuries were likely caused by a kick. Defendant asserts the correct testimony at trial would have resulted in conviction of a lesser offense.

In its response, the State asserts this claim is procedurally barred and should be summarily denied where Defendant raised this claim in his previous postconviction proceedings. The State further contends this claim should be denied as time-barred.

As discussed in claim one above, Dr. Miller's affidavit does not constitute newly discovered evidence. Consequently, Defendant's allegations in claim two are procedurally barred as untimely under rule 3.851(d)(2).

Additionally, Defendant has previously raised allegations of ineffective assistance of counsel related to Dr. Miller's trial and postconviction testimony, and such allegations have

already been addressed and rejected. In affirming the postconviction court's ruling, the Florida Supreme Court found:

> Taylor asserts this ineffectiveness argument in the alternative for his newly discovered evidence claims relating to Dr. Miller's testimony. Taylor alleges that should this Court find that any evidence could have been discovered at trial, then trial counsel was deficient for failure to discover said evidence. As discussed above with Dr. Miller's testimony, and below with Taylor's other claims, we conclude there was no material new evidence presented during these proceedings. . . . Each of Taylor's claims of newly discovered evidence is sufficiently refuted by the trial and postconviction record. None of them fail for counsel's lack of diligence. For example, we find there has been no demonstration of ineffectiveness under *Strickland* as to counsel's alleged failure to elicit Dr. Miller's "one in a million" testimony at trial. Accordingly, we reject Taylor's claim that counsel's performance was deficient.

Taylor, 3 So. 3d at 995–96. Defendant's allegations are successive, untimely and procedurally barred. **No relief is warranted on claim two.**

CLAIM THREE

> **THE STATE VIOLATED THE CONSTITUTIONAL PROTECTIONS OF *BRADY V. MARYLAND*, 373 U.S. 83 (1963), AND *GIGLIO V. UNITED STATES*, 405 U.S. 15 0(1972).**

In claim three, Defendant asserts that to the extent Dr. Miller always knew a kick was the likely cause of the victim's injuries, the State committed *Brady* and *Giglio* violations when it knew or should have known but failed to disclose that the medical examiner knew the victim's injuries did not support a sexual battery. Defendant asserts the correct testimony at trial would have resulted in his conviction for a lesser offense.

In its response, the State asserts this claim is procedurally barred as Defendant raised these allegations in his previous postconviction proceedings, the postconviction court rejected his claims and the Florida Supreme Court affirmed. The State requests that the Court summarily deny claim three.

As discussed in claim one above, Dr. Miller's affidavit does not constitute newly discovered evidence. Consequently, Defendant's allegations in claim three are procedurally barred as untimely under rule 3.851(d)(2).

Additionally, Defendant has previously raised allegations of *Giglio* and *Brady* violations related to Dr. Miller's trial and postconviction testimony and such claims have already been addressed. As to Defendant's previous *Giglio* and *Brady* allegations, the Florida Supreme Court held:

> **Giglio/Brady**
>
> In addition to the claim of newly discovered evidence arising from Dr. Miller's testimony, Taylor asserts that the trial court erred in denying his claim that through Miller's testimony the State intentionally permitted false or misleading evidence to be presented to the jury in violation of *Giglio* (where the United States Supreme Court held it to be a violation of due process when a prosecutor failed to disclose to the defense a promise made by the prosecution to a key witness that he would not be prosecuted if he testified for the prosecution). Finding there was no change in Dr. Miller's testimony, the trial court denied this claim. We conclude that the trial court properly denied Taylor's claim because it is refuted by the record.
>
> To prevail under *Giglio*, a claimant must show that false testimony was presented by the State and that there is a reasonable possibility that the false evidence affected the judgment of the jury.
>
> Taylor alleges that Dr. Miller's trial testimony was false because it was contradicted by his testimony at the evidentiary hearing. As the trial court concluded, the record does not support this allegation. Dr. Miller's testimony did not materially change. When the trial court finds that the testimony is not false, and there is competent substantial evidence to support that finding, we defer to the trial court's findings. Accordingly, Taylor has not shown cause for relief under *Giglio*.
>
> Alternatively, Taylor asserts that the State withheld material, favorable information in violation of Brady. Brady requires the State to disclose material information within its possession or control that is favorable to the defense. To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, (2) was willfully or inadvertently suppressed by the State, and (3)

> because the evidence was material, the defendant was prejudiced. The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."
>
> Here, however, the trial court has concluded, and we agree, that neither the State nor its actors suppressed evidence. Because the trial court has concluded that Dr. Miller's testimony is unchanged, there is nothing the State has been demonstrated to have suppressed.

Taylor, 3 So. 3d at 994-95 (citations omitted). Defendant's allegations are successive, untimely and procedurally barred. **No relief is warranted on claim three.**

CLAIM FOUR

> **MR. TAYLOR'S SENTENCE OF DEATH CANNOT BE SUSTAINED IN LIGHT OF THE DECISION IN *HURST V. FLORIDA*, 136 S. CT. 616 (2016).**

In claim four, Defendant asserts his death sentence is unconstitutional in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), wherein the United State Supreme Court held Florida's death sentencing scheme unconstitutional. Defendant acknowledges that the Florida Supreme Court is currently deciding various *Hurst*-related matters, but asserts that even if *Hurst* is not held to be retroactive, Defendant is still entitled to relief based on principles of equal protection.

In its response, the State asserts claim four is untimely, procedurally barred and should not be applied retroactively. The State cites to rule 3.851(d)(2)(B) and asserts *Hurst* does not create or recognize a new fundamental constitutional right and has not been held to apply retroactively. The State further posits the instant case is distinguishable from *Hurst* where Defendant was convicted of a contemporaneous felony and also had a previous felony conviction involving the use or threat of violence, therefore, no *Hurst* or *Ring* error is applicable here.

The Court finds the issue regarding the retroactivity of *Hurst* is critical to this Court's determination of claim four. The Court also agrees that the Florida Supreme Court is currently

considering cases and issues involving *Hurst,* including the applicability and retroactivity of *Hurst.* Consequently, in an abundance of caution, the Court reserves ruling on claim four at this time.[1]

It is therefore **ORDERED AND ADJUDGED** that claims one, two and three of Defendant's First Successive Motion for Postconviction Relief are each hereby **DENIED.**

It is further **ORDERED AND ADJUDGED** that the Court hereby **RESERVES RULING** on claim four.

This is a non-final, non-appealable order. Defendant may not appeal until such time as the Court has entered a final order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of October, 2016.

ORIGINAL SIGNED
OCT 07 2016
MICHELLE SISCO
CIRCUIT JUDGE

MICHELLE SISCO
Circuit Judge

Attachment:
Order Denying Motion to Vacate Judgments of Convictions and Sentences

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to David R. Gemmer, Esquire, CCRC-M, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; Suzanne Bechard, Esquire, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, by U.S. mail; and Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 7th day of October, 2016.

Deputy Clerk

[1] The Court notes claim four is an issue of law which does not require an evidentiary hearing.

APPENDIX B

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 88-CF-015525**

v.

PERRY ALEXANDER TAYLOR, **DIVISION: J**
Defendant.
_____/

FINAL ORDER DENYING AMENDED CLAIM FOUR OF DEFENDANT'S FIRST SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS MATTER is before the Court on Defendant's First Successive Motion for Postconviction Relief, filed on July 14, 2016, pursuant to Florida Rule of Criminal Procedure 3.851, wherein Defendant raises four grounds for relief; and Defendant's Motion to Amend First Successive Motion for Postconviction Relief and attached Defendant's Amended Claim 4 of First Successive Motion for Postconviction Relief, filed on January 24, 2017, wherein he amends claim four. On August 1, 2016, the State filed its response to Defendant's First Successive Motion for Postconviction Relief and, on August 30, 2016, the Court held a case management conference. On September 8, 2016, Defendant filed a reply to the State's response. On October 10, 2016, the Court rendered an order denying the first three claims of Defendant's First Successive Motion for Postconviction Relief but reserving ruling on claim four, pending a determination by the Florida Supreme Court on the retroactivity of *Hurst*.[1]

On January 24, 2017, Defendant filed his Motion to Amend First Successive Motion for Postconviction Relief and Defendant's Amended Claim 4 of First Successive Motion for Postconviction Relief, wherein Defendant amended claim four. On February 8, 2017, the Court granted Defendant's first motion to amend and, on February 27, 2017, the State filed its response.

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On March 23, 2017, the Court held a case management conference and scheduled a tentative evidentiary hearing date for June 15, 2017. Defendant filed his second motion to amend on May 2, 2017, seeking to add a fifth claim based on the recently amended death penalty scheme in Chapter 2017-1. On May 15, 2017, the Court rendered an order denying Defendant's second motion to amend.

The Court first finds the allegations raised in Defendant's amended claim four are purely legal and do not require an evidentiary hearing. After considering Defendant's allegations in claim four, the State's response, as well as the court file and record, and applicable case law, the Court further finds as follows.

AMENDED CLAIM FOUR

> **IN LIGHT OF *HURST V. FLORIDA*, *HURST V. STATE*, *RING*, AND *APPRENDI*, MR. TAYLOR'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION AND ARTICLE 1, SECTIONS 15, 16 AND 22 OF THE FLORIDA CONSTITUTION.**

In amended claim four, Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Defendant requests that the Court vacate his death sentence.

> **4-1: MR. TAYLOR'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS UNCONSTITUTIONAL BASED ON *HURST V. FLORIDA* AND *HURST V. STATE*, PRIOR PRECEDENT AND SUBSEQUENT DEVELOPMENTS BECAUSE MR. TAYLOR WAS DENIED HIS RIGHT TO A JURY TRIAL ON THE FACTS THAT LED TO HIS DEATH SENTENCE.**

In sub-claim 4-1, Defendant contends his death sentence is unconstitutional because he was deprived of his right to a jury trial on the essential elements that led to his death sentence. Defendant cites to the *Hurst* decisions as well as *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the United States and Florida constitutions. Defendant further asserts that he raised the issue of the unconstitutionality of Florida's death penalty scheme at trial and on direct appeal, but previously lacked the specific application of *Ring* and *Hurst*.

In its response, the State asserts Defendant's motion is untimely, procedurally barred and without merit. The State asserts the Florida Supreme Court has drawn "a bright-line rule" holding *Hurst* does not afford relief to defendants whose sentences became final before *Ring* was decided. The State posits the Court's analysis as to all of Defendant's allegations should end there, and urges the Court to summarily deny Defendant's amended claim four.

The Court agrees with the State's response and finds the Florida Supreme Court has clearly held *Hurst v. Florida* and *Hurst v. State* simply do not apply retroactively to cases that were final before the issuance of *Ring*.[2] *See Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016) ("[W]e conclude that *Hurst v. Florida* should not apply retroactively to cases that were final when *Ring* was decided."); *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) ("[W]e have now held in *Asay v. State*, that *Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*."); *Gaskin v. State*, SC15-1884, 2017 WL 224772, at *2 (Fla. Jan. 19, 2017) (citing *Asay* and finding defendant, whose sentence became final in 1993, is not entitled to relief under *Hurst*); *Bogle v. State*, No. SC11-2403 and No. SC12-2465, 2017 WL 526507, *16 (Fla. February 9, 2017) (citing *Asay* and finding defendant is not "entitled

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[2] *Ring* was decided on June 24, 2002. *See Ring*, 536 U.S. at 584.

to *Hurst* relief because *Hurst* does not apply to retroactively to cases that were final before *Ring* was decided."); *Lambrix v. State*, SC16-8, 2017 WL 931105, *8 (Fla. March 9, 2017) (citing *Asay* and concluding defendant is not entitled to a new penalty phase based on *Hurst v. Florida* or *Hurst v. State*). This Court is bound by the decisions of the Florida Supreme Court.

Here, Defendant's sentence became final on November 14, 1994, when the United States Supreme Court denied certiorari. *See Taylor v. Florida*, 115 S. Ct. 518 (1994); Fla. R. Crim. P. 3.851(d)(1)(B) ("For purposes of this rule, a judgment is final . . . on disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Because Defendant's sentence was final before *Ring* was decided, the Court finds *Hurst v. Florida* and *Hurst v. State* do not retroactively apply to the instant case. **No relief is warranted on sub-claim 4-1.**

4-2: THIS COURT SHOULD VACATE MR. TAYLOR'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, AND SUBSEQUENT CASES, MR. TAYLOR'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS.

In sub-claim 4-2, Defendant asserts his death sentence violates the Eighth Amendment, is contrary to evolving standards of decency and is arbitrary and capricious. Defendant cites to various cases involving the reliability requirements of the Eighth Amendment, and asserts his death sentence lacks such Eighth Amendment reliability as he "had no jury to determine his death sentence in the guided manner necessary to avoid being condemned to death in an arbitrary and capricious manner." Defendant further asserts the instant jury was instructed that its recommendation was only advisory and cites to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Defendant argues that any reliance on the advisory recommendation is misplaced and the instruction of the jury's role in such an unconstitutional death penalty scheme fails to meet the

Eighth Amendment requirements of *Caldwell*. Defendant further cites to *Hurst v. State*, and argues the Florida Supreme Court required jury unanimity in the recommendation verdict based on the Eighth Amendment and evolving standards of decency, and to prevent arbitrary and capricious imposition of the death penalty. Defendant posits that subjecting him to the death penalty based on Florida's previous unconstitutional death penalty scheme violates the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution, and "is the very definition of arbitrary and capricious." Defendant contends that in light of *Hurst v. Florida* and *Hurst v. State*, he is "ensconced in a class of individuals who may not be subject to the death penalty."

In its response, the State asserts the Eighth Amendment has never required a unanimous jury sentencing recommendation and the United States Supreme Court has never held the Eighth Amendment requires a unanimous jury sentencing recommendation. The State contends in *Spaziano v. State*, 468 U.S. 447 (1984), the United States Supreme Court held the Eighth Amendment is not violated when the ultimate sentencing responsibility rests with the judge. The State further contends *Hurst v. Florida* overruled *Spaziano* only to the extent *Spaziano* allows a sentencing judge to find an aggravating circumstance independent of the jury's fact-finding, but the Court did not overrule *Spaziano* on Eighth Amendment grounds. The State also contends the conformity clause of the Florida Constitution requires this Court to construe Florida's prohibition against cruel and unusual punishment consistently with the United States Supreme Court's precedent on Eighth Amendment claims. The State further argues any allegation that *Caldwell* mandates relief is without merit, untimely and procedurally barred.

As discussed in sub-claim 4-1 above, the *Hurst* decisions do not apply retroactively to the instant case. There is no United States Supreme Court or Florida Supreme Court precedent that

would require this Court to vacate Defendant's death sentence as violative of the Eighth Amendment. **No relief is warranted on sub-claim 4-2.**

4-3: THIS COURT SHOULD VACATE MR. TAYLOR'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED MR. TAYLOR TO THE DEATH [SENTENCE] WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

In sub-claim 4-3, Defendant contends his death sentence is unconstitutional because he was not only deprived of his right to a jury trial on the essential elements that led to his death sentence, but also because he was denied his right to proof of those elements beyond a reasonable doubt. Defendant argues "*Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt."

The State contends this argument is procedurally barred. The State further asserts these allegations are meritless as the jury was "unequivocally instructed as to Taylor's right to proof beyond a reasonable doubt on the aggravation that subjected him to the death penalty."

As discussed in sub-claim 4-1 above, the *Hurst* decisions do not apply retroactively to the instant case. **No relief is warranted on sub-claim 4-3.**

4-4: IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*, MR. TAYLOR'S DEATH SENTENCE SHOULD BE VACATED BECAUSE IT WAS OBTAINED IN VIOLATION OF THE FLORIDA CONSTITUTION.

In sub-claim 4-4, Defendant also contends that in light of *Hurst v. Florida* and *Hurst v. State*, his death sentence further violates the Florida Constitution. Defendant asserts his death sentence should be vacated where the increase in penalty imposed on him was "without any jury at all." Defendant cites to *Hurst v. State* and *Perry v. State*,[3] and asserts that "[n]o unanimous jury" here found the aggravating factors to be considered, that sufficient aggravating factors

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3 *Perry v. State*, 210 So. 2d 630 (Fla. 2016)

existed for imposition of a death sentence or that the aggravating factors outweighed the mitigating circumstances, as required. Defendant further asserts there was no unanimity in the jury's final recommendation of death. Additionally, Defendant cites to this unconstitutional death penalty scheme and to Article I, Sections 15(a) and 16(a), and asserts the aggravating factors in this case were not submitted to the grand jury or charged in the indictment, therefore, he was denied his right to a proper grand jury indictment and was never fully informed of the "full nature and cause of the accusation."

The State contends Defendant's allegations regarding the grand jury indictment are procedurally barred and without merit. The State notes the Florida Supreme Court has previously rejected such claims and has not vacated any death sentence based on the absence of aggravating factors in the indictment. The State further contends any error in the allegedly incomplete indictment is subject to a harmless error analysis, and Defendant has failed to and cannot demonstrate the absence of aggravating factors in the indictment affected his death sentence.

As discussed in claim I above, the *Hurst* decisions do not apply retroactively to the instant case. The Court further agrees there is no legal authority that would permit or require this Court to find that the Florida Constitution requires the aggravating factors of a capital case to be charged in the indictment in light of either *Hurst* decision. To the extent Defendant is raising allegations regarding the grand jury and his indictment that are not predicated on *Hurst*, the Court agrees with the State's response and finds his allegations are procedurally barred and without merit. **No relief is warranted on sub-claim 4-4.**

4-5: *HURST V. FLORIDA* AND *HURST V. STATE* APPLY RETROACTIVELY IN MR. TAYLOR'S CASE.

In sub-claim 4-5, Defendant asserts his death sentence is unconstitutional and in violation of the Sixth Amendment pursuant to *Hurst v. Florida* and *Hurst v. State*. Defendant asserts *Hurst*

v. Florida should be applied retroactively to his case under the *Witt*[4] retroactivity analysis as well as principles of fundamental fairness as set forth in *Mosley* and *James v. State*, 615 So. 2d 668 (Fla. 1993). Defendant asserts he raised *Ring* and *Hurst*-like issues at trial and on direct appeal, even before those opinions issued. Defendant argues that considerations of fairness and uniformity require retroactive application of *Hurst*, and defendants who raised and preserved *Hurst*-type challenges should be treated the same, regardless of when their sentences became final. Failure to do so "would not only be fundamentally unfair, but would render Florida's entire capital punishment system unconstitutional as arbitrary and capricious under the Eighth Amendment, because eligibility for a death sentence would be based on when a conviction became final..."

In its response, the State asserts Defendant's position is not supported by a reasonable reading of *Mosley*. The State further cites to *Gaskin* and asserts the Florida Supreme Court denied Gaskin, who raised *Hurst*-type challenges at trial and on direct appeal, *Hurst* relief because his sentence became final in 1993. The State further argues that Defendant's reliance on any unfairness in jury fact-finding is misplaced, and this Court is obligated to follow Florida Supreme Court precedent.

As discussed in sub-claim 4-1 above, the Florida Supreme Court has held *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to cases such as the instant case, and this Court is bound by such decisions. **No relief is warranted on sub-claim 4-5.**

4-6: THE COURT'S DENIAL OF MR. TAYLOR'S POSTCONVICTION CLAIMS MUST BE REHEARD AND DETERMINED UNDER A CONSTITUTIONAL FRAMEWORK.

In subclaim 4-6, Defendant asserts the Court should review his previously presented and denied postconviction claims under a constitutional framework. Defendant asserts the Court

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4 *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

previously determined his ineffective assistance of counsel claims and other claims "based on the constitutionally incorrect analysis that it was the judge that was required to, and did, make the findings of fact." Defendant cites to *Hurst* and incorporates his previous postconviction claims.

In its response, the State asserts *Hurst* "does not operate to breathe new life into unrelated, previously denied claims." The State requests that the Court summarily this claim.

As discussed in sub-claim 4-1 above, *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to the instant case. The Court agrees with the State's assertion that there is no legal authority which would permit or require this Court to re-evaluate and reconsider previously presented postconviction claims in light of *Hurst*. **No relief is warranted on sub-claim 4-6.**

4-7: THE *HURST V. FLORIDA* AND *HURST V. STATE* ERROR IN MR. TAYLOR'S CASE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Defendant asserts harmless error has no application to the violation of his Eighth Amendment rights. Defendant further contends that in light of *Hurst v. Florida* and *Hurst v. State*, the State bears the burden of proving any *Hurst* error is harmless here, but the State cannot do so based on the non-unanimous (8-4) advisory recommendation in this case. Defendant cites to various Florida Supreme Court opinions wherein the court declined to find harmless error in cases involving non-unanimous jury recommendations. Defendant further alleges his case is highly mitigated, including additional postconviction evidence of abuse and brain damage. Defendant contends the constitutional violations alleged in his motion are not harmless beyond a reasonable doubt.

In its response, the State asserts that "[n]o harmless error analysis is necessary in this case, since no cognizable constitutional error has been present in the motion." The State further contends it does not bear the burden of proving harmless error and that any *Hurst* error is harmless in this case.

As discussed in sub-claim 4-1 above, *Hurst v. Florida* and *Hurst v. State* do not apply retroactively to the instant case, and there is no cognizable constitutional error. Therefore, the Court agrees with the State's assertion that a harmless error analysis is not necessary here. **No relief is warranted on sub-claim 4-7.**

Based on the foregoing, the Court finds no relief is warranted on Defendant's amended claim four.

It is therefore **ORDERED AND ADJUDGED** that Defendant's amended claim four is hereby **DENIED.**

This is a final, appealable order. Defendant has thirty days from the date of rendition to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of June, 2017.

ORIGINAL SIGNED

MICHELLE SISCO
Circuit Judge

JUN 12 2017

MICHELLE SISCO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to David Dixon Hendry, Esquire, Gregory W. Brown, Esquire, and James L. Driscoll, Jr., Esquire, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607, by U.S. mail; and Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this _____ day of June, 2017.

Deputy Clerk

APPENDIX C

246 So.3d 231
Supreme Court of Florida.

Perry Alexander TAYLOR, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1501
|
[May 3, 2018]

Synopsis
Background: Following affirmance of defendant's murder conviction and death sentence, 638 So.2d 30, denial of postconviction relief, 3 So.3d 986, and denial of federal habeas relief, petitioner filed a successive motion for postconviction relief. The Circuit Court, Hillsborough County, Michelle Sisco, J., summarily denied motion. Petitioner appealed.

Holdings: The Supreme Court held that:

[1] repetitions of medical examiner's postconviction-hearing testimony in court opinions did not commence a new one-year period for filing a successive motion based on such testimony;

[2] affidavit in which medical examiner expressed regret regarding his phrasing of testimony at postconviction hearing was not newly discovered evidence; and

[3] defendant was not entitled to retroactive application of *Hurst v. Florida*, 136 S.Ct. 616.

Affirmed.

Canady, J., specially concurred with opinion, in which Polston, J., concurred.

Pariente, J., concurred in result with opinion.

Lewis, J., concurred in result with opinion.

***232** An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291988CF015525000AHC

Attorneys and Law Firms

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, James L. Driscoll, Jr., David Dixon Hendry, and Gregory W. Brown, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and C. Suzanne Bechard, Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Perry Alexander Taylor, a prisoner under a sentence of death, appeals an order denying his successive motion for postconvictfion relief filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the denial of relief.

FACTS AND RELEVANT PROCEDURAL HISTORY

The facts of this case were described on direct appeal as follows:

> Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball *233 field.[1] Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give her ten dollars in exchange for sex, and the two of them went to the dugout.
>
> Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

Taylor v. State (*Taylor I*), 583 So.2d 323, 325 (Fla. 1991) (footnote omitted). During the trial, Dr. Lee Miller, the associate medical examiner of Hillsborough County, testified that Birch died of massive blunt force injuries to the head, neck, chest, and abdomen. Dr. Miller offered the following testimony with respect to Birch's genital injuries:

> STATE: Do you have an opinion within a reasonable degree of medical probability as to what caused the injuries to the interior of the vagina ... ?
>
> DR. MILLER: Yes.
>
> STATE: What would be that opinion?
>
> DR. MILLER: Something was inserted into the vagina which stretched the vagina enough for it to tear over the object that was inserted in there.
>
> STATE: Do you have an opinion within a reasonable degree of medical probability that object could have been a hand?
>
> DR. MILLER: Yes.
>
> STATE: Could it have been some other type of object other than a penis?
>
> DR. MILLER: Yes.
>
> STATE: Is it your opinion within a reasonable degree of medical probability that a penis inserted into the vagina could have caused the injuries you just described?
>
> DR. MILLER: No.

Dr. Miller later testified:

> STATE: The injury you observed to the exterior of the vagina, within a reasonable degree of medical probability is that consistent with having been inflicted by someone kicking her to that area?
>
> DR. MILLER: No.
>
> STATE: *The injuries you observed to the interior of the vagina, are those injuries within a reasonable degree of medical probability consistent with having been inflicted by someone kicking her in that area?*
>
> DR. MILLER: *No.*
>
> STATE: Within a reasonable degree of medical probability would penetration have been necessary to inflict the injuries to the interior of the vagina?
>
> ***234** DR. MILLER: Yes.

(Emphasis added.)

1 Taylor was charged with both premeditated murder and felony murder with the underlying felony of sexual battery. *Taylor v. State*, 583 So.2d 323, 328 (Fla. 1991).

The jury convicted Taylor of both first-degree murder and sexual battery with great force. The jury recommended death by a vote of twelve to zero, and the trial court sentenced Taylor to death. *Taylor I*, 583 So.2d at 325. On direct appeal, this Court affirmed Taylor's convictions, but reversed the death sentence and remanded for a new penalty phase. *Id.* at 330. Of relevance to this case was Taylor's guilt-phase challenge to the trial court's denial of his motion for judgment of acquittal with respect to the charge of felony murder. *Id.* at 328. Taylor argued the evidence was legally insufficient to prove lack of consent with respect to the charge of sexual battery. *Id.* In rejecting this claim, we stated:

> [E]ven accepting Taylor's assertion that the victim initially agreed to have sex with him, the medical examiner's testimony contradicted Taylor's version of what happened in the dugout. According to Taylor, he had vaginal intercourse with the victim for less than a minute without full penetration. He testified that she then indicated that she did not want to have intercourse and began performing oral sex on him. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina. Given the evidence conflicting with Taylor's version of events, the jury reasonably could have rejected his testimony as untruthful.

Id. at 329.[2] After a second penalty phase, the jury recommended a sentence of death by a vote of eight to four, and the trial court followed that recommendation. *Taylor v. State* (*Taylor II*), 638 So.2d 30, 31–32 (Fla.), *cert. denied*, 513 U.S. 1003, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). On appeal, we rejected all of Taylor's claims and affirmed the sentence of death. *Id.* at 33.

2 We also concluded that the trial court did not err in denying the motion for judgment of acquittal on the charge of premeditated murder:

> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to

> submit the question of premeditation to the jury.
> *Taylor I*, 583 So.2d at 329.

In his initial motion for postconviction relief, Taylor raised twenty-one claims, all of which were denied. *See Taylor v. State (Taylor III)*, 3 So.3d 986, 991 & n.1 (Fla. 2009). This Court affirmed the denial of postconviction relief and also denied Taylor's petition for writ of habeas corpus. *Id.* at 1000. Of relevance to this case was Taylor's claim that Dr. Miller had recanted his trial testimony with respect to Birch's genital injuries. *Id.* at 992. This Court described the testimony offered during the evidentiary hearing as follows:

> Dr. Miller testified that the injuries sustained were mostly confined to the labia ***235** minora and radiated inward, while some were inside the labia minora in "what anyone would describe as the vaginal canal." However, Dr. Miller further testified that the injuries could possibly have been the result of a kick if the blow had been struck where the toe of the shoe actually went into the vagina, stretching it, that any shoe would have been able to penetrate the victim's vagina due to extraversion, but that ultimately the injuries were caused by stretching and not direct impact. *Miller testified that the possibility of a kick causing the injury was "a one in a million shot" and that his opinions as expressed at trial had not changed.* He attributed any differences in his testimony to differences in the questions being asked and, in some instances more elaboration in exploring possibilities.

Id. (emphasis added). The actual dialogue from the evidentiary hearing was:

> DR. MILLER: [Defense postconviction expert] Dr. Wright said that the injuries to the inside of the vagina were sustained—probably sustained by a kick or a blow. Whereas, I had said they were sustained by a stretch injury. When he went on to say—to talk about that, he said, well, the blow would have had to have been with the toe of the shoe actually going directly into the vagina which would produce a stretch injury as well, as well as something being gently inserted in there. And I agree with that. I agree that if a blow had been struck where the toe of the shoe actually went, went into the vagina stretching the vagina it would have introduced the injuries that I've described.
>
> So it would be sort of like inserting an object. Although we certainly didn't—I did not describe originally the inserting of an object and the attorneys didn't bring it out that it could have been a hard blow from a shoe going directly in. That didn't come up and it certainly seems a reasonable possibility, maybe even a probability, in reading Dr. Wright's testimony.
>
> DEFENSE: So your testimony today would be that the injury to the ten radial lacerations in the labia minora to a reasonable degree of medical probability are the result of a kick?
>
> DR. MILLER: I'm saying that they could have been the result of a kick. One of many scenarios where something went in there that was wider than the vagina and stretched it. We talked about kicks and blows earlier on. But the subject of the shoe or the foot actually entering the vaginal canal didn't come up. That was—*it's a one-in-a-million shot.*
>
> DEFENSE: What do you mean a one-in-a-million shot?
>
> DR. MILLER: Well, it's you can kick somebody an awful lot in that area and not have your toe actually go up into that narrow vaginal canal.

(Emphasis added.) During cross-examination, Dr. Miller stated his opinion had not changed that Birch's internal genital injuries were caused by penetration by an object "large enough to stretch enough to produce those tears," but he did not know what the object was.

The postconviction court found that Taylor's assertion of a "supposed recantation" by Dr. Miller of his trial testimony was "not an accurate statement of [Dr. Miller's] testimony" and, therefore, Taylor had not demonstrated the existence of newly discovered evidence of innocence of sexual battery. *Taylor III*, 3 So.3d at 993 (alteration in original). In affirming the denial of this claim, we stated:

> In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within ***236** reasonable medical probability, caused by a kick. Similarly, at the evidentiary

> hearing, *Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick.* Hence, because the record refutes Taylor's contrary interpretation of the testimony, Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the trial court's conclusion that sufficient "new evidence" had not been established.

Id. at 993 (emphasis added). We also rejected Taylor's *Brady/Giglio*[3] claims. 3 So.3d at 994–95. Because Dr. Miller's testimony did not materially change, we affirmed the postconviction court's determination that false testimony was not presented during Taylor's trial, *id.* at 994, and "there is nothing the State has been demonstrated to have suppressed." *Id.* at 995. Additionally, we determined that trial counsel was not ineffective for failing to elicit Dr. Miller's "one-in-a-million" testimony. *Id.* at 996.

3 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Thereafter, Taylor filed a petition for writ of habeas corpus with the United States District Court for the Middle District of Florida, which was denied. *Taylor v. Sec'y, Fla. Dept. of Corr.* (*Taylor IV*), No. 8:10-cv-382-T-30AEP, 2011 WL 2160341, at *65 (M.D. Fla. June 1, 2011). In addition to other claims, Taylor contended that as a result of *Brady* and *Giglio* violations, as well as ineffective assistance of counsel, he was wrongfully convicted of sexual battery. *Id.* at *19. According to Taylor, because of this error, he was wrongfully convicted of felony murder, and the trial court erroneously found the aggravating factor that the murder was committed during a sexual battery. *Id.* As part of this claim, Taylor contended that Dr. Miller recanted his trial testimony that Birch's genital injuries were inconsistent with being inflicted by a kick. *Id.* at *20. The federal district court comprehensively discussed both Taylor's arguments and Dr. Miller's testimony during the initial trial, the penalty phase retrial, and the postconviction evidentiary hearing. *Id.* at *26–27. It concluded that Dr. Miller did not recant his trial testimony, no evidence was suppressed by the State, and no false testimony was given. *Id.* at *27–28. In concluding that Dr. Miller's postconviction testimony had not changed from his trial testimony, the federal district court explained:

> Dr. Miller did not testify at the evidentiary hearing that it was his opinion within a reasonable degree of medical probability that the injuries to the victim's genital area were caused by a kick. *Instead, he stated that the injuries possibly could have been caused by a kick if the shoe had actually entered the vaginal canal, which he stated was "a one-in-a-million shot."* That testimony is not inconsistent with his trial testimony that within a reasonable degree of medical probability the interior injuries were caused by something inserted into the vagina, and that those injuries were not consistent with having been inflicted by someone kicking the victim in that area.

Id. at *27 (emphasis added).

The federal district court again referenced Dr. Miller's "one-in-a-million shot" testimony when it concluded that Taylor had failed to satisfy the prejudice prong of *237 *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where Taylor claimed trial counsel was ineffective for failing to retain an independent pathologist to assist the defense:

> [T]o satisfy the prejudice prong under *Strickland*, Taylor must establish that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* 466 U.S. at 694, 104 S.Ct. 2052. At the post-conviction hearing, Dr. Miller admitted that it was possible that the injuries to the victim's genital area were caused by a kick if the toe of the shoe penetrated the victim's vaginal area. *He stated, however, that such a kick would be a "one[-]in-a-million shot."* [State postconviction expert] Dr. Lynch's [sic] testified at the evidentiary hearing that penetration caused the injuries to the victim's vagina, and that she did not believe a kick could have caused the injuries unless the foot was able to fit into the vagina. She testified that it was unlikely that Taylor's shoes would have been able to fit into the victim's vagina. Thus, her testimony supported Dr. Miller's opinion. In light of Dr. Miller and Dr. Lynch's testimony during the post-conviction hearings regarding the cause of the injuries to the victim's genital area, Taylor has not established a reasonable probability that had counsel obtained a forensic pathologist to testify at trial, the result of the trial would have been different.

Taylor IV, 2011 WL 2160341, at *34 (emphasis added).

On July 14, 2016, Taylor filed a successive motion for postconviction relief, which is the subject of the present case. Attached to the motion was an affidavit signed by Dr. Miller (the Miller affidavit) in which he stated:

> On June 7, 2004, I testified at Mr. Taylor's postconviction evidentiary hearing. I expressed my opinion that it was reasonably possible, perhaps probable, that the internal genital injuries were caused by the penetration of the toe of a shoe. I commented that this was a one-in-a-million shot.
>
> This was an unfortunate choice of words and I regret it. A "one in a million" shot implies near impossibility and in this case this is not true. I can only reiterate my previous testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted into the vagina is a very reasonable possibility.

In his motion, Taylor contended that the alleged misinterpretation of Dr. Miller's "one-in-a-million shot" comment led the postconviction court and subsequent courts to reject any claim that Dr. Miller's opinion had changed, and that the evidence of sexual battery had been negated. Taylor stated that the Miller affidavit was not previously available because Dr. Miller "was not aware of the incorrect interpretation of his testimony and therefore was unaware of the need to come forward to correct the errors." Taylor asserted that he was unable to contact Dr. Miller until June 2015.

Taylor presented the following claims in his successive motion: (1) the Miller affidavit is newly discovered evidence that undermines the courts' rejection of Dr. Miller's postconviction testimony that Birch's injuries were caused by a kick; (2) the Miller affidavit demonstrates that trial counsel was ineffective for failing to elicit testimony from Dr. Miller that a likely cause of Birch's internal genital injuries was a kick, and for failing to retain a forensic pathologist who could make the correct determination of causation; (3) the ***238** State violated *Brady* and *Giglio* by failing to notify the defense that Dr. Miller believed Birch's internal genital injuries supported a theory of innocence of sexual battery; and (4) Taylor's death sentence violates *Hurst v. Florida* (*Hurst v. Florida*), 136 S.Ct. 616 (2016).

On October 7, 2016, the postconviction court summarily denied claims one through three. The court reserved ruling on claim four on the basis that this Court's determination of the retroactivity of *Hurst v. Florida* was critical to resolution of the claim. On February 8, 2017, the postconviction court granted Taylor's motion to amend claim four to add claims based upon *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).[4]

4 However, the postconviction court denied a second motion to amend to add a fifth claim that the enactment of chapter 2017–1, Laws of Florida, which precludes imposition of the death penalty unless the jury unanimously recommends death, created a substantive right that must be retroactively applied.

Taylor filed a witness/exhibit list, naming as a witness Dr. Harvey Moore, Ph.D. The exhibit list included a content analysis evaluation conducted by Dr. Moore which concluded that "[b]ased on the socio-legal standard established in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) we may conclude to a reasonable degree of sociological certainty the jury which recommended a sentence of death for Mr. Taylor in [*Taylor II*] was persuaded against the requisite level of attention to its responsibility through comments made by the court and prosecutor, and repeated by fellow members of the venire." Taylor intended to present Dr. Moore and introduce the exhibits "to lend evidentiary support for arguments against the current June 24, 2002 *Hurst* cutoff date,[5] and in support of retroactivity under the fundamental fairness doctrine." The State filed a motion to strike Dr. Moore as a witness and the exhibits. On June 12, 2017, the postconviction court granted the State's motion and summarily denied amended claim four of Taylor's successive motion.

5 June 24, 2002, is the date the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), *cert. denied*, —— U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017), we held that *Hurst* does not apply retroactively to defendants whose death sentences became final prior to the issuance of *Ring*.

This appeal follows.

ANALYSIS

Newly Discovered Evidence

Taylor first asserts that the Miller affidavit constitutes newly discovered evidence of his innocence of sexual battery because it demonstrates that the cause of Birch's internal genital injuries was a kick. He argues that because of Dr. Miller's "one-in-a-million shot" comment during the postconviction evidentiary hearing, the state courts have refused to recognize that Dr. Miller's opinion has changed, and the federal district court endorsed the state courts' refusal to recognize the shift in opinion. This claim is both untimely and without merit.

[1]With respect to timeliness, Florida Rule of Criminal Procedure 3.851 provides that a motion for postconviction relief must be filed within one year after the judgment and sentence become final unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). The first alleged misinterpretation of Dr. Miller's ***239** testimony occurred on February 1, 2006, when the postconviction court stated in its denial order, "Dr. Miller concluded that the chances of the victim's vaginal injuries coming from a kick were kind of a one-in-a-million shot." Counsel for Taylor would have been aware of this statement at that time, and accordingly, any challenge based upon the postconviction court's interpretation of Dr. Miller's testimony was required to have been filed within one year of that date. Because more than ten years elapsed between this statement by the postconviction court and the filing of the successive motion on July 14, 2016, Taylor's motion is untimely. Further, even though this Court in 2009 and the federal district court in 2011 later stated that the chance that Birch's internal genital injuries were caused by a kick was "one in a million," *Taylor III*, 3 So.3d at 993, 996; *Taylor IV*, 2011 WL 2160341, at *27, *34, these repetitions of Dr. Miller's testimony do not commence a new one-year period for filing a successive motion.

[2]With regard to the merits of Taylor's claim, the Miller affidavit does not constitute newly discovered evidence because nothing in the affidavit is materially different from Dr. Miller's postconviction evidentiary hearing testimony. During the hearing, Dr. Miller testified that Birch's internal genital injuries were caused by penetration. He further testified that if, as the result of a kick, the toe of a shoe entered the vaginal canal, stretch injuries consistent with those sustained by Birch could result. However, Dr. Miller also stated that the likelihood of a kick hitting the genital area where it would enter the vaginal canal was a "one-in-a-million shot." Taylor's postconviction counsel sought clarification of this precise statement, to which Dr. Miller replied, "Well, it's you can kick somebody an awful lot in that area and not have your toe actually go up into that narrow vaginal canal." Although the Miller affidavit reflects that Dr. Miller now regrets his choice of words, this does not change the fact that Dr. Miller believed the likelihood of the toe of a shoe entering the vaginal canal as the result of a kick was very slim. Therefore, the chance that the internal genital injuries were caused by a kick remains slim.

Stated differently, if—against significant odds—the toe of Taylor's shoe did penetrate Birch's vagina, then Dr. Miller agreed with Dr. Wright that it is possible, maybe even probable, that her internal genital injuries were caused by a kick. However, based upon Dr. Miller's testimony, the chance of the shoe making contact in such a way was so unlikely, it was—to use Dr. Miller's exact words—a "one-in-a-million shot." The fact that Dr. Miller could have, and if given another opportunity would have, phrased his observation differently does not alter the conclusion reached by the postconviction court and this Court that the chance Birch's internal genital injuries were caused by a kick was "one in a million" because this was the phrasing Dr. Miller used to convey the unlikely odds. Further, this is not inconsistent with the Miller affidavit, which states:

> I can only reiterate my previous testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted into the vagina is a very

reasonable possibility.

Nor is it inconsistent with Dr. Miller's trial testimony that Birch's internal genital injuries, within a reasonable degree of medical probability, (1) could have been caused by a hand or other object, (2) were not consistent with her having been kicked in that area, and (3) were the result of penetration. Based upon the foregoing, the Miller affidavit is not newly discovered evidence.

*240 *Ineffective Assistance of Trial Counsel*

Taylor next asserts that trial counsel was ineffective for failing to elicit testimony from Dr. Miller that a likely cause of Birch's injuries was a kick, and for failing to retain a forensic expert to make the correct determination of causation. Because the Miller affidavit does not constitute newly discovered evidence, these claims are both successive and without merit. The same claims were raised in both *Taylor III* and *Taylor IV* and were rejected. *See* 3 So.3d at 996; 2011 WL 2160341, at *32–34.

Hurst–Related Claims

[3]Taylor raises a number of challenges to his death sentence based upon *Hurst v. Florida* and *Hurst*. Most of these arguments were rejected in *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), and do not warrant discussion. To the extent Taylor challenges the postconviction court's refusal to permit Dr. Moore to testify with respect to the content analysis he conducted, this challenge turns on whether *Hurst* should be made retroactive to the date of the decision in *Caldwell*. However, in *Hitchcock*, we explained that *Hurst* does not apply retroactively to death sentences that became final prior to the issuance of *Ring* based upon our earlier decision in *Asay v. State*, 210 So.3d 1 (Fla. 2016). *See Hitchcock*, 226 So.3d at 217. Because Taylor's sentence became final in 1994, *Hurst* does not apply to him, and we decline to extend the retroactivity of *Hurst* to the date of *Caldwell*. Moreover, in *Reynolds v. State*, —— So.3d ——, ——, 43 Fla. L. Weekly S163, S167 (Fla. Apr. 5, 2018) (plurality opinion), we concluded that pre-*Ring Hurst*-induced *Caldwell* challenges are without merit.

Finally, in *Asay v. State*, 224 So.3d 695, 703 (Fla. 2017), and *Lambrix v. State*, 227 So.3d 112, 113 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 312, 199 L.Ed.2d 202 (2017), we rejected as without merit the claim that chapter 2017–1, Laws of Florida, created a substantive right that must be retroactively applied. Accordingly, the postconviction court did not abuse its discretion when it denied Taylor's second request to amend his successive motion to add this claim.

CONCLUSION

Based upon the foregoing, we affirm the summary denial of Taylor's successive motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and LAWSON, J., concur.

CANADY, J., concurs specially with an opinion, in which POLSTON, J., concurs.

PARIENTE, J., concurs in result with an opinion.

LEWIS, J., concurs in result with an opinion.

QUINCE, J., recused.

POLSTON, J., concurs.

PARIENTE, J., concurring in result.

CANADY, J., specially concurring.

I concur in the denial of Taylor's newly discovered evidence claim and ineffective assistance of trial counsel claims. I also agree that Taylor is not entitled to postconviction relief on his *Hurst v. Florida*, — U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016)-related claims and that the successive motion for postconviction relief should therefore be denied. But I would not rely on *Hurst v. State* and its progeny. Instead, I would deny the *Hurst*-related claims on two grounds. First, no ***241** *Hurst v. Florida* error occurred in this case because the aggravating factor that the capital felony occurred during the commission of a sexual battery was established by the sexual battery conviction. *See Hurst v. State*, 202 So.3d at 77–83 (Canady, J., dissenting).[6] Second, in any event *Hurst v. Florida* should not be given retroactive application. *See Mosley v. State*, 209 So.3d 1248, 1285–91 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

6 The requirement of *Hurst v. Florida* that the jury find an aggravator was also satisfied by the existence of the prior violent felony aggravator, which was established by Taylor's conviction "for sexual battery in 1982." *See Taylor v. State*, 3 So.3d 986, 999 (Fla. 2009).

Taylor was sentenced to death based on a jury's nonunanimous recommendation for death by a vote of eight to four. *Taylor v. State*, 638 So.2d 30, 31 (Fla. 1994). To not apply *Hurst*[7] in Taylor's case results in Taylor being sentenced to death under an unconstitutional sentencing scheme. As I explained in *Asay V*:[8]

> I conclude that *Hurst* should apply to all defendants who were sentenced to death under Florida's prior, unconstitutional capital sentencing scheme. The majority's [retroactivity] conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced. For example, many defendants whose crimes were committed before 2002 will receive the benefit of *Hurst* because they were previously granted a resentencing on other grounds and their newest death sentence was not final when *Ring* was decided. To avoid such arbitrariness and to ensure uniformity and fundamental fairness in Florida's capital sentencing, our opinion in *Hurst* should be applied retroactively to all death sentences.

210 So.3d at 36 (Pariente, J., concurring in part and dissenting in part) (footnote omitted).

7 *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, — U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, — U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

8 *Asay v. State* (*Asay V*), 210 So. 3d 1 (Fla. 2016), *cert. denied*, — U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017); *see Hitchcock v. State*, 226 So.3d 216, 220–23 (Fla.) (Pariente, J., dissenting), *cert. denied*, — U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017).

I also note that on direct appeal in 1993, Taylor, like other defendants sentenced to death before *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002),[9] argued that Florida's capital sentencing statute was unconstitutional, stating:

> To the extent that Florida's death penalty scheme allows a death recommendation, which has a crucial and often dispositive impact on the resulting death sentence, to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> Not only does the Florida procedure fail to require jury unanimity ... to return a death recommendation; it also fails to require unanimous ... agreement as to whether a particular aggravating circumstance has been proven beyond a reasonable doubt, or even as to whether *any* aggravating circumstance has been proven beyond a reasonable doubt. The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of ***242** reliability when a death sentence is imposed. Florida's capital sentencing scheme ... works in the opposite direction.

Initial Br. of Appellant, *Taylor v. State*, No. 80,121 (Fla. July 6, 1993), at 33–34 (footnote omitted) (citations omitted). Of course, we have now determined that the United States and Florida Constitutions require that these precise findings be made by a unanimous jury before a death sentence can be imposed. *Hurst*, 202 So.3d at 44. As I stated in *Hurst*: "If 'death is different,' as this Court and the United States Supreme Court have repeatedly pronounced, then requiring unanimity in the jury's final recommendation of life or death is an essential prerequisite to the continued constitutionality of the death penalty in this State." 202 So.3d at 70 (Pariente, J., concurring) (footnote omitted) (quoting *Yacob v. State*, 136 So.3d 539, 546 (Fla. 2014)).

9 *See, e.g., Gaskin v. State*, 218 So.3d 399, 401–05 (Fla.) (Pariente, J., concurring in part and dissenting in part), *cert. denied*, —— U.S. ——, 138 S.Ct. 471, 199 L.Ed.2d 362 (2017).

Applying *Hurst* in this case, I would grant Taylor a new penalty phase based on the jury's nonunanimous recommendation for death. *See Mosley v. State*, 209 So.3d 1248, 1284 (Fla. 2016); *see also Reynolds v. State*, —— So.3d ——, ——, 43 Fla. L. Weekly S163, S169–71 (Fla. Apr. 5, 2018) (Pariente, J., dissenting). Nevertheless, recognizing that I am bound by this Court's opinions in *Asay V* and *Hitchcock*, which are final, I concur in result.

LEWIS, J., concurring in result.

I have repeatedly expressed my disagreement with this Court's *Hurst* retroactivity determinations,[10] and I do so again today. I recognize that the majority simply applies prior precedent but I again urge that we follow proper legal theory. I believe that defendants who properly preserved the substance of a *Ring*[11] challenge at trial and on direct appeal prior to that principle of law having a case name should also be entitled to have their constitutional challenges heard. Today the Court again looks the other way and denies relief to a pre-*Ring* defendant who raised—and thus preserved—a substantive *Ring* claim before it was so named. *See Taylor v. State*, 638 So.2d 30, 33 n.4 (Fla. 1994). For this reason, I dissent as to the *Hurst* retroactivity issue.

10 *See State v. Silvia*, 235 So.3d 349, 352, 356–57 (Fla. 2018) (Lewis, J., dissenting); *Hitchcock v. State*, 226 So.3d 216, 218–20 (Fla.) (Lewis, J., concurring in result), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017); *Asay v. State*, 210 So.3d 1, 30–31 (Fla. 2016) (Lewis, J., concurring in result), *cert. denied*, —— U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017).

11 *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Preservation is perhaps the most basic tenet of appellate review, *see Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); and this Court should be particularly cognizant of preservation issues for capital defendants. Accordingly, the fact that some

defendants specifically cited the name *Ring* while others did not is not dispositive, in my view. Rather, the proper inquiry centers on whether a defendant preserved his or her substantive constitutional claim to which and for which *Hurst* applies.[12] This preservation approach—enshrined in *James v. State*, 615 So.2d 668 (Fla. 1993)—ameliorates some of the majority's concern with the effect on the administration of justice. Defendants who did not properly preserve their constitutional challenges—through trial and direct appeal—forfeited them just as any other defendant who fails to raise and preserve a claim. However, ***243** those defendants who, like Taylor, challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge.

12 *See* L. Anita Richardson & Leonard B. Mandell, *Fairness Over Fortuity: Retroactivity Revisited and Revised*, 1989 Utah L. Rev. 11, 56–57 (1989).

Jurists have echoed this type of approach as a remedy to the more exacting federal *Teague*[13] standard.[14] Federal courts have employed a similar preservation approach, and it is "one of the dominant means by which federal courts limit the disruptive effects of legal change in the context of direct review of federal criminal convictions."[15] Regardless of the limited federal approach, scholars urge state courts to pull retroactivity off *Teague*'s constitutional floor,[16] which the United States Supreme Court expressly permitted in *Danforth v. Minnesota*, 552 U.S. 264, 280, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

13 *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

14 Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203, 232 (1998).

15 Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 942 (2006).

16 Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 Am. Crim. L. Rev. 1, 51–54 (2009).

This Court's adoption of the *Stovall*[17]/*Linkletter*[18] standard was intended to provide "more expansive retroactivity standards" than those of *Teague*. *Johnson v. State*, 904 So.2d 400, 409 (Fla. 2005). However, the Court's retroactivity decision post-*Hurst* eschews that intention. Further, it illuminates Justice Harlan's famous critique of *Linkletter*:

> Simply fishing one case from the stream of appellate review ... and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

Williams v. United States, 401 U.S. 646, 679, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) (Harlan, J., concurring in part and dissenting in part). However, that is how the majority of this Court draws its determinative, albeit arbitrary, line. As a result, Florida will treat similarly situated defendants differently—here, the difference between life and death—for potentially the simple reason of one defendant's docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.[19]

17 *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

18 *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

19 *See generally* Christopher M. Smith, Note, Schriro v. Summerlin*: A Fatal Accident of Timing*, 54 DePaul L. Rev. 1325 (2005).

Every pre-*Ring* defendant has been found by a jury to have wrongfully murdered his or her victim. There may be defendants that properly preserved challenges to their unconstitutional sentences through trial and direct appeal, but this Court nonetheless chooses to limit the application of *Hurst*, which may result in the State wrongfully executing those defendants. It seems axiomatic that "two wrongs don't make a right"; yet this Court essentially condones that outcome with its very limited interpretation of *Hurst*'s retroactivity and application.

***244** For the reasons discussed above, I continue to respectfully dissent on the *Hurst* issue.

All Citations

246 So.3d 231, 43 Fla. L. Weekly S212

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APPENDIX D

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Supreme Court of Florida

THURSDAY, JULY 5, 2018

CASE NO.: SC17-1501
Lower Tribunal No(s).:
291988CF015525000AHC

PERRY ALEXANDER TAYLOR vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, POLSTON, LABARGA, and LAWSON, JJ., concur.
QUINCE, J., recused.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

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C. SUZANNE BECHARD
JAMES L. DRISCOLL JR.
GREGORY W. BROWN
HON. PAT FRANK, CLERK
JAY PRUNER
HON. MICHELLE SISCO, JUDGE

APPENDIX E

Filing # 72353268 E-Filed 05/18/2018 11:43:42 AM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1501

PERRY ALEXANDER TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

MOTION FOR REHEARING

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COMES NOW, Appellant, Perry Alexander Taylor, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.330, and moves for rehearing of this Court's opinion issued on May 3, 2018. The Court misapprehended or overlooked points of law or fact in denying the claims Mr. Taylor raised in this appeal. Mr. Taylor offers the following in support:

The Court failed to substantively address three of the Appellant's four claims in his Initial Brief. Specifically:

"THIS COURT SHOULD CONSIDER THE MOST RECENT REPORT FROM DR. HARVEY MOORE DETAILING 134 *CALDWELL* VIOLATIONS THAT OCCURRED AT TRIAL IN THE INSTANT CASE. THIS COURT SHOULD HOLD *HURST* RETROACTIVE TO AT LEAST *CALDWELL V. MISSISSIPPI* (1985), OR AT THE VERY LEAST, SHOULD REMAND THIS CASE BACK TO THE LOWER COURT FOR A FULL EVIDENTIARY HEARING. THE SCIENTIFIC AND SOCIOLOGOCAL EVIDENCE PRESENTED IN FAVOR OF FURTHER RETROACTIVITY AND RELIEF FROM THE DEATH SENTENCE SHOULD NOT HAVE BEEN *FRYE*-BARRED BY THE LOWER COURT. 10

TO THE EXTENT THAT RETROACTIVE APPLICATION IS NECESSARY, THIS COURT SHOULD FIND THAT *HURST V. FLORIDA* AND *HURST V. STATE* ARE RETROACTIVE TO ALL OF MR. TAYLOR'S CLAIMS BECAUSE DENYING MR. TAYLOR RELIEF BASED ON NON-RETROACTIVITY VIOLATES MR. TAYLOR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. 33

THIS COURT SHOULD VACATE MR. TAYLOR'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST* AND SUBSEQUENT CASES, MR. TAYLOR'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS. THE LOWER COURT ERRED IN SUMMARILY DENYING THE MOTION TO AMEND THE HURST CLAIM TO INCLUDE THE SUBSTANTIVE RIGHTS CREATED BY THE ENACTMENT OF NEW MARCH 13, 2017 LAW CHAPTER 2017-1 REQUIRING UNANIMITY FOR DEATH SENTENCES. . . . . 54"

This Court failed to address or mention Dr. Harvey Moore's report in support of harmful error, and failed to address or

mention the lower court's refusal to consider Dr. Moore's report. This Court failed to consider and analyze the 134 specific *Caldwell* violations that occurred at Mr. Taylor's trial. This Court failed to consider the diminishing effect that these 134 *Caldwell* violations had on this particular advisory panel. This Court failed to analyze whether the lower court properly *Frye*-barred the scientific evidence offered in support of arguments in favor of retroactivity to *Caldwell*.

Regarding the fourth claim, this Court overlooks the substance and significance of Dr. Miller's affidavit. At pages 14-15 the Court states that "Although the Miller affidavit reflects that Dr. Miller now regrets his choice of words, this does not change the fact that Dr. Miller believed the likelihood of the toe of a shoe entering the vaginal canal as the result of a kick was very slim. Therefore, the chance that the internal genital injuries were caused by a kick remains slim."

Dr. Miller's affidavit obtained by postconviction counsel on July 17, 2015 states that Dr. Miller testified at the postconviction evidentiary hearing, and that at hearing he "expressed [the] opinion that it was a reasonably possible, ***perhaps probable***, that the internal genital injuries were caused by the penetration of the toe of a shoe." (Emphasis added). "Perhaps probable" means at least or greater than a fifty percent chance. The odds of a "probability" occurring can hardly be characterized

as "slim" and "very slim." The chance of a coin flipping and landing on heads is "perhaps probable." The chance of a coin flipping and landing on heads cannot fairly be characterized as "very slim." A fifty percent chance is not slim or very slim. Mr. Taylor should not be executed or wrongly convicted of first-degree murder based on the mere flip of a coin. The odds that the shoe caused these injuries is "perhaps probable," not "one in a million." As such, there exists reasonable doubt in this case which warrants that this conviction for first-degree murder be vacated.

It is unsettling that the lower court's decision to deny relief in this case has been affirmed by this Court, considering the recantation of the state's medical examiner regarding the odds of something quite significant occurring. If it is indeed "probable" that the shoe caused the vaginal injuries in this case, there is no longer a sexual battery component to this case, and this crime would be a second-degree murder rather than a first-degree murder. Under the "probable" scenario discussed by Dr. Miller in his sworn affidavit, Mr. Taylor is actually innocent of first-degree murder. *See Herrera v. Collins*, 506 U.S. 390 (1993).

In light of Dr. Miller's affidavit recanting his "one in a million" testimony opining that the kick did not cause the vaginal injuries, Mr. Taylor's conviction for rape murder is no more reliable than Han Tak Lee's conviction for arson murder in Pennsylvania. Han Tak Lee's conviction for arson murder was vacated

a few years back in federal habeas §2254 litigation because the junk science that was utilized to sustain the conviction was debunked.

> Finding that Lee has "show[n] that the admission of the fire expert testimony 'undermined the fundamental fairness of the entire trial,' *Keller v. Larkins*, 251 F. 3d 408, 413 (3d Cir. 2001), because 'the probative value of [the fire expert] evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission,'" *Han Tak Lee v. Glunt*, 667 F. 3d 397, 403 (3d Cir. 2012), we conclude that Lee is entitled to relief in the form of an order conditionally granting the petitioner's petition for writ of habeas corpus, vacating Lee's conviction and sentence and directing the Commonwealth to either retry Lee within 120 days, or release the petitioner.
>
> In reaching this result we conclude as we began. **To achieve justice, the law must serve as the vehicle through which imperfect institutions strive for greater justice through a more perfect understanding of the truth. Therefore, as our understanding of scientific truth grows and changes, the law must follow the truth in order to secure justice.** (Footnote omitted, emphasis added).

Han Tak Lee v. Tennis, --F. Supp.--, 2014 WL 3894306, 19 (MD Pa. 2014).

Through his sworn affidavit, Dr. Miller hoped to have the courts gain "a more perfect understanding of the truth." This Court should "follow the truth in order to secure justice." To ensure that justice is served in this case, this Court must reverse the lower court's rulings. This Court should not endorse and sustain this conviction based on the now self-debunked and flawed opinions of the very same medical doctor that "unfortunately" advanced it

in the past. *See also* a very significant, similar scientific ruling from this Court in 2014:

> In considering the evidence at trial, the newly discovered evidence at issue now, as well as admissible evidence previously discovered in prior postconviction proceedings, we conclude that this newly discovered evidence "weakens the case against [Paul Hildwin] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So.2d at 526.

Hildwin v. State, 141 So. 3d 1178, 1192 (Fla. 2014). Paul Hildwin was wrongly convicted based in large part on flawed testimony concerning probabilities that he may have left biological evidence behind on physical evidence at the murder scene (i.e. only 10% of the male population are secretors, like Hildwin). Now we know that Perry Taylor was wrongly convicted based on flawed testimony concerning improbabilities that his shoe cased the vaginal injuries during the course of the murder (i.e. the *one in a million* remark). In both cases, the sexual battery component of the murders has been debunked by advancements in science, and debunked by the corrected opinions of the medical examiner.

The Houston Law Review published a relevant article in 2015 concerning the prevalence of wrongful criminal convictions based on debunked scientific opinions and junk science. The article stated:

> The scope of this problem presents additional alarming numbers: the set of trials in the study included inaccurate testimony by seventy-two prosecution experts employed by fifty-two laboratories, practices, or

> hospitals from twenty-five states. To say the least, these study findings present a cause for concern.
>
> ...
>
> The second Texas case to be overturned under the Junk Science Writ was that of Frances and Dan Keller. The Kellers were **convicted in 1992 of sexually abusing children at a day care center they ran near Austin, Texas**. Charges were filed when three young children who were infrequent visitors to the day care center claimed that they had been forced to take part in bizarre Satanic rituals. The only physical evidence offered at the Kellers' trial was the testimony of **Doctor Michael Mouw, an ER doctor who examined one of the children. Dr. Mouw testified that he had discovered "what appeared to be lacerations" on the girl's hymen, and concluded that the marks could have come from sexual abuse. Dr. Mouw's testimony was enough for the jury to convict the Kellers and sentence each of them to forty-eight years in prison.**
>
> **Dr. Mouw has since recanted his testimony**. In an affidavit supporting a writ filed on behalf of the Kellers in early 2013, Dr. Mouw stated, "While my testimony was based on my good faith belief at that time, I now realize my conclusion is not scientifically or medically valid, and that I was mistaken." Pursuant to the Junk Science Writ, **the Kellers successfully proved that scientific standards had changed since the time of their trial. A trial court released both Frances and Dan on bond after vacating their convictions.** (footnotes omitted, emphasis added).

Sabra Thomas, *Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent*, 52 Hous. L. Rev. 1037, 1038, 1054 (2015). In contrast to the Kellers who were released from a 48 year prison sentence, Perry Taylor remains under a death sentence following the recantation of the state's medical examiner concerning the sexual battery component of this crime. Mr. Taylor also remains sentenced to death despite the United States Supreme Court finding that the

State of Florida violated his Sixth Amendment right to a jury trial. This conviction for first degree murder and subsequent death sentence is unreliable and should be vacated.

The denial of relief in this case is contrary to established jurisprudence because this is a death penalty case, and death is supposed to be different. Here the Court refuses to accept the probability that Perry Taylor is actually innocent of first-degree murder and ineligible for the death penalty, according to the state's own expert and his recent sworn recantation. The Court should accept Dr. Miller's recantation of his erroneous "one in a million" comment. The odds of the shoe causing the vaginal injuries in this case are not "one in a million" as opined previously; they are 50/50. This certainly creates reasonable doubt in this death penalty case. The death penalty in this case is as unreliable as the comments about the "one in a million" odds.

As Justice White stated in his concurrence many years ago: "These death sentences are cruel and unusual in the same way that being struck by lighting is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972). The average odds of being struck by lightning are approximately 300,000 to 1. People do get struck by lighnting, especially in Florida. In refusing to accept Dr. Miller's recantation about the odds of the shoe causing the vaginal injuries in this case, this Court erroneously attributes this reasonable scenario as "one in a million" odds when the scenario

is actually one-in-two odds ("probable," aka 50/50; *see* Dr. Miller's affidavit).

Remarkably, this recantation is different. This is not the classic recantation of the jailhouse snitch who was looking to cut years off of his prison sentence at the time he originally testified for the state. Such recantations have regularly been characterized as unreliable by this Court. This is the recantation of the state's medical examiner, a medical doctor. This recantation is newly discovered evidence, it is reliable, and this Court should accept it and reverse the lower court's order. Dr. Miller's recantation makes this conviction and death sentence completely unreliable. Based on Dr. Miller's recantation, this is clearly a rage murder, not a rape murder.

Even with the expert testimony at trial that erroneously informed the advisory panel that a sexual battery occurred in conjunction with this murder, the panel in this case still recommended death by a only a vote of 8-4. That makes this death sentence all the more unreliable. This death sentence certainly is not more reliable than other vacated Florida death sentences simply because the case was final prior to June 24, 2002.

Furthermore, this death sentence was recommended by a mere advisory panel who had a diminished role in the sentencing proceedings, and was imposed by a trial judge who also had a diminished sense of responsibility when he sentenced Mr. Taylor to

death. Another legal scholar described the compounded problems with Florida's capital sentencing scheme 29 years ago:

> Under the trifurcated system[] of Florida[], even a descriptively accurate statement regarding the specific roles of the judge and jury would suggest that each bears, at most, only partial responsibility for the sentence. As a result, both judge and jury could look to the other as the decisionmaker responsible for making the hard choices – with neither ever doing so. When responsibility for a death sentence is divided, there exists the danger – identified in *Caldwell* as constitutionally intolerable – that no one bears the ultimate responsibility for this critical decision.

Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Sentencing Statutes That Divide Responsibility Between Judge and Jury, Michael Mello, 30 Boston College Law Review 283, 286 (1989).

This Court should rehear this case and reverse the lower court's order.

CERTIFICATE OF SERVICE

We certify that a copy hereof will be furnished to opposing counsel by filing with the e-portal which will serve a copy on Suzanne Bechard, Assistant Attorney General on May 18, 2018.

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APPENDIX F

638 So.2d 30
Supreme Court of Florida.

Perry TAYLOR, Appellant,
v.
STATE of Florida, Appellee.

No. 80121.
|
May 5, 1994.
|
Rehearing Denied June 23, 1994.

Synopsis
Defendant was convicted in the Circuit Court, Hillsborough County, M. Wm. Graybill, J., of murder and sexual battery, and was sentenced to death. Following remand for resentencing, 583 So.2d 323, the Circuit Court, Diana M. Allen, J., again sentenced defendant to death. Defendant appealed. The Supreme Court held that: (1) jury was properly allowed to consider sexual battery as aggravating circumstance in first-degree murder trial; (2) prospective juror who stated opposition to death penalty was not improperly excused; and (3) trial court was not required to make *Neil* inquiry regarding prospective juror in light of race-neutral reasons for striking prospective juror which were already on record.

Affirmed.

Attorneys and Law Firms

*31 James Marion Moorman, Public Defender and Steven L. Bolotin, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

Opinion

PER CURIAM.

Perry Taylor appeals his sentence of death. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

Taylor was convicted and sentenced to death in May 1989 for the first-degree murder of Geraldine Birch. On appeal, this Court affirmed Taylor's convictions but vacated his sentence and remanded for a new sentencing. *Taylor v. State,* 583 So.2d 323 (Fla.1991).[1]

1 The facts surrounding the murder are detailed in our original opinion. *Taylor v. State,* 583 So.2d 323, 325 (1991).

The new jury recommended death by an eight to four vote. The judge found the following aggravating factors: (1) Taylor had a previous felony conviction involving the use *32 or threat of violence; (2) the capital felony occurred during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel. The court found no statutory mitigators but did give some weight to Taylor's deprived family background and the abuse he was reported to have suffered as a child. The court considered but gave little weight to Taylor's remorse, to psychological testimony that while Taylor has above-average intelligence, he suffers from an organic brain injury, and to testimony concerning Taylor's good

conduct in custody. The judge determined that the aggravating circumstances outweighed the mitigating factors and sentenced Taylor to death.

[1] As his first issue on appeal, Taylor argues that the jury should not have been allowed to consider sexual battery as an aggravating circumstance because it unconstitutionally repeats an element of first-degree murder. We have considered and rejected arguments substantially the same as this in *Stewart v. State,* 588 So.2d 972 (Fla.1991), and *Clark v. State,* 443 So.2d 973 (Fla.1983), *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). Taylor's claim is without merit.

[2] [3] [4] [5] [6] Taylor next argues that prospective juror Arnaiz was improperly excused after stating her opposition to the death penalty. Prospective jurors may not be excused for cause simply because they voice general objections to the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). The critical question is whether the prospective juror's views would prevent or substantially impair the performance of her duty under oath and in accordance with the judge's instructions. *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). A prospective juror's inability to be impartial about the death penalty need not be made "unmistakably clear." *Id.* at 425, 105 S.Ct. at 852. "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror." *Sanchez-Velasco v. State,* 570 So.2d 908, 915 (1990) (quoting *Wainwright v. Witt,* 469 U.S. at 424-26, 105 S.Ct. at 852-53). The trial judge's predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record, *Witt,* 469 U.S. at 429, 105 S.Ct. at 854, and it is the trial judge's duty to decide if a challenge for cause is proper. *Id.* at 423, 105 S.Ct. at 851.

Ms. Arnaiz's voir dire responses indicated that her feelings against the death penalty would impair her ability to serve as a juror in a capital case. Ms. Arnaiz asked to be heard privately and was questioned in camera about her beliefs and her ability to objectively follow the court's instructions. After encouragement by defense counsel, Ms. Arnaiz reluctantly agreed that she probably could follow the law despite her opposition to the death penalty. The trial judge found her answers conflicting and properly exercised the court's discretion in excusing Ms. Arnaiz.

[7] [8] Taylor also contends that the court erred in not requiring a *Neil*[2] inquiry when the State exercised a peremptory challenge of prospective juror Williams. Both Taylor and the victim in this case as well as Mr. Williams were black. Mr. Williams had earlier responded affirmatively when the prosecutor asked if any venirepersons had prior experience with law enforcement officers which would cause them to harbor ill feelings toward police. In addition, Mr. Williams had previously expressed some doubt to the court over whether he could concentrate on jury duty because he was holding two jobs and was worried about lost income. The prosecutor's challenge for cause based on Mr. Williams' employment concerns was denied. When the prosecutor later used a peremptory challenge to strike Mr. Williams, the defense objected and requested a *Neil* inquiry. The court noted that three black jurors had already been selected and found the defense's representation that the prosecution was excluding blacks to be unconvincing. At the time of this trial, Florida law required the party objecting to a peremptory challenge ***33** to make a prima facie showing of a "strong likelihood" of racial discrimination before there was a necessity of inquiring into the challenging party's motivation. *Neil,* 457 So.2d at 486.[3] In view of the race-neutral reasons for excusal which were already on the record, the court did not err in declining to conduct a *Neil* inquiry.

2 *State v. Neil,* 457 So.2d 481 (Fla.1984).

3 In our recent opinion in *State v. Johans,* 613 So.2d 1319 (Fla.1993), we eliminated the requirement of making a prima facie showing of a strong likelihood of discrimination and held that henceforth a *Neil* inquiry must be initiated whenever such an objection is made.

[9] Taylor next argues that it was error for the trial judge to consider evidence which had not been provided to the jury and which had not been properly admitted under section 921.141, Florida Statutes (1987). At a hearing held subsequent to the penalty phase proceeding but prior to sentencing, the trial judge allowed a detention deputy to testify that Taylor had attacked him with a homemade razor at the jail. The incident had occurred after the jury had been discharged. The evidence was submitted in rebuttal of the argument in mitigation that Taylor had behaved well in custody. Taylor could not have been

prejudiced by the jury's failure to hear this unfavorable testimony. There was no error in the admission and consideration of this evidence. *See Engle v. State,* 438 So.2d 803 (Fla.1983), *cert. denied,* 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984).

Taylor's remaining claims are without merit.[4] Accordingly, we affirm the sentence of death.

[4] Taylor also makes the following claims: (1) that the Florida death penalty statute which allows a bare majority death recommendation violates the Constitution; (2) that the death penalty statute conflicts with the Florida Rules of Criminal Procedure; (3) that the penalty phase judge erred in admitting a graphic photo into evidence; (4) that the judge failed to instruct the jury on the intent element of the heinous, atrocious, or cruel aggravating circumstance; (5) that the trial judge failed to instruct the jury specifically on several nonstatutory mitigating factors; and (6) that the sentence of death was not proportional considering the balance of aggravating versus mitigating factors.

It is so ordered.

GRIMES, C.J., and OVERTON, McDONALD, SHAW, KOGAN and HARDING, JJ., concur.

All Citations

638 So.2d 30, 19 Fla. L. Weekly S250

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APPENDIX G

3 So.3d 986
Supreme Court of Florida.

Perry Alexander TAYLOR, Appellant,
v.
STATE of Florida, Appellee.
Perry Alexander Taylor, Petitioner,
v.
Walter A. McNeil, etc., Respondent.

Nos. SC06-615, SC07-1168.

Jan. 29, 2009.

As Revised on Denial of Rehearing Jan. 29, 2009.

Synopsis
Background: Defendant was convicted of murder and sexual battery, and he was sentenced to death upon jury's unanimous recommendation. Defendant appealed. The Supreme Court, 583 So.2d 323, affirmed the convictions, but vacated the sentence and remanded for resentencing. On remand, the jury again recommended death. Upon review, the Supreme Court, 638 So.2d 30, affirmed defendant's convictions and sentence. Defendant thereafter filed a postconviction motion to vacate his judgments of conviction and sentence. The Circuit Court, Hillsborough County, J. Michael McCarthy, J., denied the motion. Defendant appealed. Defendant also filed a petition for writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] medical examiner's postconviction testimony did not qualify as newly discovered evidence warranting a new trial;

[2] record supported finding that medical examiner's trial testimony had not been false, thereby defeating defendant's *Giglio* claim;

[3] defendant failed to demonstrate ineffective assistance of trial counsel; and

[4] defendant's prior conviction for sexual battery validly served as prior violent felony aggravator.

Affirmed; petition denied.

Attorneys and Law Firms

*990 Bill Jennings, Capital Collateral Regional Counsel, and David Robert Gemmer, Assistant CCR Counsel, Middle Region, Tampa, FL, for Appellant/Petitioner.

Bill McCollum, Attorney General, Tallahassee, Florida, and Katherine V. Blanco, Assistant Attorney General, Tampa, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Perry Alexander Taylor appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, §§ 3(b)(1), (9), Fla. Const. For the reasons set forth below, we affirm the trial court's denial of Taylor's postconviction motion and deny Taylor's petition for writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

The facts are taken from this Court's opinions in Taylor's direct appeals.

> Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field. Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give her ten dollars in exchange for sex, and the two of them went to the dugout.
>
> Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

Taylor v. State, 583 So.2d 323, 325 (Fla.1991) (footnote omitted). "The jury convicted Taylor on both counts. Upon the jury's unanimous recommendation, the trial judge sentenced Taylor to death." *Id.*

On direct appeal, Taylor raised three issues related to the guilt phase of his trial. *Id.* at 326. First, that the trial court erred by failing to conduct an inquiry pursuant to *State v. Neil,* 457 So.2d 481 (Fla.1984), on the State's peremptory challenge of a black prospective juror. *Taylor,* 583 So.2d at 326. Second, that the trial court erred in excluding testimony that the victim had used crack cocaine. *Id.* at 328. ***991** Third, that the trial court erred in denying his motion for judgment of acquittal because the State's circumstantial case was legally insufficient to prove sexual battery and premeditation. *Id.* We rejected these claims and affirmed Taylor's convictions.

Additionally, Taylor raised three issues related to the penalty phase of his trial, but we addressed only one. *Id.* at 329. We concluded that the prosecution overstepped the bounds of proper argument and we vacated Taylor's sentence and remanded for resentencing. *Id.* at 330.

At resentencing the jury again recommended death:

> The new jury recommended death by an eight to four vote. The judge found the following aggravating factors: (1) Taylor had a previous felony conviction involving the use or threat of violence; (2) the capital felony occurred during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel. The court found no statutory mitigators but did give some weight to Taylor's deprived family background and the abuse he was reported to have suffered as a child. The court considered but gave little weight to Taylor's remorse, to psychological testimony that while Taylor has above-average intelligence, he suffers from an organic brain injury, and to testimony concerning Taylor's good conduct in custody. The judge determined that the aggravating

circumstances outweighed the mitigating factors and sentenced Taylor to death.

Taylor v. State, 638 So.2d 30, 31-32 (Fla.1994). Upon review we affirmed Taylor's conviction and sentence. *Id.* at 33.

Thereafter, Taylor filed a postconviction motion to vacate his judgments of conviction and sentence on March 12, 1996. The trial court held hearings pursuant to *Huff v. State,* 622 So.2d 982 (Fla.1993), on November 25, 1998, and April 8, 2005. Evidentiary hearings were ordered on two of the claims set out in Taylor's third amended motion to vacate judgments of conviction and sentence and the trial court later issued an order denying all relief.

At the evidentiary hearings held on October 7, 2003, June 7, 2004, June 8, 2004, and March 3, 2005, testimony was heard from Mike Benito, the prosecutor at Taylor's trial; James McNally, Taylor's childhood social worker; Judge Manuel Lopez, penalty phase counsel; Nick Sinardi, trial counsel; Bill Brown, defense trial investigator; Dr. Ronald Wright, forensic pathologist; Dr. Catherine Lynch, obstetrician-gynecologist; Dr. Donald Taylor, adult psychiatrist; Dr. Henry Dee, clinical neuropsychologist; Stanley Graham, Taylor's brother; Edwina Graham, Taylor's mother; Charles Kelly, a jail deputy who had been physically assaulted by Taylor; Howard Ury, who had been a foster child in the same home as Taylor; Dr. Frank Wood, head of neuropsychology at Wake Forest; Dr. William Mosman, forensic psychologist; Dr. Lee Miller, medical examiner; Robert Norgard, mitigation expert; Dr. Jon Kotler, PET scan interpreter; and Dr. Helen Mayberg, PET scan interpreter.

In its sixty-nine page order denying relief, the trial court comprehensively treated each of Taylor's twenty-one claims.[1] This appeal follows.

[1] Taylor's postconviction claims were: (1) no trial transcript had been provided; (2) his statements were admitted in error; (3) there was prosecutorial misconduct; (4) he was absent from critical proceedings; (5) there were violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and ineffective assistance of counsel; (6) the State failed to prove corpus delicti; (7) counsel was ineffective for failure to obtain a mental health evaluation; (8) Taylor's right to confront witnesses was violated; (9) the prosecutor made improper statements; (10) defense counsel failed to obtain a mental health expert; (11) there was ineffective assistance of counsel in other respects; (12) the death sentence is disproportionate; (13) the sexual battery aggravator is unconstitutional; (14) the prior conviction record admitted was obtained illegally; (15) the aggravating factors statute is unconstitutional; (16) the jury instructions were unconstitutional; (17) the death sentence was unconstitutional; (18) Florida's capital sentencing statute is unconstitutional; (19) Taylor's rights under *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), were violated; (20) numerous trial and resentencing errors deprived Taylor of his rights; and (21)Taylor was denied due process.

*992 DISCUSSION

On appeal from the denial of rule 3.850 relief, Taylor first contends that the trial court erred in denying his claims of newly discovered evidence, ineffective assistance of counsel, and his *Brady* and *Giglio* claims.

DR. MILLER'S TESTIMONY

Taylor raised multiple claims concerning Dr. Miller's trial testimony concerning the extensive injuries suffered by the victim. The trial court addressed these claims together, finding Taylor's allegations of recantation by Miller as to the victim's sexual injuries to be an inaccurate characterization of Miller's testimony. The trial court denied these claims, finding no newly discovered evidence, that trial counsel was not deficient, and that any possible deficiencies did not have the cumulative effect

of denying Taylor a fair trial.

At trial, Dr. Miller testified that the injuries to the victim's vagina were, within a reasonable degree of medical probability, caused by something "inserted into the vagina which stretched the vagina enough for it to tear over the object that was inserted in there." Dr. Miller further testified that the injuries were inconsistent with someone having kicked the victim. Relying on this evidence, we noted on review that "the medical examiner's testimony contradicted Taylor's version of what happened.... The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina." *Taylor,* 583 So.2d at 329.

At the postconviction evidentiary hearing, Dr. Miller testified that the injuries sustained were mostly confined to the labia minora and radiated inward, while some were inside the labia minora in "what anyone would describe as the vaginal canal." However, Dr. Miller further testified that the injuries could possibly have been the result of a kick if the blow had been struck where the toe of the shoe actually went into the vagina, stretching it, that any shoe would have been able to penetrate the victim's vagina due to extraversion, but that ultimately the injuries were caused by stretching and not direct impact. Miller testified that the possibility of a kick causing the injury was "a one in a million shot" and that his opinions as expressed at trial had not changed. He attributed any differences in his testimony to differences in the questions being asked and, in some instances more elaboration in exploring possibilities. Taylor contends that had Miller's testimony about a kick possibly causing the vaginal injuries been presented at trial he could not have been convicted of sexual battery or felony murder. Taylor alleges that (1) this is new evidence that requires a new trial, (2) the State withheld this evidence, (3) the State allowed Dr. Miller to present false testimony, or (4) his trial counsel was deficient for ***993** not having discovered this evidence before trial.

Newly Discovered Evidence

[1] In ruling on this issue, the trial court found Taylor's claim of a "supposed recantation" by Dr. Miller of his trial testimony was "not an accurate statement of [Dr. Miller's] testimony." Hence, the trial court concluded Taylor had not actually established the existence of important new evidence of his innocence of sexual battery. We agree.

[2] [3] [4] To obtain a new trial based on newly discovered evidence, Taylor must meet two requirements: first, the evidence must be newly discovered and not have been known by the party or counsel at the time of trial, and the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such quality and nature that it would probably produce an acquittal on retrial. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998) (citing *Jones v. State,* 591 So.2d 911, 915 (Fla.1991)). In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones,* 591 So.2d at 916. This determination includes

> whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevancy of the evidence and any inconsistencies in the newly discovered evidence.

Jones, 709 So.2d at 521 (citations omitted). As noted above, the second prong of *Jones* requires a showing of the probability of an acquittal on retrial.

[5] On review, "[t]his Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings." *Smith v. State,* 931 So.2d 790, 803 (Fla.2006) (citing *Windom v. State,* 886 So.2d 915, 921 (Fla.2004)); *see also Blanco v. State,* 702 So.2d 1250, 1252 (Fla.1997) (citing *Demps v. State,* 462 So.2d 1074, 1075 (Fla.1984)). In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr.

Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, because the record refutes Taylor's contrary interpretation of the testimony, Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the trial court's conclusion that sufficient "new evidence" had not been established.

[6] Additionally, we note the jury was not instructed to and did not differentiate between first-degree premeditated murder and first-degree felony murder in determining Taylor's guilt. There is no indication that Taylor was convicted of first-degree murder predicated solely upon the felony of sexual battery. This Court previously detailed the massive injuries sustained by the victim to support the State's alternative theories of premeditation and felony murder:

> [T]he jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination ***994** did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury.

Taylor, 583 So.2d at 329.

Accordingly, even if Dr. Miller's alleged change in testimony were considered sufficient to call into question Taylor's sexual battery conviction, it would not be sufficient to outweigh the evidence that Taylor committed premeditated murder or to cast doubt on his conviction for first-degree murder based upon premeditation. Ultimately, then, even if we were to construe Dr. Miller's testimony at the evidentiary hearing the way Taylor seeks, there remains an abundance of evidence the jury could have used to convict Taylor of premeditated first-degree murder. Hence, we conclude the trial court did not err in denying this claim.

Giglio/Brady

[7] In addition to the claim of newly discovered evidence arising from Dr. Miller's testimony, Taylor asserts that the trial court erred in denying his claim that through Miller's testimony the State intentionally permitted false or misleading evidence to be presented to the jury in violation of *Giglio* (where the United States Supreme Court held it to be a violation of due process when a prosecutor failed to disclose to the defense a promise made by the prosecution to a key witness that he would not be prosecuted if he testified for the prosecution). Finding there was no change in Dr. Miller's testimony, the trial court denied this claim. We conclude that the trial court properly denied Taylor's claim because it is refuted by the record.

[8] To prevail under *Giglio,* a claimant must show that false testimony was presented by the State and that there is a reasonable possibility that the false evidence affected the judgment of the jury. *See Ventura v. State,* 794 So.2d 553, 564-65 (Fla.2001) (holding that a witness's testimony was not material under *Giglio* where the witness was significantly impeached); *Routly v. State,* 590 So.2d 397, 400-01 (Fla.1991) (finding that an equivocal statement did not have a reasonable probability of affecting the judgment of the jury).

Taylor alleges that Dr. Miller's trial testimony was false because it was contradicted by his testimony at the evidentiary hearing. As the trial court concluded, the record does not support this allegation. Dr. Miller's testimony did not materially

change. When the trial court finds that the testimony is not false, and there is competent substantial evidence to support that finding, we defer to the trial court's findings. Accordingly, Taylor has not shown cause for relief under *Giglio.*

[9] [10] [11] [12] Alternatively, Taylor asserts that the State withheld material, favorable information in violation of *Brady. Brady* requires the State to disclose material information ***995** within its possession or control that is favorable to the defense. *Mordenti v. State,* 894 So.2d 161, 168 (Fla.2004) (citing *Guzman v. State,* 868 So.2d 498, 508 (Fla.2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Cardona v. State,* 826 So.2d 968, 973 (Fla.2002); *Way v. State,* 760 So.2d 903, 910 (Fla.2000). The remedy of retrial for the State's suppression of evidence favorable to the defense is available when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler,* 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley,* 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Here, however, the trial court has concluded, and we agree, that neither the State nor its actors suppressed evidence. Because the trial court has concluded that Dr. Miller's testimony is unchanged, there is nothing the State has been demonstrated to have suppressed.

INEFFECTIVE ASSISTANCE OF COUNSEL

Taylor raised multiple claims of ineffective assistance of defense counsel stemming from his representation at trial and both penalty phases. Taylor also alleged ineffective assistance in the alternative should the court determine any of his other claims insufficient for lack of due diligence by counsel. In addressing these claims, the trial court found that Taylor failed to demonstrate deficiency or any resulting prejudice, the two prongs of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We agree.

[13] [14] We have held that for ineffective assistance of counsel claims to be successful, the two requirements of *Strickland* must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.1986) (citations omitted). To prove the deficiency prong under *Strickland,* Taylor must prove that counsel's performance was unreasonable under the "prevailing professional norms." *Morris v. State,* 931 So.2d 821, 828 (Fla.2006) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). "To establish the [prejudice] prong under *Strickland,* the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052).

Failure to Perform Due Diligence

[15] Taylor asserts this ineffectiveness argument in the alternative for his newly discovered evidence claims relating to Dr. Miller's testimony. Taylor alleges that should this Court find that any evidence could have been discovered at trial, then trial counsel was deficient for failure to discover said evidence. As discussed *996 above with Dr. Miller's testimony, and below with Taylor's other claims, we conclude there was no material new evidence presented during these proceedings. Further, unlike the situation in *State v. Gunsby,* 670 So.2d 920 (Fla.1996), upon which Taylor relies, the State has not been shown to have withheld evidence, and trial counsel has not been found to have failed to object to abuses by the State. *See id.* at 922-24. Each of Taylor's claims of newly discovered evidence is sufficiently refuted by the trial and postconviction record. None of them fail for counsel's lack of diligence. For example, we find there has been no demonstration of ineffectiveness under *Strickland* as to counsel's alleged failure to elicit Dr. Miller's "one in a million" testimony at trial. Accordingly, we reject Taylor's claim that counsel's performance was deficient.

Failure to Prepare Taylor to Testify

[16] Contrary to Taylor's assertion below, and now on appeal, trial defense counsel, Nick Sinardi, testified that he did prepare Taylor to testify, and his trial strategy was to show that Taylor did not have the intent to murder the victim. Sinardi testified that he believed it was in Taylor's best interest to take the stand in order for the jury to evaluate his defense. Further, although Sinardi testified that he did not rehearse Taylor's testimony, he did tell Taylor to testify truthfully. Because Taylor had given a detailed confession, defense counsel felt he was limited in available strategies.

After hearing defense counsel's testimony, the trial court found that Taylor failed to demonstrate any deficiency or resulting prejudice from the performance of guilt phase counsel. Further, the trial court found that Sinardi made reasonable tactical decisions under the circumstances he faced and with the limited choices available.

In *Zack v. State,* 911 So.2d 1190 (Fla.2005), this Court rejected a similar claim:

> Zack argue[d] that trial counsel failed to adequately prepare him to testify at trial and failed to inform him about what would occur during cross-examination. Zack contend[ed] that had he been adequately prepared and informed of the hazards of cross-examination, he would not have testified. Zack stated that trial counsel gave him no choice but to testify, and that he was only told that he was going to testify after trial began.

Id. at 1198. The trial court found that Zack had testified on his own behalf at trial to give his version of events even on cross-examination. *Id.* at 1199. The trial court further found that Zack showed a desire to explain himself on cross-examination, and that Zack failed to show either that counsel failed to prepare him or that he suffered any prejudice. *Id.* at 1199-1200. This Court accepted the trial court's findings. *Id.*

This Court has also held that trial counsel cannot be deemed ineffective simply because postconviction counsel now disagrees with trial counsel's strategy or because there were other choices. *See Davis v. State,* 875 So.2d 359, 366 (Fla.2003) (citing *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000)); *see also Henry v. State,* 862 So.2d 679, 681-82 (Fla.2003) (ineffective assistance claims for reliance on theories of self-defense and diminished capacity failed because they were conclusively refuted by the record).

On the record before us, we conclude that Taylor, like Zack, has not shown that he testified against his will, nor has he met the burden to demonstrate that Sinardi's strategy was unreasonable under the circumstances, especially considering the limited choices available to the defense. Because we agree with the trial court that Taylor has failed to demonstrate deficient *997 performance, we need not address prejudice. *See, e.g., Waterhouse v. State,* 792 So.2d 1176, 1182 (Fla.2001) (because *Strickland* requires both prongs, it is not necessary to address prejudice when a deficient performance has not been shown).

Failure to Investigate and Present Mental Health Issues

[17] Taylor claimed below that defense counsel failed to demand a hearing on Taylor's competency or present evidence of Taylor's mental health problems. However, Sinardi testified at the postconviction hearing that he did not feel there was any reason to question Taylor's competence. The trial court found that Taylor did receive a competent mental health evaluation at trial, and he did not prove that his counsel's investigation of this issue was deficient.

Taylor cites *Futch v. Dugger,* 874 F.2d 1483 (11th Cir.1989), to support his claim. In *Futch,* the Eleventh Circuit considered a habeas petition brought by a defendant convicted of second-degree murder. *Id.* at 1484. The court stated, "In order to demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.' " *Id.* at 1487 (quoting *Alexander v. Dugger,* 841 F.2d 371, 375 (11th Cir.1988)). The court stated that if Futch was correct in his allegation that a prison psychologist evaluated him and found him incompetent and that trial counsel was aware of this finding, Futch met this burden. *Id.* The Eleventh Circuit remanded for evidentiary hearing on this issue. *Id.* at 1488.

Unlike the petitioner in *Futch,* however, Taylor has had an evidentiary hearing on this claim. And, unlike Futch, Taylor has never been declared incompetent by any of the psychologists and neuropsychologists who have examined him. Despite Taylor's reading of this case, the Eleventh Circuit did not mandate that trial counsel investigate a defendant's competency without some cause. Instead, in *Futch,* the petitioner specifically alleged that although counsel had substantial reason to suspect petitioner's competency, he still failed to investigate. *Id.* at 1487. We conclude that the trial court did not err in holding Taylor has not demonstrated deficiency of his trial counsel in regard to counsel's investigation of any mental health issues.

Failure to Investigate and Present Mitigation

[18] Taylor asserts that there were more mitigating factors that could have been presented that counsel, Manuel Lopez, failed to present, but does not specify what these factors could be. Instead, Taylor attempts to demonstrate counsel's ineffectiveness by focusing solely on the number of hours Lopez spent preparing for resentencing.

We have held:

> "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary,* 14 F.3d 554, 557 (11th Cir.), *cert. denied,* 513 U.S. 1009, 115 S.Ct. 532, 130 L.Ed.2d 435 (1994). The failure to do so "may render counsel's assistance ineffective." *Bolender [v. Singletary],* 16 F.3d [1547,] 1557 [(11th Cir.1994)].

Rose v. State, 675 So.2d 567, 571 (Fla.1996). In *Rose,* we found counsel was ineffective where counsel made practically no investigation, and Rose was able to demonstrate substantial mitigation that counsel failed to uncover and present. *Id.* at 572. The record demonstrated that counsel was inexperienced, and this Court held that his uninformed decision did not amount to strategy. *Id.* Likewise, in *Hildwin v. Dugger,* 654 So.2d 107 (Fla.1995), ***998** the petitioner also was able to demonstrate mitigation that trial counsel failed to uncover. *Id.* at 110.

> The trial court found, and we conclude, that trial counsel's performance at sentencing was deficient. Trial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. For example, trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts.

Id. at 109.

[19] [20] However, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith,* 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable." *Ferrell v. State,* 918 So.2d 163, 170 (Fla.2005) (citing *Wiggins,* 539 U.S. at 523, 123 S.Ct. 2527; *Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052). "When making this assessment, 'a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.' " *Ferrell,* 918 So.2d at 170 (quoting *Wiggins,* 539 U.S. at 527, 123 S.Ct. 2527). Ultimately, in *Ferrell,* we agreed with the trial court's assessment that trial counsel was not deficient, stating that this was not a case where counsel presented no mitigation, nor a case where counsel made no attempt to investigate. *Id.* at 171 (citing *Torres-Arboleda v. Dugger,* 636 So.2d 1321, 1326 (Fla.1994)).

The record shows this is not a case where trial counsel failed to investigate and present available mitigating evidence. *Cf. Rose,* 675 So.2d at 571-72. The trial court's findings of mitigation directly refute such a claim. Taylor does not allege that counsel made no attempt to investigate mitigation or that he failed to present something he otherwise uncovered. Importantly, Taylor makes no specific allegation of what mitigation could have been presented that counsel failed to present. Under these circumstances, we conclude Taylor has shown no error in the trial court's holding that Taylor has failed to demonstrate that counsel was deficient. Accordingly, the Court need not address prejudice. *See, e.g., Waterhouse,* 792 So.2d at 1182.

NEWLY DISCOVERED EVIDENCE

PET Scan

[21] Taylor argues that a PET Scan is newly discovered evidence that shows brain damage. However, in the prior sentencing proceedings the trial court found Taylor's brain damage was established as a mitigating factor, and gave it little weight. Taylor's argument resembles that rejected by this Court in *Ferrell,* stating

> In fact, a capital cases defense manual prepared by the Florida Public Defender's Association and distributed in 1992 did not mention either PET or SPECT scans in a list of medical tests used to confirm brain damage. Furthermore, the manual cautioned that even the listed medical tests could be unreliable and did not always indicate organic brain damage. Instead, the manual stated that neuropsychological testing was actually more reliable in showing such deficits.

*999 918 So.2d at 175 n. 11. In denying this claim, the trial court relied on *Ferrell* and also noted that the testimony of two experts who interpreted the scan showed that the scan did not represent a significant indication of brain damage. As in *Ferrell,* Taylor has not demonstrated that a PET scan would have been available to counsel or even admissible at Taylor's prior trial. Further, in light of the trial court's findings, Taylor has also failed to demonstrate that if the scan had been prepared, it would have affected the outcome of Taylor's penalty phase, since the sentencing court did consider proof of brain damage in mitigation. Accordingly, we conclude the trial court properly rejected this claim.

Sonya Davis

[22] The trial court denied Taylor's claim that trial counsel was ineffective for failing to present the testimony of the victim's daughter, Sonya Davis, because the record "clearly shows Ms. Davis would not have been willing to testify in the prior proceedings." Additionally, the trial court denied the claim for being untimely since the evidence of Ms. Davis was known at trial. The trial court denied admission of Davis's deposition because the deposition would not have been admissible at trial and because the postconviction claim allegedly supported by the deposition was untimely asserted. None of these findings have been demonstrated to have been erroneous.

[23] The summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. *McLin v. State,* 827 So.2d 948, 954 (Fla.2002). It is evident from the record that Taylor was aware of Davis's existence prior to the trial, and that Davis would have been unwilling to testify for Taylor. Additionally, as the State correctly points out, even if Taylor had succeeded in introducing this evidence, it would have served to impeach his own testimony and to impugn his theory of defense. *Cf. Antone v. State,* 410 So.2d 157, 162 (Fla.1982) (holding that newly discovered evidence that would have impeached defendant's testimony and changed totally his theory of defense did not meet the test that the alleged facts must be of such a vital nature that they would have prevented entry of the judgment). Accordingly, the trial court properly denied this claim.

PETITION FOR HABEAS CORPUS

[24] In his petition for habeas corpus, Taylor argues that his death sentence is unconstitutional under *Johnson v. Mississippi,* 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and *Richmond v. Lewis,* 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); that the jury instructions unconstitutionally diminished the jury's sense of responsibility; and that Florida's capital sentencing statute constitutes cruel and unusual punishment. We reject each of these claims on the merits. Further, we note that Taylor's constitutional claims are procedurally barred because they were not preserved on direct appeal.

[25] Taylor argues that his prior violent felony aggravator was invalid because his conviction for sexual battery in 1982 was unconstitutional because his then deficient mental state prevented him from making a knowing, intelligent, and voluntary waiver of his right to trial in entering a plea of nolo contendere. He further argues that this 1982 conviction was too remote in time to qualify as an aggravator.

[26] In *Nixon v. State,* 932 So.2d 1009, 1023 (Fla.2006), we refused to grant relief where the allegedly unlawful prior felony convictions had not been vacated and were still valid. Nixon was convicted of and received a death sentence for first-degree murder, kidnapping, and other crimes. *Id.* ***1000** On appeal, he argued that the prior felonies used to support the prior felony aggravator in his case were invalid. *Id.* We held that because no court had vacated the prior convictions, *Johnson* did not apply. *Id.* The invalid conviction at issue in *Johnson* had been reversed by the New York Court of Appeals. *Johnson,* 486 U.S. at 583, 108 S.Ct. 1981. Taylor's conviction has not been vacated by any court. Accordingly, his claim under *Johnson* must fail. We also reject Taylor's argument that the prior conviction is too remote in time, since we have held a conviction obtained thirty-two years prior to the crime in question is not too remote to be considered a valid aggravating factor. *Thompson v. State,* 553 So.2d 153, 156 (Fla.1989).

[27] [28] Taylor's claim as to the invalidity of Florida's heinous, atrocious and cruel aggravator is procedurally barred. Taylor cannot relitigate the merits of an issue through a habeas petition or use an ineffective assistance claim to argue the merits of claims that either were or should have been raised below. *See Preston v. State,* 970 So.2d 789, 805 (Fla.2007); *Knight v. State,* 923 So.2d 387, 395 (Fla.2005). "It is important to note that habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial." *Parker v. Dugger,* 550 So.2d 459, 460 (Fla.1989). We rejected a similar argument in *Doyle v. Singletary,* 655 So.2d 1120, 1121 (Fla.1995) (holding that Doyle's claim was procedurally barred because Doyle had failed to pursue the issue on appeal). As in *Doyle,* Taylor did not raise this claim on direct appeal and we now reject this habeas claim for the same reason.[2]

[2] The lower court instructed the sentencing jury with then-standard instructions for the "heinous, atrocious, or cruel" aggravating factor. Taylor did not challenge the standard jury instructions at trial or on direct appeal. The United States Supreme Court later declared Florida's standard jury instructions for the "heinous, atrocious, or cruel" aggravating factor unconstitutionally vague in *Espinosa v. Florida*, 505 U.S. 1079, 1081, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). However, even though Taylor's resentencing occurred prior to the *Espinosa* decision, the jury instructions used were not those involved in *Espinosa* but were the same as this Court found constitutional in *Hall v. State*, 614 So.2d 473, 478 (Fla.1993).

CONCLUSION

In light of the above analysis, we affirm the trial court's denial of Taylor's postconviction motion and deny Taylor's petition for writ of habeas corpus.

It is so ordered.

WELLS, PARIENTE, LEWIS, and CANADY, JJ., and ANSTEAD, Senior Justice, concur.

QUINCE, C.J., recused.

POLSTON, J., did not participate.

All Citations

3 So.3d 986, 34 Fla. L. Weekly S161

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APPENDIX H

583 So.2d 323
Supreme Court of Florida.

Perry Alexander TAYLOR, Appellant,
v.
STATE of Florida, Appellee.

No. 74260.
|
June 27, 1991.
|
Rehearing Denied Aug. 20, 1991.

Synopsis

Following jury trial before the Circuit Court, Hillsborough County, M. Wm. Graybill, J., defendant was found guilty of murder and sexual battery and sentenced to death. Defendant appealed. The Supreme Court held that: (1) mere fact that State challenged one of four black venire members did not show substantial likelihood that State was exercising peremptory challenges discriminatorily, so as to require State to provide reasons for juror challenge; (2) subsequent finding that State might be using its peremptory challenges discriminatorily did not require State to explain its first challenge to black juror where State withdrew challenge to second juror; (3) trial court properly excluded testimony that victim had been seen purchasing or using crack cocaine on various occasions before her death; (4) issues of whether victim consented to sexual activity and whether murder was premeditated were for jury; and (5) prosecutor's improper closing argument, in which prosecutor pointed out various activities that defendant would be able to do in jail that victim could no longer do, required resentencing before new jury.

Affirmed in part, reversed in part and remanded for resentencing.

Kogan, J., concurred in result only.

Attorneys and Law Firms

*325 James Marion Moorman, Public Defender and Steven L. Bolotin, Asst. Public Defender, Tenth Judicial Circuit, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Peggy A. Quince, Asst. Atty. Gen., Tampa, for appellee.

Opinion

PER CURIAM.

Perry Alexander Taylor appeals his convictions for murder and sexual battery and the related sentence of death. We have jurisdiction under article V, section 3(b)(1), Florida Constitution.

Taylor was charged with the murder and sexual battery of Geraldine Birch whose severely beaten body was found in a dugout at a little league baseball field. Shoe prints matching Taylor's shoes were found at the scene. Taylor confessed to killing Birch but claimed that the sexual contact was consensual and that the beating from which she died was done in a rage

without premeditation. Taylor testified that on the night of the killing, he was standing with a small group of people when Birch walked up. She talked briefly with others in the group and then all but Taylor and a friend walked off. Taylor testified that as he began to walk away, Birch called to him and told him she was trying to get to Sulphur Springs. He told her he did not have a car. She then offered sex in exchange for cocaine and money. Taylor agreed to give her ten dollars in exchange for sex, and the two of them went to the dugout.[1]

1 The testimony of defense witnesses Otis Allen and Adrian Mitchell, friends of Taylor, corroborated this portion of Taylor's testimony. Allen testified that he heard Birch tell Taylor that she wanted to have sex for money or crack cocaine and that he saw Birch and Taylor walk off toward the little league park together. Mitchell testified that he saw Birch talking to Taylor, then she walked away and he followed as though they were together.

Taylor testified that when he and Birch reached the dugout they attempted to have vaginal intercourse for less than a minute. She ended the attempt at intercourse and began performing oral sex on him. According to Taylor, he complained that her teeth were irritating him and attempted to pull away. She bit down on his penis. He choked her in an attempt to get her to release him. After he succeeded in getting her to release her bite, he struck and kicked her several times in anger.

The jury convicted Taylor on both counts. Upon the jury's unanimous recommendation, the trial judge sentenced Taylor to death.[2]

2 The trial court found no mitigating circumstances and three aggravating circumstances: (1) that Taylor had been convicted previously of a felony involving the use of violence to the person, to wit: sexual battery; (2) that the murder was committed while Taylor was in the commission of a sexual battery; and (3) that the murder was especially wicked, evil, atrocious, or cruel.

***326** Taylor raises three issues related to the guilt phase of his trial. First, he contends that the trial court erred by failing to conduct a *Neil* inquiry upon the prosecutor's peremptory challenge of a black prospective juror. *State v. Neil,* 457 So.2d 481 (Fla.1984), *clarified, State v. Castillo,* 486 So.2d 565 (Fla.1986), established the test for determining whether a party is exercising peremptory challenges on the basis of improper bias. The complaining party must make a timely objection, demonstrate that the challenged persons are members of a distinct racial group, and show a strong likelihood that they were challenged because of their race. If the trial court determines that there is such a substantial likelihood, the other party must show that the challenges were not exercised solely because of the jurors' race. If the court determines no such likelihood exists, no inquiry into the challenges is required. *Neil,* 457 So.2d at 486–87.

During jury selection Taylor, who is black, objected to the state's peremptory challenge of prospective juror Farragut. Farragut was one of four black members of the venire and the first black to reach the jury box. In response to the *Neil* motion, the prosecutor told the court that he was not systematically excluding blacks from the panel because the effect of striking Farragut was to place a black woman on the panel.[3] The trial judge stated that he could not at that time find that the state was systematically excluding blacks from the jury and did not require the state to give its reasons for challenging juror Farragut. Defense counsel then exercised a peremptory challenge against the black woman. Later in the jury selection, the state exercised a peremptory challenge against the third black prospective juror to reach the jury box. Defense counsel again made a *Neil* motion, and the following interchange occurred:

3 Under the procedure being followed for jury selection, all prospective jurors were examined on voir dire, after which the state and the defense exercised their challenges at a single conference. Each juror was numbered, and as any of the first twelve were challenged, the next numbered juror would be added to the panel, subject to further challenge.

THE COURT: I will require the State to give a valid reason for exercising a peremptory challenge as to Jacqueline Boyd since there is no other black left on this panel other than Charlie Robinson, who unequivocally stated that he could never vote to recommend death. I now find the State may well be systematically removing blacks from this jury panel.

MR. BENITO [prosecutor]: My concern with Ms. Boyd would be the fact that she has two children [and] my reading of

her questionnaire seemed to indicate that she lived in the area where this offense took place.

THE COURT: What was your first reason, Mr. Benito? The second one, merely because she lives in the area, I don't find is any reason peremptorily or not to challenge somebody. What was the first reason?

MR. BENITO: The fact that she has two children.

THE COURT: [Does] [t]he Defense want Jacqueline Boyd on their jury? ... Or [do] the Defense and the State want to excuse her, and then I don't have to worry about whether the State is systematically excluding blacks.

....

MR. BENITO: I was incorrect as to where she lived, Judge.... Judge, I will leave it up to the Defense. They can either have Jacqueline Boyd or Linda Custer, the one after Ms. Boyd.

MR. SINARDI [defense counsel]: Judge, again we would renew our previous objections to the State.

THE COURT: He is withdrawing it.

MR. SINARDI: That's fine, then.

Ms. Boyd served on the jury.

Taylor claims two errors occurred here. First, he argues that the trial court applied the incorrect standard when it determined that the state was not systematically excluding blacks and denied his *Neil* motion with respect to juror Farragut. Second, he contends that once the trial judge found, upon the challenge to juror Boyd, that the state might be exercising its peremptory challenges discriminatorily the court was ***327** required to obtain the state's reasons for the earlier challenge of juror Farragut.

We find no error in the trial court's initial refusal to require the state to provide its reasons for challenging juror Farragut because defense counsel did not demonstrate a strong likelihood that Farragut was challenged solely because of his race. Farragut was the first and, as a result of the withdrawal of the challenge to juror Boyd, the only black challenged by the state. We realize that under *State v. Slappy,* 522 So.2d 18, 21 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), the striking of even a single black juror for racial reasons is impermissible. *See also Reynolds v. State,* 576 So.2d 1300 (Fla.1991) (striking of only black venire member shifts burden to require justification for challenge). However, on this record, the mere fact that the state challenged one of four black venire members does not show a substantial likelihood that the state was exercising peremptory challenges discriminatorily, particularly since the effect of the challenge was to place another black on the jury. *See Woods v. State,* 490 So.2d 24, 26 (Fla.) (three peremptories exercised by state against blacks did not rise to level needed to require trial court to inquire into state's motives for challenges), *cert. denied,* 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). The record does not reveal the requisite likelihood of discrimination to necessitate an inquiry into the state's reasons for challenging juror Farragut.

In support of his second contention, Taylor relies on *Thompson v. State,* 548 So.2d 198 (Fla.1989). In *Thompson,* defense counsel raised timely *Neil* objections when the state exercised several peremptory challenges against black prospective jurors. The trial court did not require the state to provide the reasons for the challenges. However, after the state exercised a peremptory challenge against black prospective juror Bell, the court found that the state was systematically excluding blacks from the jury and asked the state to give its reasons for the challenge. However, the prosecutor told the court that he could not be systematically excluding because "you got a black sitting on the jury after I excuse Mr. Bell [.]" *Thompson,* 548 So.2d at 201. The trial judge then determined that the state was not systematically excluding blacks, did not require the state to provide its reasons for challenging juror Bell, and continued to allow the state to exercise peremptory challenges against black jurors without explanation. Ultimately, the trial court determined that the state was systematically excluding black prospective jurors and required the state to explain its challenge to a black juror. Thereafter, the state continued to exercise peremptory challenges against blacks but offered explanations for each strike. However, the state did not give, nor did the trial court require, reasons for the challenges to the first black jurors challenged by the state. In determining that a *Neil* violation occurred, this Court concluded:

The record reflects that the trial court below clearly entertained serious doubts as to whether the state

> was improperly exercising its peremptory challenges. Accordingly, the court should have resolved this doubt in favor of the defense and conducted an inquiry as to the state's reasons for all the challenged excusals. *Slappy,* 522 So.2d at 21–22. These reasons must be supplied by the prosecutor. Here, the trial court conducted an improper inquiry because it failed to question the state as to *each and every* peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

Thompson, 548 So.2d at 202. Thus, once a sufficient doubt is raised that a prospective juror may have been eliminated because of race, "the trial court must require the state to explain *each* one of the allegedly discriminatory challenges." *Williams v. State,* 574 So.2d 136, 137 (Fla.1991).

However, the prosecutor's withdrawal of the challenge to Juror Boyd distinguishes this case from *Thompson.* The withdrawal, which was accepted by defense counsel, removed the court's determination ***328** that the state might be exercising peremptory challenges discriminatorily. This eliminated the requirement that the court look back to the state's reasons for challenging juror Farragut. We caution, however, that a party may not continually withdraw peremptory challenges in order to avoid an inquiry into the reasons for other challenges to minority jurors. If it becomes apparent that a party is withdrawing challenges to minority jurors to avoid the requirements of *Neil,* the state must be required to provide the reasons for all allegedly discriminatory challenges.

Next, Taylor argues that the trial court erred in excluding testimony that the victim had been seen purchasing or using crack cocaine on various occasions before her death. Taylor proffered the testimony of three of the victim's sisters that they had seen her buy or use crack cocaine from five and one-half months to one month before her death. The trial court ruled that the testimony was irrelevant and refused to admit it.

Taylor's defense to the sexual battery charge was consent. He argues that the fact that Birch was a crack cocaine user was relevant to his defense because it corroborated his version of the events preceding the victim's death. Taylor argues that a crack cocaine user would be much more likely than a nonuser to approach a group of men at 4 a.m. in the location where this crime occurred and offer sex for money and drugs.

We find no error in the trial court's exclusion of this testimony. A person seeking admission of testimony must show that it is relevant. *Stano v. State,* 473 So.2d 1282, 1285 (Fla.1985), *cert. denied,* 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). To be relevant, evidence must tend to prove or disprove a fact in issue. *Id.* The fact that the victim may have used or purchased crack cocaine on occasions prior to her death does not tend to show that she consented to sex with Taylor on the night in question. None of the witnesses whose testimony was excluded had observed the victim offer sex for drugs or money. Absent a link between the prior cocaine use and sexual activity by the victim, the testimony simply was not probative of whether she consented to sexual activity with Taylor before the fatal beating.

Next, Taylor argues that the trial court erred in denying his motions for judgment of acquittal. Taylor was charged with premeditated murder and with felony murder based on the alleged sexual battery. He claims that the state's circumstantial evidence was legally insufficient to prove lack of consent to the sexual battery and premeditation. We disagree.

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. *Lynch v. State,* 293 So.2d 44, 45 (Fla.1974). In moving for judgment of acquittal, Taylor admitted the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. *Id.* We find competent, substantial evidence of premeditation and lack of consent to submit those issues to the jury. *Hufham v. State,* 400 So.2d 133, 135–36 (Fla. 5th DCA 1981) ("Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses.").

To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. Further, to establish premeditation by circumstantial evidence, the state's evidence must be inconsistent with every other reasonable inference. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be

decided by the jury. *Cochran v. State,* 547 So.2d 928, 930 (Fla.1989). However, the jury need not believe the defense version of facts on which the state has produced conflicting ***329** evidence. *Id.* On the question of lack of consent, even accepting Taylor's assertion that the victim initially agreed to have sex with him, the medical examiner's testimony contradicted Taylor's version of what happened in the dugout. According to Taylor, he had vaginal intercourse with the victim for less than a minute without full penetration. He testified that she then indicated that she did not want to have intercourse and began performing oral sex on him. The medical examiner testified that the extensive injuries to the interior and exterior of the victim's vagina were caused by a hand or object other than a penis inserted into the vagina. Given the evidence conflicting with Taylor's version of events, the jury reasonably could have rejected his testimony as untruthful. *Cochran,* 547 So.2d at 930.

Further, the jury reasonably could have rejected as untruthful Taylor's testimony that he beat the victim in a rage after she injured him. Although Taylor claimed that the victim bit his penis, an examination did not reveal injuries consistent with a bite. According to Taylor, even after he sufficiently incapacitated the victim by choking her so that she released her bite on him, he continued to beat and kick her. The medical examiner testified that the victim sustained a minimum of ten massive blows to her head, neck, chest, and abdomen. Virtually all of her internal organs were damaged. Her brain was bleeding. Her larynx was fractured. Her heart was torn. Her liver was reduced to pulp. Her kidneys and intestines were torn from their attachments. Her lungs were bruised and torn. Nearly all of the ribs on both sides were broken. Her spleen was torn. She had a bite mark on her arm and patches of her hair were torn off. Her face, chest, and stomach were scraped and bruised. Although Taylor denied dragging the victim, evidence showed that she had been dragged from one end of the dugout to the other. The evidence was sufficient to submit the question of premeditation to the jury. *See Heiney v. State,* 447 So.2d 210, 215 (Fla.) (premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds), *cert. denied,* 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

Taylor raises three issues related to the penalty phase of his trial. First, he claims that the prosecutor made improper, inflammatory closing argument and misled the trial court to believe that this Court had approved the argument when the Court had expressly disapproved it in *Jackson v. State,* 522 So.2d 802 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). Because of our disposition of this claim, we need not reach the other two.

In an attempt to dissuade the jury from recommending life imprisonment, the prosecutor made the following argument:

> [B]ut what about life in jail? What can one do in jail? You can laugh, you can cry, you can eat, you can read, you can watch tv, you can participate in sports, you can make friends.
>
> In short, you live to find out about the wonders of the future. In short, it is living. People want to live.
>
> If Geraldine Birch had the choice of life in prison or being in that dugout with every one [of] her organs damaged, her vagina damaged, what choice would Geraldine Birch have made? People want to live.
>
> See, Geraldine Birch didn't have that choice because this man right here, Perry Taylor, decided for himself that Geraldine Birch should die. And for making that decision he too deserves to die.

In *Jackson,* we said:

> We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.

Id. at 809.

Aware that the prosecutor had used this argument previously, defense ***330** counsel prior to closing arguments raised an objection to its use in this case. The prosecutor sought an in limine ruling as to its propriety. The prosecutor told the trial court that this Court had approved a similar argument in *Hudson v. State,* 538 So.2d 829 (Fla.), *cert. denied,* 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989). *Hudson's* sole reference to the issue is found in a footnote:

> Hudson also argues that he should receive a new penalty hearing because the prosecutor's closing argument and the trial court's refusal to give instructions requested by the defense deprived him of a fair trial. We have considered these arguments, but find that they are not supported by the record and that no reversible error occurred.

Hudson, 538 So.2d at 832 n. 6. The prosecutor had copies of the appellant's brief in *Hudson* to show the trial court what was argued in that case. The trial judge determined that *Hudson* required him to permit the argument.[4]

[4] The state's argument that this issue was not preserved for appeal because Taylor did not request a curative instruction or move for a mistrial is misplaced. There was no requirement that Taylor do so because his objection to the prosecutor's closing argument was overruled. *Holton v. State,* 573 So.2d 284 (Fla.1990), *cert. denied,* 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991).

The prosecutor overstepped the bounds of proper argument. First, his reliance on *Hudson* was inappropriate. The Court in *Hudson* did not *approve* the argument made by the prosecutor. That case stands only for the fact that the prosecutor's argument, under the circumstances of that case, did not constitute reversible error.[5] Second, the *Jackson* opinion, which was issued a year before this trial, clearly prohibits this type of argument. While neither counsel called the court's attention to *Jackson,* the very brief to which the prosecutor referred cited *Jackson* for the proposition that such an argument should not be made. Finally, any doubt that the prosecutor should have known of *Jackson* is belied by the fact that the *Jackson* case was tried by his own state attorney's office. While we cannot say that the prosecutor intentionally misled the court, we believe that the circumstances of this case compel us to require a resentencing proceeding. Unlike *Jackson,* which involved a double murder and minimal mitigating circumstances, we cannot say that the offending argument constituted harmless error.

[5] It should be noted that no objection to the argument was interposed in *Hudson.*

Accordingly, we affirm Taylor's conviction of murder, but we reverse the sentence of death and remand for resentencing before a new jury.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT and GRIMES, JJ., concur.

KOGAN, J., concurs in result only.

All Citations

583 So.2d 323, 16 Fla. L. Weekly S469

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APPENDIX I

TRIAL PRACTICES INC

June 28, 2017

Via Electronic Mail

Subject: Content Analysis of *Taylor v. State*

David D. Hendry, Esquire
Capital Collateral Regional Counsel-Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637

Dear Mr. Hendry:

You have asked me to evaluate the retrial transcript (1992 Penalty Phase) in *Taylor v. State,* Hillsborough County Circuit Court Case Number 88-15525 to identify any statements which, from a reasonable juror's perspective, appear to undermine the personal sense of responsibility for the outcome of trial culminating and reflected in sentencing based on guidance derived from *Caldwell*[1]. Furthermore, you have asked me to revise and expand on commentary regarding (1) the alleged novelty of the methodology selected in terms of its specific application to the law and (2) the notion that any one person can accomplish the same analysis of that conducted through panel evaluation of specific texts. A wide variety of journeyman research methodologies in the social and behavioral sciences have been applied to problems in legal analysis covering broad areas of judicial interest, such as venue change, pre-trial publicity, mediation, ethics, voir dire, jury selection, jury deliberations, the application of peremptory and cause challenges, racial discrimination, the design of patterned jury instructions and capital punishment.[2] A simple and

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[1] *Caldwell v. Mississippi* 472 U.S. 320 (1985).

[2] Brodsky, S. L. (2000), Change of Venue Assessments in Civil Litigation: Methodologies for a Comprehensive Evaluation. *Journal of Law and Psychiatry*, 28(3), 335-349; or, Kovera, M. B. (2002), The Effects of General Pretrial Publicity on Juror Decisions: An Examination of Moderators and Mediating Mechanisms, *Law and Human Behavior*, 26(1), 43-72; or, Posey, A.J. & Dahl, L.M. (2002), Beyond Pretrial Publicity: Legal and Ethical Issues Associated With Change of Venue Surveys, *Law and Human Behavior*, 26(1), 107-125; or, Frederick, J.T. (2011), *Mastering Voir Dire and Jury Selection: Gaining an Edge in Questioning and Selecting a Jury*. Chicago, IL: American Bar Association; or, Kalven, H. & Ziesel, H. (1971), *The American Jury*. Chicago, IL: The University of Chicago; or, Ziesel, H. & Diamond, S.S. (1978), The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, Stanford Law Review, 30(1), 491-531; or, Frederick, J.T. (1984), Social Science Involvement in Voir Dire: Preliminary Data on the Effectiveness of "Scientific Jury Selection", Behavioral Science and the Law, 2(4), 375-394; *or, United States v. Mikos*, 539 F.3d 706 (2008); or, Perlman, H.S. (1986), Pattern Jury Instruction: The Application of Social Science Research, *Nebraska Law Review*, 65(525), 520-542; or, Tanford, J. A. (1990), The Law and Psychology of Jury Instructions, *Nebraska Law Review*, 69(71) ,72-110; or, "Deciding Death: Revising Jury Instructions to Improve Juror Comprehension of the Law" (1996), 7 Researching Law: An ABF Update 1; or, *United States v. I. Lewis Libby*, 461 F.Supp.2d 3 (2006).

direct method of applying a non-legal perspective to this transcript is to conduct a content analysis of the text record of statements made to the jurors during the trial in terms of two principles in *Caldwell* which frame the inquiry you seek:

- "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere."[3]

- "There are several reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."[4]

Innumerable Florida cases have cited *Caldwell* errors, in part or in whole, as a basis for an appeal. However, the courts do not appear to have paid any *empirical* attention to the frequency of statements that would constitute harmful error, no matter the Supreme Court decision held that even a single such sentence is sufficient to undermine the jury's role in decision-making by diminishing a juror's sense of responsibility for the outcome of trial and was sufficient grounds for reversal. While much discussed, statements which constitute *Caldwell* errors affecting the deliberations and verdicts of reasonable jurors have not been *counted* in the two most relevant cases decided by the 11th U.S. Circuit Court of Appeals.[5] Indeed, the most serious scholarly attempt to wrestle with the significance of the *Caldwell* decision examines available empirical evidence demonstrating support for the significance of *Caldwell* errors by outlining research results from studies of jury decision-making, jury perception, bias, unresponsive bystander studies, sentencing severity research and mock trial studies, yet gives no attention to the *frequency* of such errors during any specific trial.[6] If, as the Supreme Court found, even a single sentence has the power to diminish or undermine a juror's awesome sense of personal responsibility for the outcome of a capital case, any analysis of the power of such comments must begin with an informed and rigorous examination of the *number of such references* in the trial record. Without such evidence derived from the transcript, any analysis of *Caldwell* errors is incomplete. Moreover, the cumulative meaning and weight of such references, multiplied by their number during the *entire* trial, threaten to overwhelm jurors leaving them with a misapprehension of their role. [7]

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[3] *Caldwell v. Mississippi,* 472 U.S. at 328-329 (1985).

[4] *Caldwell v. Mississippi,* 472 U.S. at 330 (1985).

[5] See *Mann v. Dugger,* 817 F.2d 1471, 1475 (11th Cir. 1987) and *Harich v. Dugger,* 844 F.2d 1464, 1470-71 (11th Cir. 1988).

[6] See Mello, M. (1989) "Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury," 30 *Boston College Law Review* 283 .

[7] See Judge Tjoflat's concurring opinion in *Harich v. Dugger* 844 f.2d 1464, 1475 (11th Cir. 1988): "The chief defect in the analysis...is that it focuses too heavily on whether the statements by the prosecutor and the court regarding the sentencing process were accurate in a very technical sense, and does not fully consider whether the jurors were nevertheless left with a misimpression as to the importance of their role. In my view, a proper analysis of a *Caldwell* claim requires an evaluation of how a reasonable juror would have understood the court's statements in *the context of the entire trial".* (Emphasis added.) See also Bowers, W.J., Sandys, M., & Steiner, B.D. (1998) "Foreclosed Impartiality in Capital Sentencing: Predispositions, Guilt-trial experience, and Premature Decision Making," *Cornell Law Review.* 1476 which concludes at p. 1556 "Many jurors make premature pro-death punishment decisions, and most are absolutely convinced that death is the right punishment and stick with it

Similarly, there has been little, if any, attention to the *placement* or occasion for such statements during the trial in terms of the effects of either such factor on the decision-making of reasonable jurors. *Caldwell* statements by the court or prosecution *before* decisions on guilt and/or sentencing is reached could have the same effect as those made during the sentencing phase: "One concern expressed in *Caldwell* was that a sentencing jury, unconvinced that death is the appropriate punishment...might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. The jury might thus tend to sentence the defendant to death because of any lingering doubts about possible error may be corrected on appeal."[8] In short, the gruesomeness of evidence necessarily adduced during the trial of a capital case, before punishment is even considered, may affect later phases of the trial.[9] *Caldwell* errors can have an effect on determination of both guilt and the appropriate sentence. In any case, even when there may be two separate juries hearing the case, deciding respectively guilt or sentence, the immediate effect of gruesome evidence as recounted in the summary of facts for the sentencing group may have a different but unknown impact.

Method. Content Analysis is a methodology common to many disciplines in the social and behavioral sciences including Sociology, Psychology, and Social Psychology, the Information and Library Sciences and other disciplines. Typically it is used for the evaluation of text, video, audio and other observational data and may include both qualitative, quantitative and mixed modes of research frameworks.[10] Although not an element of legal training, the application of content analysis to the law was neither "novel" nor "speculative" when, approximately 70 years ago, the *University of Chicago Law Review* introduced the method to its readers: "Conclusions are drawn solely from the incidence of materials within the categories"-- and the method has since enjoyed broad acceptance and a long tradition of use both nationally and internationally.[11] The method

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thereafter. Pre-existing feelings that death is the only acceptable punishment for many kinds of aggravated murder and the belief that premeditated murder requires the death penalty substantially contribute to an early pro-death stand...Early pro-life stands are largely independent of death penalty values or predispositions but they are strongly influenced by lingering doubt as a mitigating consideration among capital jurors demonstrates that it is essential to the moral character of capital sentencing...The guilt trial has become a venue for advocating punishment stands and for injecting punishment considerations into the guilt decisions. This shift is a reflection of both unspoken assumptions about the purpose of the capital trial and the unique character and gravity of the decision. Whatever the reasons, the consequence is a system gone awry from the start."

[8] *Harich v. Dugger* 844 F.2d 1464 at 1473(fn13 citing language from Caldwell). This case, on the other hand was decided by two separate juries: one during the guilt phase and a separate group which heard evidence both on the nature of the wrongdoing and mitigation.

[9] See, for example, Bright, D. A. & Delahunty-Goodman, J. (2006), "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-making," *Law and Human Behavior*, 30(2), 183-202.

[10] See White, M., & Marsh, E. (2006), Content Analysis: A Flexible Methodology, *Library Trends, 55* (Summer); or, Babbie, E. R. (2007), *The Basics of Social Research* (4th ed., p.416), Belmont: Wadsworth Publications. See also Neuendorf, K. A. (2017), *The Content Analysis Guidebook* (2nd Ed.) Los Angeles: Sage Publications, Inc. See also Schreier, M. (2012), *Qualitative Content Analysis in Practice* (p.9) Los Angeles: Sage Publications, Inc. for the difference between quantitative and qualitative content analysis. See also Weber, R. P. (1990). *Basic Content Analysis* (2nd Ed.) California: Sage Publications, Inc.

[11] Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review*: 15(4); see also Hall, M. E. & Right, R.F. (2008) , "Content Analysis of Judicial Opinions, *California Law Review*, 96(1) p. 63: "Professor Herman Oliphant, in his inaugural address as President of the American Association of Law Schools [see Oliphant, H. (1928), "A Return to Stare Decisis", *American Bar Association Journal, 161*] Our case material is a scientific goldmine for scientific work. It has not been scientifically exploited...We should critically

and conclusions derived from its application are not speculative when quantitative results are applied only to an accepted legal or scientific principal. At its most fundamental level, the technique provides a systematic means of codifying and counting references (such as *Caldwell* errors) based on explicit coding standards executed by multiple reviewers. "Basic content analysis relies mainly on frequency counts of low-inference events that are manifest or literal and that do not require the researcher to make extensive interpretive judgments."[12] By using a panel of coders as opposed to relying on a single, expert review, conclusions are cleansed of individual biases and variance in the interpretation of the meaning for any particular sentence.

A panel of six coders read the trial transcript and recorded observations which fit any of the following categories derived from *Caldwell*:

- Any suggestion they might make with respect to the ultimate recommendation for punishment can be corrected on appeal by the sitting judge, appellate court, or executive decision-maker; or,
- Any suggestion that only a death sentence and not a life sentence will subsequently be reviewed; or,
- Any suggestions indicating that the jury's responsibility for any ultimate determination of death will rest with others, *e.g.* an alternative decision maker such as the judge or a higher state court.

The unit of analysis chosen for this review was the *sentence*. Reviewers were asked to count any comment uttered before the jury which either directly, or, implicitly fell into the categories above in their judgment.[13] Disagreements were adjudicated in a review by the full panel. Inter-coder reliability was established by identifying *errors* reflecting judgments that could not be corrected by review of the panel due to a fundamental disagreement over the meaning of the comment and *mistakes*, *e.g.*, accidental oversights or misreads which were identified by a vote on review.

The results of this analysis are summarized in Table I, attached at Tab A. The inter-coder reliability rate for errors was 97% with 134 comments (four discrepancies) out of a total of 138 observations. (See Table I at Tab A.) Coding mistakes which were resolved upon review and did not reflect disagreement on content included 17% (93) of the 536 judgments.

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examine all of the methods now used in any of the social sciences and having any useful degree of ***objectivity***"; or Gupta, S. K. (1982), Applicability of Content Analysis in Legal Research," *Journal of the Indian Law Institute*, 24(4), 751-755

[12] Drisko, J. W., & Maschi, T. (2015). *Content Analysis*. New York: Oxford University Press, 2015.

[13] Implicit comments were those which included restatement of the question, in whole or in part, by one party to another before the larger audience as within the case when the prosecution partially repeats a question or response made by a juror to ensure common understanding. The significance of implicit statements is reflected in the opinion of Judge Tjoflat writing for the U.S. Court of Appeals 11th Circuit in *Mann v. State* 844 F.2d 1446, 1458(fn14) "In light of the prosecutor's repeated suggestions throughout the proceedings that the jury's role was unimportant, we are satisfied that when jurors heard the trial judge say "as you have been told," they understood the reference to be the prosecutor's portrayal of their role."

My resume and those of the coders are attached at Tab B. Two of the coders (Ms. Deery and Mr. Ali) respectively are graduate and undergraduate Psychology majors at the University of South Florida. Mr. Brennan, the fourth coder, is a journalist who actually covered the *Caldwell* case for *The Meridian Star* before the Mississippi Supreme Court. None have any previous experience in conducting content analysis and the entire panel consists of an availability sample of jury-eligible citizens. The coders were trained and tasked by me prior to the exercise in accordance with standard content analysis protocol and guidelines.

Coder training is an essential first step in any human-coded content evaluation. It is a *myth* that anyone can do content analysis, though, because "...indeed anyone can do it, but only with some training and with substantial research planning."[14] The impression this is a novel technique in the law when applied to evidence should diminish as familiarity with its broad application in both the social sciences and legal analysis grows. [15] All coders were trained beginning with a read of the *Caldwell* decision. All coders followed a fixed protocol which defined the categories and each member of the team was oriented to the task by means of practice sessions involving other cases.

Results. Table I at Tab A identifies 134 sentence-long statements by Judge Diana M. Allen, or, State Prosecutor, Ron Hanes, or, by jurors who directly or implicitly repeated questions posed by the State during voir dire which the coders found to fit the categories described above. On their face, these sentences appear to diminish the role of jurors or the jury as the final arbiter of the punishment in accord with existing Florida law which requires the judge to set the penalty. A total of 83 sentences or 62% ***directly*** reflected the juror's inferior position in setting punishment while 38% (51) ***implicitly*** asserted sentencing would actually be determined by some other party. Moreover, 72% (97) of these statements were made before the jury heard evidence concerning mitigation while 28% (137) were made largely at the conclusion of the evidentiary phase. (See Table I at Tab A.)

To further evaluate the content of the transcript we conducted a machine read to count the incidence of two key phrases frequently recognized by coders in the content analysis as opposed to complete sentences: "advisory sentence" and "recommend a sentence" using Adobe XI. [16]

Table II

	Machine Search	Content Analysis
Before Evidence	5% (2)	72% (97)
After Evidence	95% (41)	28% (37)
Total	100% (43)	100% (134)

[14] Neuendorf, K. A. (2017), *The Content Analysis Guidebook* (2nd Ed.) Los Angeles: Sage Publications, Inc., pp. 7-8.
[15] See Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review*, 15(4) at p. 924: "...judicial reaction to novelty will disappear with repeated use of the device. As the argument in the *News* so well demonstrates, when a novel technique is used before a judging body it finds itself on trial, while the matter in issue which it seeks to convey is relegated to the status of a waif tugging at the judicial robes for a sign of recognition."
[16] Adobe Systems Incorporated. (n.d.). Adobe Acrobat X (Version 10.0.0) [Computer software].

This machine approach to word count generated fewer reference sentences than the content analysis. (See Table II.). A full list of the reference sentences containing these phrases is attached at Tab C. Only 5% (2) of the references caught by the electronic review occurred the presentation of evidence to the jury, while 95% (41) after presentation of evidence. Conversely, 72% (97) of the sentences identified by the panel of coders were made before the presentation of evidence with 28% (37) occurring after. Clearly, the machine read is a clumsy tool, unable to identify nuances of meaning or to identify implicit meanings. The comparison of the results of the two methods highlights the number of references that may have undermined the juror's sense of personal responsibility for the outcome of the trial *before* the sentence for Mr. Taylor was considered.

Analysis. These results are not surprising given that Florida law directly tasked the sitting judge in the trial with the actual sentencing decision in death penalty cases. However, inasmuch as *Caldwell* was decided on the basis of a single assertion the U.S. Supreme Court held was sufficient to establish a constitutional flaw, the sheer number and weight of such statements, in this case, supports the conclusion jurors might well apply themselves to the awesome responsibility of addressing the question of life or death for the defendant with either more or less intensity for reasons unrelated to either evidence or testimony. A simple content analysis of the trial transcript of this case demonstrates the suspect statements constitute many multiples and variations of the type of single statement the Supreme Court has held is harmful error. While the present analysis does not allow specification of the incremental power of such multiple statements, by using content analysis, the data are available here for direct inspection. As observed by the editors of the *University of Chicago Law Review* in 1948, "...content analysis is unlike expert testimony founded on what judges consider to be the 'occult arts' of ballistics, chemistry and physiology. Its assumptions can be tested by one accustomed to logical reasoning."[17] Moreover, the impact of *Caldwell* statements *before* the verdict is reached cannot help but similarly diminish a juror's personal sense of responsibility for the outcome of the trial. While it is not possible to establish on the basis of a simple content analysis alone whether there is any linear relationship between the number of sentences and the harmfulness of error in terms of the meaning these sentences convey, we can observe more is *more*.

Further, two concepts common to the social sciences, education and the law accelerate the impact of any statements which suggest the jury, or jurors, hold a responsibility for sentencing inferior to other actors for the outcome of trial. These include (1) the role of repetition in learning and (2) the concept of primacy-recency.

The value of repetition in learning and education is apparent to all readers who have mastered the multiplication tables in arithmetic. Repetition is common to *all* disciplines of learning whether manual or intellectual in nature. The mechanism of repetition in learning is

[17] See Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review* 15(4) at p. 924.

addressed frequently in both education and social psychology.[18] Repetition as used in this analysis merely reflects a count of the number of sentences identified by the four coders in comparison to the standard set by the United States Supreme Court in *Caldwell*—a single statement by the prosecutor. In light of this standard, the more frequent repetition of problematic sentences in this case underscores the fact the jurors sense of responsibility for the outcome of the trial may have been diminished more than a hundredfold of that suspected by the court in Mr. Caldwell's trial.

The second concept in social psychology concerns the primacy-recency effect in learning.[19] In short, respondents are most likely to retain those statements made early in the learning process and those heard late in the experience. As noted above, 72% (97) of the sentences identified were found at the beginning of the trial during the court's opening remarks and *voir dire* by the prosecution before the presentation of evidence and testimony. Based on this finding, both the *placement* and repetition of the sentences counted in Table I may, by the logic of the *Caldwell* decision, further accelerate the impact of those sentences in reducing the jury's attention to its responsibility in recommending life or death for a defendant.

A standard jury instruction at the start of Florida jury trials, made in this case, holds that statements offered by the attorneys and the court during *voir dire* and/or opening of counsel are *not* evidence and should not be considered by the jury in reaching its decision. The "story model" of juror decision-making now dominant among attorneys and trial scientists underscores the seriousness of such framing effects in determining trial outcomes.[20] Statements by the court and prosecution frame the jury's orientation to the tasks in its subsequent performance. On balance, a jury which is told its work will not determine the outcome of trial necessarily is less likely to take

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[18]See, for example, the discussion in Jensen, E. (2005), *Teach with the Brain in Mind,* Alexandria, Virginia: The Association for Supervision and Curriculum Development, which references the importance of repetition as part of seven factors critical for learning due to the nature of neural networking and the strengthening of conditioned responses through repetition leading to increased recall and application; see also Cacioppo, J., & Petty, R. (1989), Effects of Message Repetition on Argument Processing, Recall, and Persuasion, *Basic and Applied Social Psychology, 10*(1), 3-12; or, Melton, A. (1970), The Situation with Respect to the Spacing of Repetitions and Memory, *Journal of Verbal Learning and Verbal Behavior,* 9(5), 596-606; or, Wogan, M., & Water, R. H. (1959), The Role of Repetition in Learning, *The American Journal of Psychology,* 72, 612-613; or, Rock, I. (1957), The Role of Repetition in Associative Learning, *The American Journal of Psychology,* 70(2), 186-193; or, Repovs, G., & Baddely, A. (2006), The Multi-Component Model of Working Memory: Explorations in Experimental Cognitive Psychology, *Neuroscience,* 139(1), 5-21.

[19] Murdock, B. B. (1962), "The Serial Position Effect of Free Recall", *Journal of Experimental Psychology,* 64(5), 482-488; or, Troyer, A. (2011), Serial Position Effect, *Encyclopedia of Clinical Neuropsychology*, 2263-2264; or, Lind, E., Kray, L., & Thompson, L. (2001), Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory, *Organizational Behavior and Human Decision Processes,* 85(2); or Caldwell, H.M., Perrin, L.T., Gabriel, R., Gross, S.R. (2001), Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communicating into the Direct Examination," *Notre Dame Law Review,*76, 423.

[20] See Krauss, D. A.; Sales, B. D. (2001), "The effects of clinical and scientific expert testimony on juror decision making in capital sentencing." *Psychology, Public Policy, and Law,* 7(2), 301; or, Pennington, N., & Reid, H. (1993), *Inside the Juror.* Cambridge: The Press Syndicate of the University of Cambridge; see also, Bennett, W., Feldman, M. (1984), *Reconstructing Reality in the Courtroom,* Rutgers: New Jersey.

its role as seriously as would be the case if it actually perceived itself as bearing more direct responsibility for sentencing.

Conclusion. Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of Sociological certainty the jury which recommended a sentence of death for Mr. Taylor in *State v. Taylor* more likely than not was partially persuaded against paying the requisite level of attention to its awesome responsibility for a decision of life or death for the defendant as a result of comments made by the court, prosecutor, or other actors.

Harvey A. Moore, Ph.D.

Acknowledged before me this 29th day of June, 2017
by Harvey A. Moore
PL # M600-321-46-253-0

GLORIA GONZALEZ
Notary Public - State of Florida
My Comm. Expires Mar 19, 2018
Commission # FF 103829

Tab A

Content Coding for Taylor Analysis

Transcript			Coders						
Page	Line	Sentence	Moore	Deery	Brennan	Ali	Mistakes	Errors	Total
15	24	You will then be asked to render an advisory verdict to the Court as to the sentence to be imposed.	1	1	1	1			4
16	7	As I just advised you, the verdict that you will give to the Court at the conclusion of this phase is an advisory verdict.	1	1	1	1			4
16	9	The final decision as to what punishment must be imposed rest solely with the Judge of this court, however, the law requires that you as the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.	1	1	1	0	1		4
16	11	However, I can assure you that this Court will give careful consideration and great weight to the advisory verdict, and only in rare circumstances can this Court impose a sanction other than the one you recommend.	1	1	1	0	1		4
16	17	The fact that if selected to be on this jury you will be rendering only an advisory verdict to the Court must not in anyway be taken by any of you as a minimization of your very important role in the sentencing process in this case.	1	1	1	1			4
20	22	If you were selected to be a juror in this case would the view that you hold about the death penalty prevent or substantially impair your ability to act as an impartial juror in this case to the extent that you would be unable to render a true advisory opinion as to the sentence to be imposed in accordance with the facts, the instructions of law that will be given to you by this Court, and your sworn oath as a juror.	1	0	1	1	1		4
21	12	Ms. Coyle, is your hand up for that second question?	1	0	0	0	3		4
21	15	Ms. Tilley?	1	0	0	0	3		4
21	17	Your answer to that question is yes?	1	0	0	0	3		4
21	21	If you were selected to be a juror in this case are you willing and able to set aside temporarily your view about the death penalty and render a true advisory opinion as to the sentence to be imposed which is accord with the facts, the instructions of law to be given to you by the Court, and your sworn oath as a juror?	1	0	1	1	1		4
22	4	Can you set aside temporarily your view about the death penalty and render a true advisory opinion as to the sentence based upon the facts, the instructions on the law and your sworn oath as a juror?	1	0	1	1	1		4
22	8	May I have a showing of hands?	1	0	0	0	3		4
22	9	Ms. Randazzo, your answer is no?	1	0	0	0	3		4
22	15	You would not be able to do that?	1	0	0	0	3		4
22	18	Mr. Jenkins?	1	0	0	0	3		4
22	20	Ms. Sterko	1	0	0	0	3		4
22	25	And your answer to that last question?	1	0	0	0	3		4
23	3	Yes, you could set aside your views temporarily?	1	0	0	0	3		4
23	6	Anybody else have anything they would like to say concerning those questions?	1	0	0	0	3		4
25	2	You already have the knowledge-you already know, the Court has already informed you that you are here as a jury to render an advisory recommendation to the Court.	1	1	1	1			4
25	9	The penalty phase is where the jury will make a recommendation to the Court as to what sentence is to be imposed.	1	1	1	1			4
25	14	You make one of those recommendations to the Court.	1	1	1	1			4
25	16	And as the Court has told you, and will instruct you if you are chosen as a juror in this case, the Court is to give great weight and absolute serious consideration to the jury recommendation.	1	1	1	1			4
25	21	The Court is to give great weight and serious consideration to the jury's recommendation before imposing sentence.	1	1	1	1			4
43	3	Would it be fair to say that there are no circumstances under which you could recommend the death penaltyto the court?	1	0	1	1	1		4

ERROR

Table 1

Content Coding for Taylor Analysis Con't

Transcript			Coders						
Page	Line	Sentence	Moore	Deery	Brennan	Ali	Mistakes	Errors	Total
43	21	And you think that would impair your ability to follow the law in this case, that law being that a recommendation of death can be imposed in this case?	1	0	1	1	1		4
46	17	In returning your advisory sentence, and this may be going through your head, "well, what does an advisory sentence mean?".	0	1	1	1	1		4
47	15	If they outweigh them, your recommendation is death.	1	1	1	1			4
49	10	Then you make your individual recommendation.	1	1	1	1			4
49	17	And the second phase that we are in, the recommendation would only be by a majority.	1	1	1	1			4
49	18	For example, a recommendation by eight of you that the aggravating circumstances outweigh the mitigating circumstances would be a majority recommendation for death.	1	1	1	1			4
50	1	A six/six tie is a life recommendation.	0	1	1	1	1		4
50	2	It must be at least seven to five for a death recommendation.	1	1	1	1			4
50	4	That is unlike a unanimous verdict in a guilt or innocence phase.	1	0	0	0	3		4
50	9	It's not a process of counting them up and saying there are four aggravating circumstances and two mitigating circumstances, therefore, recommendation is death.	1	1	1	1			4
50	22	But you must attach weight to those aggravating circumstances and attach weight to those mitigating circumstances, and if you believe that the aggravating circumstances outweigh the mitigating circumstances then that would call for a recommendation of death.	1	1	1	1			4
51	2	If you cannot make that finding then your recommendation would be for life.	1	1	1	1			4
51	5	Mr. Stonerock, do you understand that it is not a counting process, that we don't count the aggravating and count the mitigating to make a recommendation?	1	1	1	1			4
52	20	Mr. Abrams, do you think under the proper circumstances that you could recommend the death penalty?	1	0	1	1	1		4
52	24	Ms. Pendarvis, under the proper circumstances could you recommend that a defendant be sentenced to death?	1	1	1	1			4
53	3	Mr. McWhirter?	1	1	1	1			4
53	5	Ms. Cadow?	0	1	1	1	1		4
53	13	Is it fair to say that under no circumstances could you recommend the death penalty?	1	1	1	1			4
53	23	Mr. Stonerock, under the proper circumstances could you impose the death penalty or recommend the death penalty?	1	1	1	1			4
54	6	Under the proper circumstances could you recommend the death penalty?	1	0	1	1	1		4
54	11	The answer is yes, sir?	1	1	1	0	1		4
54	13	Ms. McNair?	1	1	1	1			4
55	1	In this particular case if the aggravating circumstances outweighed the mitigating circumstances and you attached greater weight to those aggravating circumstances than the mitigating circumstances, could you recommend the death penalty?	0	1	1	1	1		4
55	11	You could?	1	1	1	1			4
55	13	Ms. Hunlocker?	1	1	1	1			4
55	15	Mr. Cisneros?	1	1	1	1			4
55	17	Mr. Lane?	1	1	1	1			4
55	20	Ms. Mitchell?	1	1	1	1			4
56	10	Ms. Held, under the proper circumstances could you recommend the death penalty?	1	1	1	1			4
56	13	Ms. Sklenar?	1	1	1	1			4

Content Coding for Taylor Analysis Con't

Transcript			Coders						
Page	Line	Sentence	Moore	Deery	Brennan	Ali	Mistakes	Errors	Total
56	15	Ms. Boyett?	1	1	1	1			4
56	17	Ms. Tomlinson?	1	1	1	1			4
56	19	Ms. Hester?	1	1	1	1			4
56	21	Ms. Coyle?	1	1	1	1			4
57	8	If you find those outweigh the mitigating in this case could you recommend the death penalty?	1	1	1	1			4
57	12	Mr. Miller?	1	1	0	1	1		4
57	23	...that you think it would impair your ability?	0	1	0	1	2		4
59	4	Mr. Sanders, under the proper circumstances, sir, could you recommend the death penalty?	1	1	1	1			4
59	8	Ms. Smith?	1	1	1	1			4
59	10	Ms. Jungerberg?	1	1	1	1			4
59	12	Mr. Stirrup?	1	1	1	1			4
59	17	Ms. Steinlen?	1	1	1	1			4
59	19	Ms. Boland?	0	1	1	1	1		4
59	21	Mr. Bee?	1	1	1	1			4
59	23	Mr. Stewart?	1	1	1	1			4
59	25	Ms. Tidwell?	1	1	1	1			4
60	3	Ms. Tillery, you indicating that you could not under any circumstances recommend the death penalty.	1	1	1	1			4
61	5	Let me ask you, if the aggravating in the case outweigh the mitigating circumstances could you recommend the death penalty?	1	1	1	1			4
61	10	Mr. Williams?	1	1	1	0	1		4
61	12	Under the proper circumstances could you recommend the death penalty?	1	1	1	1			4
61	15	Ms. Taylor?	1	1	1	1			4
61	17	Ms. Olson?	1	0	1	1	1		4
61	19	Mr. Corero?	1	1	1	1			4
62	11	Under the proper circumstances could you recommend the death penalty?	1	1	1	1			4
62	14	Mr. Phillips?	1	0	1	1	1		4
62	16	Ms. Wyman?	1	0	1	1	1		4
62	18	Mr. Jenkins?	1	1	1	1			4
62	20	Ms. Jackson?	1	1	1	1			4
62	22	Mr. Moats?	1	1	1	1			4
62	24	Ms. Baker?	1	1	1	1			4
63	4	And I believe you answered all the judges questions to the extent that your beliefs were such that you could not vote to recommend the death penalty under any circumstances?	1	1	1	1			4
63	12	Under the proper circumstances could you recommend the death penalty?	1	1	1	1			4
63	15	Mr. Robinson?	1	1	1	1			4
63	17	Ms. Lantis?	1	1	1	1			4
63	19	Ms. Woodworth?	1	1	1	1			4
63	21	Ms. Warman?	1	0	1	1	1		4
63	23	Ms. Arnaiz?	1	0	1	1	1		4
64	9	Would it be fair to say that you could not recommend the death penalty under any circumstances?	1	1	1	1			4
64	22	There are no circumstances that you could recommend the death penalty?	1	1	1	1			4
87	13	If based upon what you heard from the witness stand, if you felt in your head and your heart that the mitigating circumstances outweighed the aggravating circumstances which you know would require you to recommend life, could you recommend life?	0	1	1	1	1		4
183 (Volume II)	8	The final decision as to what punishment must be imposed rest solely with the Judge of this court, however, the law requires that you as the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.	1	1	1	0	1		4
183 (Volume II)	14	Your advisory sentence must be given great weight by the Court in determining what sentence to impose upon the defendant, and it only under rare circumstances that the Court could impose a different sentence.	1	1	1	0	1		4
192	23	Your decision is whether or not in this case to recommend or life imprisonment without the possibility of parole for 25 years for Perry Alexander Taylor.	0	1	1	0	2		4

Content Coding for Taylor Analysis Con't

Transcript			Coders						
Page	Line	Sentence	Moore	Deery	Brennan	Ali	Mistakes	Errors	Total
193	6	But when I asked you on Monday and when we questioned you on Monday and I believe we asked each and everyone of you under the appropriate circumstances could you recommend the death penalty	0	1	1	0	2		4
193	17	Perry Taylor should, for the life of Geraldene Burch, get a recommendation of death.	0	1	1	0	2		4
193	20	As we told you in the beginning, you're advisory sentence is to be given great weight by this court in determining what punishment Mr. Taylor will receive.	0	1	1	0	2		4
193	24	And as we discussed at the beginning, you will hear in the law that will be read to you, the vote maybe a majority, not unanimous, as in the guilty or innocent phase as we talked about.	0	1	1	0	2		4
194	6	A six to six vote is a vote to recommend life.	0	0	1	1	2		4
194	6	Now, to reach your advisory recommendation, to reach your advisory sentence, you must do what we talked about.	0	0	1	1	2		4
194	18	If they do, that is justification for death recommendation.	0	0	1	1	2		4
194	19	If the mitigating circumstances outweigh the aggravating circumstances, that is justification for a life recommendation.	0	0	1	1	2		4
215	24	And it is clear what recommendation is justified in the case, ladies and gentlemen.	0	1	1	1	1		4
216	8	I ask you to recommend to the Court in your advisory sentence that Perry Alexander Taylor be sentenced to death.	1	1	1	1			4
235	14	Deciding an advisory sentence is exclusively your job.	1	1	1	1			4
235	17	Please disregard anything I may have said or done that made you think I preferred one advisory sentence over another.	1	0	1	1	1		4
235	19	It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder.	1	1	1	0	1		4
235	23	As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.	1	1	1	1			4
235	25	However, your advisory sentence must be given great weight by the Court in determining what sentence to impose on the defendant.	1	0	1	0	2		4
236	3	And it is only under rare circumstances that the Court could impose a different sentence.	0	1	1	1	1		4
236	8	It is your duty to follow the law that will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.	1	1	1	1			4
236	17	Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.	1	0	1	1	1		4
237	23	If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.	1	1	1	1			4
239	23	If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your advisory sentence.	1	1	1	1			4
240	8	The advisory sentence of the jury must be based upon the facts as you find them from the law and the evidence.	1	1	1	1			4
240	12	You should weigh the aggravating against the mitigating circumstances, and your advisory sentence should be based on these considerations.	1	1	1	1			4
240	15	In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.	1	1	1	0	1		4

Content Coding for Taylor Analysis Con't

Transcript			Coders						
Page	Line	Sentence	Moore	Deery	Brennan	Ali	Mistakes	Errors	Total
240	18	The fact that the advisory sentence of the jury can be reached by a single ballot should not influence to act hastily or without due regard to the gravity of these proceedings.	1	1	1	1			4
240	25	And bring to bear your best judgement in reaching your advisory sentence.	1	1	1	1			4
241	2	If a majority of the jury determined that the defendant, Perry Alexander Taylor, should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of and there's blank.	1	1	1	1			4
241	5	This is the advisory sentence form.	1	0	1	1	1		4
241	7	A majority of the jury by a vote of and a place for you to insert the vote advise and recommend to the Court that it imposed the death penalty upon Perry Alexander Taylor dated at, Tampa, Hillsborough County, Florida this blank day of May, 1992, and a place for the foreperson of the jury to sign.	1	0	1	1	1		4
241	14	On the other hand, if by six or more votes, the jury the determines that Perry Alexander Taylor should not be sentenced to death, your advisory sentence will be, the jury advises and recommends to the Court that it imposes a sentence of life imprisonment upon Perry Alexander Taylor without the possibility of parole for 25 years, dated at Tampa, Hillsborough County, Florida this blank day of May, 1992, and a place for the foreperson of the jury to sign.	1	1	1	1			4
242	4	It is the foreperson's job to sign and date the appropriate advisory sentence form when all of you have agreed on a verdict in this case.	1	1	1	1			4
242	8	The foreperson will bring the advisory sentence form back to the courtroom when you return.	1	1	1	1			4
242	11	You will now retire to consider your recommendation.	0	1	1	1	1		4
242	12	When you have reached an advisory sentence in conformity with these instructions, that form of advisory sentence should be signed by your foreperson and returned to the Court.	1	1	1	0	1		4
242	18	The two advisory sentence forms will go with you into the courtroom.	1	1	1	1			4
Verdict Form 1	For Life Imprisonment	Advisory Sentence	1	1	1	1			4
Verdict Form 2	For Death Penalty	Advisory Sentence	1	1	1	1			4
		Implicit	48	34	37	37	48	N/A	204
		Direct	67	67	83	70	45	N/A	332
		Observed	115	101	120	107	93	4	536

Tab B

RESUME

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Education: Ph.D., Case Western Reserve University, 1972.

M.S., Illinois State University, 1969.

B.A., Knox College, 1968.

EMPLOYMENT:

1988 - President, Trial Practices, Inc., a litigation consulting firm.

1974-1993 University of South Florida (USF), Department of Sociology, 4202 E. Fowler Avenue, Tampa, Florida 33620. Taught Sociology of Law, Deviant Behavior, Social Problems, Community Analysis, Criminology, Juvenile Delinquency. Tenured.

1984-1989 Director, MacDonald Center Project. University of South Florida/MacDonald Center for Developmental Disabilities.

1984-1986 Deputy Director for Research, Florida Mental Health Institute.

1982-1984 Publisher, Tampa Bay Monthly Magazine, Tampa, FL (G. Steinbrenner, owner)

1982-1985 Assistant to the President, USF.

1979-1983 Director, Human Resources Institute, College of Social and Behavioral Sciences, USF. Developed Institute consisting of five multi-disciplinary research centers which paralleled the structure of the College: Community Analysis and Development, Applied Anthropology, Community Psychology, Applied Gerontology, and the Center for Evaluation Research.

1971-1974 U.S. Army. Final assignment: HQ, Continental Army Command, Special Programs Division (DCSPER), Fort Monroe, Virginia. Responsible for system management of continental U.S. drug and alcohol rehabilitation/treatment programs; Organizational Development Pilot Test Program, and the Personnel Control Facilities for problems of indiscipline.

1969-1972 Research Associate and Project Director, Case Western Reserve University, Institute on the Family and the Bureaucratic Society; also taught courses on social problems, race relations, and social satisfaction.

1968-1969 Psychiatric Social Worker, Galesburg State Research Hospital, Galesburg, Illinois.

Honors: Outstanding Professor, University of South Florida Senior Class, 1990; NDEA Fellow, 1970-1971; Alpha Kappa Delta; Order of Omega; Student Government Professor of the Year, 1983.

Robert L. Hindman Award for Public Service, Pinellas County Criminal Defense Lawyer's Association, 1999

Florida Public Defenders Association, Inc. "Award for Public Service," 2001

U.S. Attorneys Office Recognition in Prosecution of U.S. v. Ahmed Mohamed and U.S. v. Yousseff Megahed. 2009

Dissertation: *Client Interests and Organizational Goals.* Case Western Reserve University, Normal, Illinois, 1972.

Thesis: *The Significant Others of a College Population.* Illinois State University, Normal, Illinois, 1969.

Books, Monographs and Reports: *Television Advertising by Attorneys: An Evaluation of Its Impact on the Public,* Tallahassee: The Florida Bar, September 12, 1989.

Treatment Programs for Sex Offenders: Report of the Governor's Task Force on Mentally Disordered Sex Offenders and their Victims, (with J. Zusman). Tampa, April, 1984.

Employment Training Needs in Pinellas County, (with D. Stenmark, A. Wolf, T. Northcutt, R. Wheeler). Private Industry Council, Clearwater, Florida, 1981.

CETA and the Private Sector: On-the-Job Training in Manatee County, (with A. Wolf, R. Hansen, T. Northcutt). Private Industry Council, Bradenton, Florida, 1981.

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Community Approaches to Drug Abuse (with Marie Haug). Administration of Justice Committee, Greater Cleveland, Ohio, 1972.

Selected References: Studies on Drug Abuse. Administration of Justice Committee, Cleveland, Ohio, 1972.

Papers and Articles: "Developing Effective Graphic Communications", presented at the Defense Research Institute Seminar on Products Liability, San Diego, California, January 22-24, 1997.

"The Trial is 30 Days Away: Surrogate Jurors and Witness Preparation", presented at the American Bar Association 1997 Annual Meeting, Section of Litigation, Washington, DC, April 17, 1997.

"Qualitative Research, Thematic Development & Jury Selection in Mass Tort Litigation," presented at the Defense Research Institute Seminar, Tampa, Florida, April 1996.

"Multidisciplinary Development of Trial Strategy in Complex White Collar Criminal Defense: A Review and Case Study," *in White Collar Crime 1995.* American Bar Association: Chicago, 1995. Pp. G12 to G22 (with Bennie Lazzara, Jr., Esquire).

"Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making," *The Clinical Sociology Review* (with J. Friedman), pp. 123-141, September, 1993.
"Television Advertising by Attorneys: An Evaluation of Its Impact on the Public." Paper presented at the American Board of Trial Advocates, November 5, 1992, Mauna Kea, Hawaii.

"Applied Sociology and Corporate Legal Practice," *The Florida Bar Journal*, Volume LXIII, No. 6, pp. 81-83, June, 1989.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," *Youth in the Contemporary World*, edited by Yedla Simhadri, Delhi: Mittal Publications, pp. 35-55, 1989.

Harvey A. Moore and Jennifer Friedman. "Applied Sociology and Courtroom Intervention: Participant Observation and Jury Decision-Making." Presented at the National Social Science Association Meeting, New Orleans, LA November 2, 1989.

D. Paul Johnson and Harvey A. Moore. "Focus Groups, Mock Trials and Jury Technique. Presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

I. Jeff Litvak, Erik Skramsted and Harvey A. Moore. "Computing and Communicating Economic Damages," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

Roy Hansen and Harvey A. Moore. "Survey Research and Litigation Consulting," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

"Social Science Consultation in the Courtroom" and "Tactical Use of Parallel Juries" presented at the Florida/Georgia Academy of Trial Lawyers Annual Meeting, Snowmass, Colorado, December 10, 1988.

"The Concept of Youth and Applied Sociology," Special Inaugural Address, International Seminar on Youth (UNESCO), February 17, 1986, Visakhapatnam, Andhra Pradesh, India.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," paper presented at the International Seminar on Youth (UNESCO), February 21, 1986, Visakhapatnam, Andhra Pradesh, India.

"Private Sector Mass Transit Option For Hillsborough County: A Concept Paper," presented to the Florida High Speed Rail Commission and the Hillsborough County High Speed Rail Task Force, Tampa, Florida, 1986.

"Noninstitutional Treatment for Sex Offenders in Florida, *American Journal of Psychiatry,* 142: 964-970 1985. (with J. Zusman).

"Athletes and Academics: The Integration of Leisure and Occupation," presented at the Annual Conference of Transitions to Leisure, St. Petersburg, Florida, February 1985.

"The Decision to Treat Sex Offenders: Policy Implications for Florida." Presented at the Annual Conference of the Florida Council for Community Mental Health, 1983.

"Nobody's Clients: Females, Alcohol, and Skid Row," (with B. Yegidis). *Journal of Drug Issues,* 12:2 (Spring, 1982).

"Chiropractic Utilization in the United States" (with R. G. Francis and M. Kleiman). *The New Zealand Medical Journal,* Vol. 93, Winter, 1981, pp. 43-46.

"Rehabilitation and Protection: The Goals of Probation and Parole Workers" (with M. Donnelan). *Journal of Offender Rehabilitation,* Vol. 3, No. 3, Spring 1979, pp. 207-218.

"Reference Others and Family Influence: A Re-Examination," *Sociological Symposium,* No. 20, Fall 1979, pp. 45-60, (with R. Schmitt and S. Grupp).

"Youth, Leisure and Post-Industrial Society: Implications for the Family," *The Family Coordinator,* (with B. G. Gunter), 24 (2) April 1975, pp. 199-207. Reprinted in D. Rogers (ed.), *Issues in Adolescent Psychology,* Englewood Cliffs, NJ: Prentice-Hall Inc., 1977.

"Examining the Flat Ego: The Problem of Self Concept, Race and Social Myth," paper presented at a conference entitled *Demythologizing the Inner-City Child,* sponsored by the Urban Life Foundation and Georgia State University, Atlanta, Georgia, March 26, 1976. Reprinted in Granger and Young (eds.) Demythologizing the Inner-City Child. Washington, D.C.: National Association for Education of Young Children, 1976.

"Observations on the Role-Specific and Orientational Others" (with R. Schmitt and S. Grupp). *Pacific Sociological Review,* Vol. 16 (3) October, 1973, pp. 509-517.

"Grappling with Deviance: Informal Treatment Modalities for Drug Abuse" (with M. Haug), paper presented at the annual meeting, Midwest Sociological Society, Chicago, Illinois, April 11, 1975.

"Reference Relationships and the Family," (with R. Schmitt and S. Grupp), paper presented at the annual meeting, Southern Sociological Society, Washington, D.C., April 9-12, 1975.

"Developing Professional Roles in Drug Abuse," presented at the Second Army Conference on Alcoholism and Drug Abuse Treatment and Rehabilitation, Atlanta, Georgia, June 1973.

"Doctor, Lawyer, and Indian Chief: The Public and the Professions" (with G. Kitson). Presented at the annual meeting, OVSS, Cleveland, Ohio, April 1971.

"Role Specific and Orientational Others," presented at the annual meeting, Ohio Valley Sociological (OVSS), Akron, Ohio, April 1970.

Research and Training: Grants/Contracts:

Co-Principal Investigator and Project Director, Swine Influenza Immunization Program Evaluation, (with T. J. Northcutt) Center for Disease Control, DHEW, Atlanta, Georgia, $54,157 (1978).

Co-Principal Investigator and Project Director, "Comparative Analysis of Public Health Organization and Structure," (with T. J. Northcutt, Jr. and R.L. Bowman), Florida Department of Rehabilitation Services, $67,500 (1977).

Co-Principal Investigator (with Marie Haug), "Drug Treatment Evaluation Program,: The Associated Cleveland Foundations, $63,400 (1972).

Principal Investigator, Staff Development and Technical Assistance Project, Big Brothers of Tampa, Inc., $7,500 (1975).

Principal Investigator, Evaluation Training Program, Tampa Area Mental Health Board, $15,400 (1974)

Co-Principal Investigator and Project Director, (with T. J. Northcutt), Florida Public Health Immunization Project, State of Florida, Department of Health and Rehabilitative Services, $24,900 (1976).

Co-Principal Investigator (with D. Stenmark), City of Tampa, CETA Training Project, $5,307 (1979).

Co-Principal Investigator (with R. Francis and M. Kleiman), National Survey of Chiropractors, Congress of Chiropractic State Associations, $14,797 (1979).

Principal Investigator, "A Planning and Program Base for Employment Generating Services in Manatee County," U.S. Department of Labor, $33,420 (1980).

Principal Investigator, "Private Industry Council Labor Market Analysis: Pinellas County, "U.S. Department of Labor, $52,320 (1980).

Co-Principal Investigator (with E. Nesman and T. Northcutt) "Periodic Estimates of Florida's Seasonal Migrant Farm Workers," Florida Department of Labor and Employment Security, $40,440 (1980).

Principal Investigator, "In Service Training Audio-Visual Slide/Tape Instructional program Development, Florida Department of Health and Rehabilitative Services, $140,318 (1980).

Principal Investigator, "Management of Hostility and Violence," Florida Department of Health and Rehabilitative Services (District IX, West Palm Beach), $9,680 (1980).

Principal Investigator, "Training Project for Children and Youth Workers," Florida Department of Health and Rehabilitative Services (District XIII, Fort Myers) $22,094 (1981).

Principal Investigator, "Individual and Group Counseling Training Project," Florida Department of Health and Rehabilitative Services (District III, Gainesville) $8,900 (1981).

Principal Investigator, "Medicaid Program Pre-Service Training Module Development," Florida Department of Health and Rehabilitative Services, $85,210 (1981).

Co-Principal Investigator (with J. P. Doyle), "Training Primary Care Health Providers," National Institute of Mental Health, $10,000 (1982).

Project Director, "The Retired Retarded: Evaluating Day Care for the Elderly Developmentally Disabled." Hillsborough County Government funded at J. Clifford MacDonald Center, Tampa, FL $10,000 (1987).

Project Director/ Principal Investigator, Supported Employment Conversion Project. Florida Department of Health and Rehabilitative Services, funded at the J. Clifford MacDonald Center, Tampa, FL $51,200 (1988).

Project Director/Principal Investigator: Retired Retarded: Evaluating Adult Day Care. Hillsborough County, $42,499 (1988-89), funded at JCMC.

Recent Seminars and Presentations:

"Once Upon a Time: The Development of Successful Trial Stories," The Southern Trial Lawyers Association Conference, (New Orleans) 2005

"Use of Experts and The Development of Successful Trial Stories," The Academy of Florida Trial Lawyers Workhorse Seminar, (Orlando, FL) 2005

"Tassel Top Loafer Lawyers and the Damages Crisis," American Association for Justice, (Columbus, OH) 2006

"The Business Model of Voir Dire and Trial," Indiana Trial Lawyers Association Seminar, (Indianapolis, IN) 2006

"Using the Social Sciences to Prepare Killer Questioning," PESI Seminars, Depositions Fantasy Camp, (Taos, NM) 2007

"Managing The Art of Video Depositions and Audience Responses," The Academy of Florida Trial Lawyers (Orlando, FL) 2007

"Multi-Camera Video Depositions," The Ohio Academy of Trial Lawyers (Columbus, OH) 2007

"Understanding the Psychology and Sociology of Persuasion in Jury Trials: What All Jurors Need to Hear in the Courtroom," The Absolute Litigators Conference (Las Vegas, NV) 2007

"Focus Groups and Other Preliminary Work to Get Ready for the Deposition," PESI Deposition Fantasy Camp (Taos, NM) 2007

"Modulating Persuasion in Jury Trials: Communicating with Conservative Jurors," International Society of Primerus Law Firms (Charleston, SC) 2007

"Understanding the Psychology and Sociology of Conservative Jurors," Idaho Trial Lawyers Association (Sun Valley, ID) 2007

"Accelerating Risk: Developing and Telling the Trial Story," The Florida Bar CLE Special Topics and Eminent Domain Seminar, (Tampa, FL) 2007

"Voir Dire: Using a Jury Consultant in the Cyber-Age," National Association of Criminal Defense Lawyers, (Key West, FL) 2007

St. Petersburg Bar Association Seminar on Jury Selection, (Clearwater, FL) 2008

"Jury Psychology: Developing and Telling the Defense Story Before Trial Instructor," Current Topics in Liability and Insurance Defense, (Orlando, FL) 2009

"Tassel Top Loafer Lawyers and the Real Problem with Juries Today," National CLE Conference – Litigation, (Vail, CO) 2009

"Jury Consultant Negotiation," Negotiation & Settlement Planning Seminar, Champions Gate, FL (2009)

"The Focus Group Speaks," 360 Seminar, Teton Village, WY (2011)
"Voir Dire, Vorpal Swords and the Cheap Whore: Pre-trial Research and the Trucking Voir Dire," Association of Plaintiff Interstate Trucking Lawyers of America, (St. Louis, MO) 2011

"There is No Such Thing as a Bad Jury: The 5 Must Do's to Effectively Communicate with Conservative Jurors," Trial Lawyers Summit, (South Beach, FL) 2012

"How to Theme Your Case, Then Use the Theming to Develop Damages," Attorneys Information Exchange Group, (Charleston, S.C.) 2012

"Effectively Communicating with Conservative Jurors - Lessons in Psychology and Sociology," Nevada Justice Association, (Las Vegas, NV) 2012
"Jury Selection: Overview," University of Miami Criminal Law Symposium, (Miami, FL) 2012

Private Brain Injury Seminar, (Melbourne, FL) 2013

"Witness Preparation," American Inns of Court, (Tampa, FL) 2013

"Jury Appeal: How to Obtain a Not Guilty Verdict During Voir Dire," Trial Lawyers Association, (Miami, FL) 2014

"Gravitational Pull in Advocacy, What to Do, What to Say, and How to Say It from the Start," Connectionology Seminars, Columbus, OH 2014

"How to Make a Jury Listen: Pearls of Wisdom on use of Focus Groups, Visual Aids, and Technology in Malpractice Cases," Florida Justice Association Medical Malpractice Seminar, Orlando, FL 2014

"Essential Components of Jury Persuasion and Voir Dire Steps in Traumatic Brain Injury Cases," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015

The Consumer Product Safety Commission Regulatory Panel, Perrin Conferences-The Product Liability Conference, (Miami, FL) 2015

"Job Interviews with the Willfully Unemployed," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015

"Trying to Determine or Measure the Impact of testing the Results on Jurors in Brain Injury and Spinal Injury Cases," Traumatic Brain and Spinal Injury Medical/Legal Symposium, (Las Vegas, NV) 2015

"The Crazy Things Jurors Think About and How to Deal With It," South Carolina Association for Justice Auto Torts Seminar, (Atlanta, GA) 2015

"Using Data to Prepare Arguments for Jury Selection and Trial," Manasota Trial Lawyers Board, (Lakewood Ranch, FL) 2016

The Duodenal Theory of Damages at Trial: Jury Persuasion on Damages Issues," Barney Masterson Inn of Court, (Clearwater, FL) 2016

"Maximize Your Client's Recovery Without Litigation," Central Florida Trial Lawyers Association, (Orlando, FL) 2016

"From Jury Selection to Robot Lawyers: Big Data Changes are Coming," Invited Lecture, Stetson College of Law, (Gulfport, FL) 2017

"Data Applications and Communication in the Courtroom," Florida Bar, Annual Intellectual Property Law Symposium. (Fort Lauderdale, FL) 2017

Other Service:

Reporter, Florida Bar Special Committee to Study the Integration of Law Graduates into Practice of Law (Germany Committee), 1979-81.

Florida Bar Standing Committee on the Unauthorized Practice of Law, 1982-1994.

Founding Chairman and Member, Museum of Science and Industry Foundation, Board of Directors, 1985-; also Advisory Board, Hillsborough County Department of Museums, 1979-1984, President, 1983.

J. Clifford MacDonald Center, Tampa, Florida, Board Committees on Planning, Programs and Training, 1981-89.

President, Board of Trustees, The Downtown Retirement Center, 1987-2002.

Chair, Vice-Chairman and Member, Board of Directors, National Conference of Christians and Jews (Tampa Bay Region) 1987-91.

2012 Pilot of the Year, Central Florida West, Angel Flight Southeast, Inc.

2013 Transplant Pilot of the Year, Angel Flight Southeast, Inc.

2013 Above & Beyond Award, Angel Flight Southeast, Inc.

2014 Pilot of the Year Award, Angel Flight Southeast, Inc.

2015 Pilot of the Year Honoree, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.

2016 Pilot of the Year Honoree, Above & Beyond, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.

Thomas Brennan

Tampa, FL
101 East Kennedy Blvd.
Tampa, FL 33602
813-523-1865
tbrennan@trialpractice.com

Professional Experience

Harvey Moore & Associates, Tampa, FL (2011 to present):
Senior Trial Consultant for a litigation consulting firm

The Tampa Tribune, Tampa, FL (1987 to 2011):
Senior Staff Writer. Researched and conducted interviews, condensing and compiling the information into accessible and engaging stories. Collaborated across news platforms using print, online and television. Interacted with the public and officials in person, by phone and electronically. Recently have covered the state court system but have also been responsible for the federal court system, transportation, planning, code enforcement, zoning and consumer issues. I have spent more than a decade in community journalism, covered northeastern and eastern Hillsborough County through the Northeast and Brandon bureaus. I filled in for the editors in both bureaus as needed and ran the Brandon bureau for months while the paper searched for a bureau chief. I have dealt with issues affecting the residents the residents and explored ones that they have raised. I have mentored younger reporters and edited less-experienced writers.

The Clarion-Ledger, Jackson, MS (1983-1987):
Staff Writer: Responsible for covering the state legal system including the Mississippi Supreme Court and its trial courts. Covered the legal profession and issues confronting it. Filled in as Assistant Metro Editor as needed.

The Meridian Star, Meridian MS (1979-1983):
Assistant Managing Editor, Metro Editor, State Editor and reporter. Responsible for the content of a 24,000-circulation daily covering eastern Mississippi and western Alabama. As a report covered courts and legal affairs.

Contract Legal Research, Meridian MS (1978-1979):
Performed legal research for attorneys and law firms.

Miscellaneous:
Have written for The National Law Journal, The New York Times, The Wall Street Journal, and Financial Times of London. Was State Correspondent for the Wall Street Journal while in Mississippi. Have been interviewed as an expert by the CBC, BBC and RTE Radio. Have been asked to serve as an expert commentator by CNN and MS-NBC. Have appeared on public affairs programs on public television in Mississippi and Florida.

Awards:

Have received national awards in writing on race relation and business writing. Regional and state awards for news, news feature and investigative writing.

Education

Bachelors of Arts (BA) from the University of Mississippi, Oxford, MS, 1974 with majors in Political Science and History.

Course work towards a Juris Doctor (JD) from University of Mississippi School of Law, and a M.A. in American Constitutional from University of Mississippi, Oxford, MS.

Jenna Deery

50 Pelican Place ◦ Palm Harbor, FL 34683
Phone: 727-470-1454 ◦ E-Mail: jennadeery@mail.usf.edu

JD

Objective

Highly motivated psychology student seeking internship opportunities dealing with forensic psychology, as I have prior volunteer experience in the criminal justice system. I also have an interest in counseling, specifically abuse counseling. Intermediate in Spanish, studied for 5 years, including 2 summers abroad in Spain.

Experience

Pinellas County Sheriff's Office **2009-2013**

Participated in the Explorer Program throughout high school and into college with the Sheriff's Office. Studied law, leadership, integrity, and devotion. Completed over 400 community service hours while in the program.

Education

St. Petersburg College **2011-2013**

Accepted into Early College Program at SPC and graduated high school with AA degree.

University of South Florida **2014-present**

Transferred into USF in 2014, will graduate in the fall of 2016 with a Bachelor's in Psychology.

Skills

Excellent interpersonal skills, fairly conversational in Spanish (reading and writing), willingness to learn, competent computer literacy, great time management and multi-tasking skills, open and flexible attitude, and also attended leadership trainings with Sheriff's Office.

AMYN ALI

407-259-1027
amynali@mail.usf.edu

8604 Duncaster St.
Windermere, FL 34786

Profile

An accomplished, dedicated, and well-rounded individual with a variety of leadership, computer, and interpersonal skills, along with extensive volunteer experience with a wish to expand his talents, broaden his education in forensic psychology, and improve his skills as well as make new connections.

Education

University of South Florida, Honors Student — 2015-Present
Major: Psychology and Criminology GPA: 3.94

Cypress Creek High School, IB Diploma Recipient — 2011-2015
GPA: 4.5510, Top 10% SAT/ACT: 2210/33

Work and Volunteer Experience

Tutor, The Tutoring Center; Orlando, FL — 2015
Tutored children one-on-one from ages five to seventeen in different skill areas involved with reading, writing, and math. Is experienced with individuals with attention and learning disabilities.

Volunteer, Give Kids The World; Orlando, FL — 2012-2014
Was involved with greeting guests, food delivery to various locations, serving meals to children from all over the world, along with cleanup afterwards in order to help children with compromised living conditions and/or fatal diseases.

Volunteer, Cypress Creek Peer Tutoring; Orlando, FL — 2013-2015
Tutored high school students at Cypress Creek High School since junior year. In senior year, partnered with two other peers and ran the peer tutoring for the school.

Volunteer, Partnership Walk; Orlando, FL — 2011-2015
Worked annually to prepare for the Aga Khan Foundation's Partnership Walk, a non-profit walk that working to alleviate global poverty. Worked mainly with the set up, registration, and management teams.

Teacher, EXCITE! Program; Orlando, FL — 2014
Volunteered as an EXCITE! Teacher, teaching middle-schoolers biweekly over the summer, in reading, mathematics, and critical thinking for six weeks.

Leadership Experience

Pre-Student Osteopathic Medical Association (Pre-SOMA) Fall 2016-Spring 2017
Public relations officer for Pre-SOMA at USF. In charge of social media outlets as well as recruiting members and informing others about the organization

USF Quidditch Team Fall 2016-Spring 2017
Historian and International Relations officer for the USF Quidditch team, as well as a player. In charge of taking meeting notes, keeping record of practices and competitions, and getting involved with international tournaments

Honors and Awards

National Forensic League Member
Placed second in a Florida Debate competition for Varsity level Lincoln Douglas

Business Professionals of America Member
Placed first in regional competition for Entrepreneurship and Financial Math & Analysis Concepts

Received President's Volunteer Service Award Gold Level
Received award twice for continuous dedication to service to the community

National Society of High School Scholars Member

Microsoft Office Specialist in Word, Powerpoint, and Excel

Adobe Certified Associate in Visual Communication using Adobe Photoshop CS3

Skills

Microsoft Office and Works

Problem Solving

Work with Mac and PC platforms

Adroit and Motivated

Great Time Management

Quick to Adapt to New Environments and Situations

Out-Going and Sociable

References Available Upon Request

Tab C

Search Results

Summary

Searched for : advisory sentence
In document : \\hmacharlie\All Case Materials\2 CURRENT CASES\2017044 Perry Taylor adv. State of FL\Case Docs\Taylor Txt Full.pdf
Results : 1 document(s) with 82 instance(s)
Saved on : 6/22/2017 2:11:36 PM

File : Taylor Txt Full.pdf
Title :
Subject :
Author :
Keywords :

Page: 12

18 Jury Question **Advisory Sentence** Notice of Evidence in Rebuttal to Mitigating Circumstance Amended

Page: 59

In returning your **advisory sentence,** and this may be going through your head, "

what does an **advisory sentence** mean?" What your role is is to listen to

Page: 200

the Court an **advisory sentence** as to what punishment should be imposed upon the

the defendant. Your **advisory sentence** must be given great weight by the Court in

Page: 551

death penalty, your **advisory sentence** should be one of life imprisonment without possibility of

Page: 557

form of the **advisory sentence** form? MR. HAYNES: No, Judge, I haven"t. THE COURT:

that you have **advisory sentence** that you delete the word advisory. I understand that

Page: 558

last sentence, the **advisory sentence,** I again raise that objection. THE COURT: All right.

LOPEZ: Yes, ma"am. **Advisory sentence.** I object to advisory being given. THE COURT: I

Page: 559

do. In Florida, **advisory sentence** is the role of the jury. THE COURT: I"m

Page: 565

the beginning, your **advisory sentence** is to be given great weight by this Court

Page: 566

to reach your **advisory sentence,** you must do what we talked about. You must

Page: 588

Court in your **advisory sentence** that Perry Alexander Taylor be sentenced to death. The

Page: 607

testimony. Deciding an **advisory sentences** is exclusively your job. I cannot participate in that

is now your **advisory sentence** over another. duty to advise the Court as to

Page: 608

advisory sentence must be given great weight by the Court in

the court an **advisory sentence** based upon your determination as to whether sufficient aggravating

to exist. Your **advisory sentence** should be based upon the evidence that has been

Page: 609

death penalty, your **advisory sentence** should be one of life imprisonment BETTY M. LAURIA,

Page: 612

in reaching your **advisory sentence.** proved beyond a reasonable doubt by the If you

circumstances, and your **advisory sentence** must In these The it be based on these

on these considerations. **advisory sentence** of the jury be unanimous. The fact that the

fact that the **advisory sentence** of the jury can be reached by a single

Page: 613

0241 reaching your **advisory sentence.** of the jury determined that the defendant, Perry 59U

to death, your **advisory sentence** will be a majority of the jury by a

This is the **advisory sentence** form. A majority of the jury by a vote

to death, your **advisory sentence** will be, the jury advises and recommends to the

Page: 614

- date the appropriate **advisory sentence** form when all of you have agreed on a
- will bring the **advisory sentence** form back to the courtroom when you return. Any
- have reached an **advisory sentence** in conformity with these instructions, that form of advisory
- that form of **advisory sentence** should be signed by your foreperson and returned to
- courtroom. The two **advisory sentence** forms will go with you into the courtroom. All

Page: 615

- instructions and the **advisory sentence** forms? Members of the jury, the bailiff will escort

Page: 622

- you hand the **advisory sentence** form to the bailiff. You can hand him both.
- clerk publish the **advisory sentence.** THE CLERK: Yes, ma"am. State of Florida versus Perry
- 15525, Division C, **advisory sentence.** A majority of the jury by a vote of
- individually concerning the **advisory sentence.** BETTY M. LAURIA, OFFICIAL COURT REPORTER 234

Page: 623

- only if the **advisory sentence** as just read by the clerk was correctly stated.
- joined in the **advisory sentence** that you have just heard read by the clerk?
- joined in the **advisory sentence** that you have just heard read by the clerk.
- joined in the **advisory sentence** that you have just heard read by the clerk?
- 0251 in the **advisory sentence** that you have just heard read by the clerk?

Page: 624

- joined in the **advisory sentence** that you have just heard read by the clerk?
- joined in the **advisory sentence** that you have just heard read by the clerk?
- Honor. in the **advisory sentence** that you have just MR. SANDERS: Yes, Your Honor.
- ~ in the **advisory sentence** that you have just and confirm that a majority
- clerk? in the **advisory sentence** that you have just heard read by the clerk?

Page: 625

- joined in the **advisory sentence** that you have just heard read by the clerk?
- joined in the **advisory sentence** that you have just heard read by the clerk?
- joined in the **advisory sentence** that you have just heard read by the clerk?

Page: 634

verdict 11 or **advisory sentence** in the instruction, but I"ve 12 inserted language in

Page: 657

having given an **advisory sentence** of death against Mr. Taylor. You have before you

Page: 670

to render an **advisory sentence** upon you, Perry 25 Taylor, for the first degree

Page: 682

18 Jury Question **Advisory Sentence** Notice of Evidence in Rebuttal to Mitigating Circumstance Amended

Page: 694

GUHENTS HEARD JURY **ADVISORY SENTENCE**· DEATH ~E"JRANDUM JF LAW TO BE

Page: 731

provides: (2) **ADVISORY SENTENCE** BY THE JURY. After hearing all the evidence, the

and render an **advisory sentence** to the C,Qurt, based upon the following matters:

Page: 768

the court an **advisory sentence** as to what punishment should be imposed on the

court [an] **advisory sentence...** Additionally. these instructions often use the words - advisory"

Page: 804

INSTRUCTION Deciding an **advisory sentence** is exclusively your job. I cannot participate in that

I preferred one **advisory sentence** over another. "

Page: 805

JUdge; however, your **advisory sentence** must be given great weight by the Court in

the Court an **advisory sentence** based upon your determination as to whether sufficient aggravating

to exist. Your **advisory sentence** should be based upon the evidence that has been

Page: 806

death penalty, your **advisory sentence** should be one of life imprisonment without possibility of

Page: 807

in reaching your **advisory sentence.** A mitigating circumstance need not be proved beyond a

Page: 808

- as established. The **advisory sentence** of the jury must be based upon the facts
- circumstances, and your **advisory sentence** must be based on these considerations. In these proceedings
- necessary that the **advisory sentence** of the jury be unanimous. The fact that the
- fact that the **advisory sentence** of the jury can be reached by a single
- in reaching your **advisory sentence.** If a majority of the jury determine that the
- to death, your **advisory sentence** will be: A majority of the jury, by a
- to death, your **advisory sentence** will be: ";J8 () The jury advises and

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Page: 809

- and date the **advisory sentence** form when all of you have agreed on a
- will bring the **advisory sentence** form back to the courtroom when you return. Any
- have reached an **advisory sentence** in conformity with these instructions, that form of advisory
- that form of **advisory sentence** should be signed by your foreperson and returned to

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Page: 812

- in reaching your **advisory sentence.**

Page: 827

- 1~S25 vs. **ADVISORY SENTENCE** m0lfr8 ~KE, ;QL~~~ A maj ority of

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Page: 828

- jury rendered an **advisory sentence** that this Court impose a sentence of death upon

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Page: 840

- CRIMINAL JUSTICE DIVISION **advisory sentence** to be imposed upon the Defendant, PERRY ALEXANDER TAYLOR,

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Search Results

Summary

Searched for : recommend a sentence
In document : \\hmacharlie\All Case Materials\2 CURRENT CASES\2017044 Perry Taylor adv. State of FL\Case Docs\Taylor Txt Full.pdf
Results : 1 document(s) with 1 instance(s)
Saved on : 6/22/2017 2:12:37 PM

File : Taylor Txt Full.pdf
Title :
Subject :
Author :
Keywords :

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of whether you **recommend a sentence** of death or sentence of life imprisonment in

APPENDIX J

Florida Senate - 2018 SB 870 By Senator Bracy

Voted in the Florida Senate March 9, 2018 (YEAS 33 NAYS 3)

A bill to be entitled an act relating to capital felonies; amending ss. 921.141 and 921.142, F.S.; providing legislative findings and intent regarding the retroactive application of *Hurst v. State*, No. SC12-1947 (Fla., October 14, 2016); providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

[] Section 1. Present subsection (9) of section 921.141, Florida Statutes, is redesignated as subsection (10), and a new subsection (9) is added to that section, to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(9) LEGISLATIVE FINDINGS AND INTENT.— The Legislature finds that the Florida Supreme Court decided in *Asay v. State*, No. SC16-223, SC16-102, and SC16-628 (Fla. December 2016) that Hurst v. State, No. SC12-1947 (Fla., October 14, 2016), will not apply in cases in which the death sentence became final prior to June 24, 2002, the day that the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). The Legislature find's that the Court's decision not to apply Hurst v. State in the cases of inmates whose death sentences became final before June 24, 2002, will result in a miscarriage of justice for those inmates. The Legislature further finds that the retroactive application of *Hurst v. State* to death row cases in which the death sentences became final before June 24, 2002, will provide a more just and final resolution in those cases. Therefore it is the intent of the Legislature that *Hurst v. State*, No. SC12-1947 (Fla. October 14, 2016), apply in cases in which the death sentence became final before June 24, 2002.

APPENDIX K

IN THE CIRCUIT COURT FOR
THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CASE NO. 88-15525

STATE OF FLORIDA,
Plaintiff,
v.
PERRY ALEXANDER TAYLOR,
Defendant.
_____/

AFFIDAVIT OF DR. LEE ROBERT MILLER

I SWEAR AND AFFIRM THE FOLLOWING:

I am Dr. Lee Robert Miller. While I was an assistant medical examiner for Hillsborough County, Florida, I conducted the autopsy of Geraldine Birch on October 25, 1988. I later testified at the trial of Perry Taylor, the person charged with killing Ms. Birch. My testimony included my opinion as to the cause of the external and internal injuries to the victim's genitals

In 2004, I was contacted by attorneys for Mr. Taylor from Capital Collateral Regional Counsel, Middle Region in Tampa. They provided me with a copy of a deposition of Dr. Ronald K. Wright, a fellow medical examiner, who provided his opinion that the external genital injuries were uniquely caused by a kick, to the point that any other cause was remote, and that the internal genital injuries were caused by a kick, perhaps the same one that caused the external injuries, when the toe of the shoe went into the victim's introitus or vagina.

On June 7, 2004, I testified at Mr. Taylor's postconviction evidentiary hearing. I expressed my opinion that it was reasonably possible, perhaps probable, that the internal genital injuries were caused by the penetration of the toe of a shoe. I commented that this was a one-in-a-million shot.

This was an unfortunate choice of words and I regret it. A "one in a million" shot implies near impossibility and in this case this is not true. I can only reiterate my previous testimony that Dr. Wright's interpretation of these injuries having been caused by a kick and not by an object having been deliberately inserted into the vagina is a very reasonable possibility.

Lee Robert Miller, M.D.
Florida
County of Hillsborough

Sworn to and Subscribed before me
this July 17, 2015

Notary Public
My Commission Expires

GREGORY L. HASLUP
Commission # FF 065398
Expires November 22, 2017
Bonded Thru Troy Fain Insurance 800-385-7019

(Seal)