IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-520

STEVEN RICHARD TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA
FROM DENIAL OF SECOND SUCCESSIVE 3.851 MOTION

Lower Tribunal Case No. 161991CF002456XXXMA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal arises from the summary denial of Appellant's Second Successor Motion for Postconviction relief and Motion for Rehearing by Circuit Court Judge Russell Healey, Fourth Judicial Circuit, Duval County, Florida. This proceeding challenges both Appellant's convictions and his death sentence. The arguments and language below has been adopted from other cases pending before this court.

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

"R"—record on direct appeal to this Court

"PCR"—record on Postconviction Appeal

"PCE"—record from Postconviction Evidentiary Hearing

"PCR-1"–record from First Successor Postconviction Appeal

"PCR-2"–record on Second Successor Postconviction Appeal

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF CASE

Taylor was found guilty at trial for murder, burglary, and sexual battery in Duval County, Florida, in 1991 (R 797-98). Taylor's jury recommended a sentence of death by a vote of 10-2 (R 879). On December 9, 1991, the Court sentenced Taylor to death as to the first-degree murder conviction (R 905).

On direct appeal, this Court affirmed Taylor's convictions and sentences. *Taylor v. State*, 630 So.2d 1038 (Fla. 1994). Taylor filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 3, 1994. *Taylor v. Florida*, 115 S.Ct. 99 (1994). On November 1, 1995, Appellant filed a shell motion entitled Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, raising a total of forty-five (45) claims for relief (PCR 1-2). On June 23, 2003, Appellant filed a Supplemental Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend, raising one (1) claim for relief (PCR 520-523). On May 13, 2004, Appellant filed an Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend, raising thirty-two (32) grounds (PCR 557-690). On May 23, 2005, Appellant filed a Motion for Postconviction Relief to Vacate Judgment of Conviction and Sentence by a Person under the

Sentence of Death and Incorporated Memorandum of Law, raising twenty-one (21) grounds.

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

On July 18, 2007, the Appellant filed a Motion for Leave to Amend Claim XII, Amended Claim XII, and Motion to take Judicial Notice. On July 30, 2007, the Trial Court issued an Order granting the Appellant's Motion to take Judicial Notice and the Motion for Leave to Amend Claim XII. On August 1, 2007, the State filed a Response opposing the Defendant's Motion. On August 6 and 7, 2007, an evidentiary hearing was held on Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the Ake claim) and Claim IX. At the beginning of the August 6, 2007, evidentiary hearing, Appellant asked the Court to withdraw from its consideration Claims VI paragraphs 2-8, VII, VIII, IX, X, XIV, and XVIII. (PCR 7-9).

On June 22, 2009, the Trial Court entered its order denying Appellant's postconviction motion. (PCR 2024). The Appellant

filed his Notice of Appeal on July 14, 2007. (PCR 2068). Taylor filed his initial brief and State Petition for Writ of Habeas Corpus on January 27, 2010. This Court entered its opinion on February 10, 2011. *Taylor v. State*, 62 So.3d 1101. (Fla. 2011). Taylor filed his federal habeas on January 25, 2012. The Federal District stayed the proceedings pending this Court's rulings in *Hurst*.

Taylor filed his first successor 3.851 Motion on January 10, 2017. The Trial Court summarily denied the motion on February 17, 2017. Taylor filed his motion for rehearing on March 2, 2017. The Trial Court denied the motion on March 23, 2017. Taylor filed his notice of appeal on April 20, 2017.

On January 12, 2018, Taylor filed his second successor 3.851 Motion (PCR-2 1-37), after having received a copy of Mr. Dixon's affidavit (PCR-2 23) and Mr. Murray's (co-defendant) list of objections to DNA testing and results case number 16-1992-CF-3708-AXXX-MA. (PCR-24-37).

On March 1, 2018, the Trial Court summarily denied Mr. Taylor's second successor 3.851 Motion. (PCR-2 38). On March 12, 2018, Taylor filed his Motion for Rehearing. (PCR-2 44). The Trial Court denied the Motion for Rehearing on March 14, 2018 (PCR-2 56). Taylor filed his Notice of Appeal on March 30, 2018 (PCR-2 59).

STATEMENT OF FACTS

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

> The record reflects that on September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend, who was later to become his accomplice, near the victim's neighborhood.
>
> Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.
>
> On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wounds were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.
>
> The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to her head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. Finally, the medical examiner testified

that the victim's breasts were bruised, and that the bruises resulted from "impacting, sucking, or squeezing" while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

The testimony at trial also revealed that the Phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January 1991, while Taylor's former roommate was removing a fence behind the duplex, he discovered a small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County Sheriff's Office executed a search warrant on Taylor that authorized the officers to take his blood, saliva, and hair samples. Taylor was taken to the nurses' station at the county jail so the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question, the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and on March 3, a grand jury returned a

two-count indictment against Taylor for first-degree murder and burglary. The indictment was amended on September 12, 1991, to add a third count for sexual battery.

At trial, the State presented the testimony of Timothy Cowart, who had shared a cell with Taylor in the Duval County jail. Cowart testified that, in a jailhouse conversation with Taylor in early April, Taylor stated that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead. Cowart also testified that Taylor said the State could place him, but not his accomplice, at the scene of the crime, and that the State could convict him with the evidence it had. Taylor allegedly asked Cowart to hide a gun and handcuff key in the bathroom at the hospital; Taylor would then feign an illness, get taken to the hospital, and have a chance to escape.

A Florida Department of Law Enforcement lab analyst, who was an expert in serology, testified that semen found on a bed covering and on a vaginal swab taken from the victim could not be tested. However, the analyst testified that semen found in the victim's blouse matched Taylor's DNA profile.

In the guilt phase, Taylor presented only one witness, an agent of the Federal Bureau of Investigation. The agent testified that certain hairs found on the victim's body and clothing matched the pubic hairs of Taylor's accomplice. On cross-examination, the agent conceded that it is possible to commit a sexual battery and not leave any fibers or hair. Taylor then rested his case and the jury found him guilty as charged.

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

Pre-Trial and Trial -

The guilt phase of Appellant's trial began on October 7, 1991. Before trial, the Defense filed a demand for discovery on

March 12, 1991. (R 10-13). In paragraph 1 of the demand for discovery, counsel requested all names and addresses of persons known to the prosecutor to have information that may be relevant to the offense charged and to any defense with respect thereto. (R 10).

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

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

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

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

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

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

Evidentiary Hearing -

DNA and Frye[1] - At the evidentiary hearing, Mr. Tassone

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

(Appellant's trial counsel) indicated he believed that Mr. de la Rionda (Assistant State Attorney), at his request, wrote to Dr. Pollock (PCE Vol. I, p16, 17) requesting the following items: copies of the autoradiograms, population database, case file, photographs of the DNA gels as well as description of the database and procedures used to obtain the DNA results. In addition, Mr. Tassone's Motion for Continuance states that Dr. Goldman hadn't received Dr. Pollock's case notes until on or after October 3, 1991. (R 61). Mr. Tassone's billing records (PCE Vol. III, p388-392) indicate that he had a one-and-a-quarter hour conversation with Dr. Goldman on October 1, 1991.

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

Motion for Continuance (PCE Vol. III, p386-387). The record is silent as to whether Mr. Tassone ever spoke with Dr. Goldman during the trial.

Mr. Tassone testified (PCR 1371, 1373) that the records indicated to him the first time he heard the name "Shirley Zeigler" was during Dr. Pollock's cross-examination during trial (PCR 1371, 1373); at that point of the trial, Dr. Pollock identified the initials SFZ (R 607) on the Calculated Fragment Lengths Report[2] (PCE Vol. I, p61-64) as being Shirley Zeigler. Mr. Tassone testified that neither the State's witness list, nor his witness list, contained Shirley Zeigler's name. (PCR 1369).

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

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[2] Webster's Ninth New Collegiate Dictionary, 1991 defines *report* as "to give an account; to make a written record or summary."

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

evidentiary hearing, Mr. Tassone testified that he would have wanted to know before trial that another FDLE analyst disagreed with Dr. Pollock's opinions regarding a match on the probes. (PCR 1380). At the evidentiary hearing, Shirley Zeigler testified two probes were inconclusive: D1S7 and D4S139.(PCR 1266-1267).

Additionally, Zeigler testified that if Dr. Pollock stated they were a match, that such testimony would be a violation of protocol. (PCR 1266). At the evidentiary hearing, Dr. Libby (Defense DNA expert) testified that three of the two probes utilized by Dr. Pollock were inconclusive: D1S7 (PCR 1544, 1632-1634), D4S139 (PCR 1548-1549) and D17S79 (PCR 1521). In addition, Dr. Libby testified that the FBI utilizes five to eight probes, while Pollock only utilizes two probes[4] (PCR 1505). Further, Dr. Libby testified that he visited an FBI facility and found the database unreliable (PCR 1554). One reason Dr. Libby found the FBI database unreliable was the differences in the calculated lengths between analysts (PCR 1470-1471).

Mr. Tassone testified that based upon the information provided to Dr. Goldman, Dr. Goldman didn't have any complaints with FDLE's testing process. (PCR 387). However, Mr.

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

Tassone also testified that this was his first DNA case, and if he had been provided with all of the State's evidence in sufficient time for the trial, he would have made sure Dr. Goldman was there to properly and thoroughly impeach Dr. Pollock's trial testimony. (PCR 1387-1391).

For example, Dr. Goldman did not know that Dr. Pollock changed the FBI protocols. Dr. Pollock testified at trial, "I have found that it's not necessarily a better protocol." (R 606).

Dr. Goldman did not know that Dr. Pollock also took it upon himself to cross out the FBI protocol that states: base pairs in excess of 10,094 are inconclusive. (PCE 471). In addition, Dr. Goldman did not speak with Mr. Tassone regarding the validity of the population database or about the calculated fragment lengths.(PCR 1387-1389).

Finally, Mr. Tassone did not speak with Dr. Goldman about Shirley Zeigler's finding that two probes were inconclusive, because Mr. Tassone didn't know she existed, nor did he have possession of necessary documents at the time he spoke with Dr. Goldman.

Mr. Taylor's case was Mr. Tassone's first DNA case. (PCR 1393). In addition, counsel was not knowledgeable about *Frye* hearings, and he did not research the issue. (PCR 1393). Mr. Tassone testified that he "probably" didn't know that novel

science was subject to a *Frye* test. (PCR 1395). In addition, Mr. Tassone testified: "I do not recall doing any research or having any knowledge about the *Frye* test at the time of Mr. Taylor's case. (PCR 1398)."

Mr. Tassone testified: "Based on what I read of the ABA guidelines and what, in my opinion, has been adopted by the United States Supreme Court in *Rompilla versus Beard*[5] I should have asked for a *Frye* test." (PCR 1397).

Mr. Tassone testified that he would have wanted Shirley Ziegler's findings, specifically that she found two of the two DNA probes were inconclusive. (PCR 1380-1383). Mr. Tassone testified that Dr. Goldman did not visit the FDLE lab or review their procedures. (PCR 1388).

Mr. Tassone had no recollection whether he spoke with Dr. Goldman about Dr. Pollock's deposition. (PCR 1388). Mr. Tassone had not requested nor received FDLE lab protocols and neither Mr. Tassone nor Dr. Goldman know about Shirley Zeigler or her opinion prior to trial. (PCR 1389).

Mr. Tassone testified that he probably didn't inform Dr. Goldman about the *Frye* requirements when he requested Dr. Goldman's opinion. (PCR 1398). Mr. Tassone had no recollection

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

about discussing databases with Dr. Goldman. (PCR 1398-1399). Mr.Tassone did not request or see any analyst proficiency tests, but he would have wanted to see them (PCR 1401, 1404). Mr. Tassone testified that the court admitted Dr. Pollock as an expert in DNA analysis and serology, but he was not admitted for statistics or databases (PCR 1404-1405). Mr. Tassone acknowledged that although Dr. Pollock, in fact, testified about statistics, he did not object. (PCR 1405).

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

Although Dr. Pollock testified at trial that Taylor matched on all two loci, loci D1S7 and D4S139 show no bands were detected in the male fragments for item 28I. (PCE Vol. I, p57-64). Conversely, Shirley Zeigler testified at the evidentiary hearing that those two loci were inconclusive, and if Dr.

Pollock testified that they were a match, it was against protocol.(PCR 1265-1266). Dr. Libby testified at the evidentiary hearing that finding a result in the female fragment of D1S7 and D4S139 was not an expected result and should render an inconclusive opinion, which coincided with Shirley Zeigler's opinion.

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

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

of the protocol (PCR 1685), located at A4 below. Dr. Pollock testified earlier that FBI protocols were generally accepted, but what FDLE was doing was not.

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

further.

XV. ASSESSMENT OF AUTORADIOGRAPY DATA

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

A. Visual evaluation of autorads

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

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

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

sized in these regions.

4. Visually inspect the lanes that contain known or questioned specimen DNA to assess the quality of the fragment bands. Determine if the bands in these lanes are extremely broad or exhibit pronounced band curvature. These band irregularities can signal potential mobility shifts. **If any fragment band for a specimen has migrated to a position that is greater than the position of the 10,094 bp size marker band, the evaluation of that specimen at the locus is considered inconclusive.**

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

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

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

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

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

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

Q Was that in the 1991 database?

A About that era.

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

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

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

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

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

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

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

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

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

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

Newly Discovered Evidence

On December 29, 2016, Mr. Murray (Co-defendant), 16-1992-CF-3708-AXXX-MA, filed Defendant's List of Objection to DNA Testing and Results. (PCR-2 24). The objection attacked the state's DNA results in Murray's case, which was also argued by Taylor in his proceedings, establishing newly discovered evidence[6].

Newly discovered evidence came to light when James C. Dixon came forward for the first time and provided information that neither Mr. Taylor nor Mr. Murray murdered Alice Vest. On September 15, 2017, James C. Dixon signed an affidavit indicating that Walter Holton, and not Mr. Taylor, killed Alice Vest, establishing newly discovered evidence. (PCR-2 23). In addition to admitting that Mr. Holton's girlfriend, Angela Smith, gave him (Dixon) Ms. Vest's jewelry, Dixon provided the following to Mr. Murray's investigator concerning this homicide:

[6] On March 12, 2018, Taylor filed a Motion for Discovery requesting an order for the state to produce any and all documents, data, reports, photographs, testimony and any other information relating to any and all forensic analysis and/or forensic testing of evidence. As of the filing of this Brief, neither the state nor the court has replied to the Motion. Co-Defendant's Appeal is presently before this court in SC17-707, wherein he has raised similar issues Taylor has raised, including denial of Motion to Compel Discovery.

Dixon's relationship with Mr. Holton

Mr. Dixon was known as "Lil Jack" in the '90s and sold large amounts of cocaine for Mr. Holton, who went by the nickname of "Tony." Mr. Dixon was very close to Mr. Holton and Holton trusted him. Mr. Holton had a house in Orange Park that had no furniture – only a large "fish" scale used to weigh kilograms of cocaine. Dixon would buy large amounts of cocaine from Dixon and distribute the drugs around town. Dixon also stole cars for Holton or was instructed to get rid of cars for him. Mr. Holton had a Cuban friend who was around 6'2" with dark hair and drove a Porsche. The two men were best friends. Holton and the Cuban man had a history of violent reputations; they were not to be messed with. The Cuban always carried a .45 firearm and a straight razor. Dixon was never allowed in the house when the Cuban was with Holton. On one occasion, Dixon had to bury a cat after the Cuban man sliced it's throat. Both men were also known to "put a hit" on people. On another occasion, a cocaine dealer in St. Augustine named Jimmy Provost was killed and buried with an expensive bracelet. Mr. Holton and/or a person working for him dug up the grave and stole the bracelet. Dixon then stole the bracelet from Holton who found out about this and put a hit out on him. Dixon went into hiding and after a time, returned the bracelet and the hit was recalled.

The Alice Vest Homicide – Mr. Holton committed the murder, not Mr. Taylor

Mr. Dixon stated he decided to come forward about the Vest homicide now because he was afraid of Mr. Holton for the above reasons. However, now that Mr. Holton has passed, Mr. Dixon wants to do the right thing because he knows Mr. Taylor and Mr. Murray are innocent of the crimes they were convicted and sentenced to death for. Angela Smith lied to police when she provided an alibi for Mr. Holton – she falsely claimed to police that she was with Mr. Holton the night Ms. Marilyn Vest was murdered. Dixon is positive about this because he was selling cocaine for Mr. Holton that night and knew Holton was not with Ms. Smith. Dixon also drove cars for Mr. Holton during this time and cannot deny he drove Mr. Holton's El Camino on more than one occasion. Dixon remembers this vehicle was damaged after they hit a mailbox belonging to a house they robbed.

Dixon acknowledged that Mr. Holton murdered Ms. Vest because she threatened Holton after one of her friends had a drug-related conflict with him. Mr. Holton took the sailboat necklace from Ms. Vest, as well as another item that she kept in her bra. Mr. Dixon knows of at least two other homicides Mr. Holton committed, but was hesitant to describe them for fear of being implicated. Mr. Dixon remembered that multiple detectives told him they thought Holton was involved in this murder during

his interview. These detectives were Jim Spaulding, Keith Touchton, and Gayward Henry. The police took hair and/or DNA samples from him. Mr. Dixon ultimately gave the sailboat necklace to a person named Deena Parker, who later pawned it.

Mr. Dixon resides at 10960 SW 63rd Street, Ocala, FL 34476, and his telephone number is 352-812-2826. Mr. Dixon has affirmed he will be available to testify under oath to the facts provided in this motion and his affidavit if an evidentiary hearing is scheduled.

SUMMARY OF ARGUMENT

1. The Trial Court denied Mr. Taylor due process by failing to conduct a *Huff* hearing.

2. The Trial Court erred by summarily denying Mr. Taylor's Second Successive 3.851 Motion because all claims and facts taken as true were not refuted by the record and would probably have caused an acquittal at trial. Mr. Taylor should have been provided an evidentiary hearing on his motion.

ARGUMENT I

MR. TAYLOR WAS DENIED DUE PROCESS DURING HIS POSTCONVICTION PROCEEDINGS.

Mr. Taylor, along with Gerald Murray, were indicted for the first-degree murder of Alice Vest in September, 1990. Mr. Murray was convicted and sentenced to death in 1994. However, on appeal, Mr. Murray's convictions and sentence were reversed. *Murray v. State*, 692 So. 2d 157, 158 (Fla. 1997). Mr. Murray was retried in February, 1999, and again convicted and sentenced to death. However, this Court again reversed Mr. Murray's convictions and sentence. See *Murray v. State*, 838 So. 2d 1073 (Fla. 2003). After a fourth trial, Mr. Murray's convictions and sentence of death were affirmed on direct appeal. *Murray v. State*, 3 So. 3d 1108 (Fla. 2009). Thus, Mr. Murray was challenging his convictions and death sentence in 2017.

Indeed, in late 2017, the State disclosed Mr. Murray's successive Rule 3.851 to Mr. Taylor, along with an affidavit from James C. Dixon. Not long thereafter, Mr. Taylor filed his successive Rule 3.851 motion relating to the affidavit (PCR-2 1-37). Additionally, along with the Dixon affidavit, it came to Mr. Taylor's counsel's attention that several items of evidence relating to the Vest homicide had been tested in 2016, including conducting DNA testing. However, the State did not disclose any of the files or records relating to the testing, including, but

not limited to, motions, transcripts, correspondence, protocols, reports, data or photographs.

Mr. Taylor's counsel sought to learn more about the recent forensic testing. And, on March 12, 2018, counsel filed a motion for discovery, requesting that the files and records concerning the testing be disclosed[7] (Clerk's docket No. 1384). Mr. Taylor also learned that the evidence that was tested excluded him as a contributor from items found at the scene of the crime and that, in addition to Mr. Taylor and Mr. Murray, James Dixon and Tony Holton were subjects relating to the testing.

However, the State did not disclose the files and records. Nor did Mr. Taylor have an opportunity to address his motion, or his successive Rule 3.851 motion before the circuit court because the circuit court disregarded the rules of criminal procedure and the law, and the court denied Mr. Taylor's successive Rule 3.851 and motion for rehearing without having heard from his counsel or addressed the motion for discovery. The circuit court's actions denied Mr. Taylor of due process. See Fla.R.Crim.P. 3.851(f)(5)(A); *Huff v. State*, 622 So. 2d 982. (Fla. 1983).

[7] While the Directions to the Clerk requested all documents related to this case filed since January 1, 2017, be included, the Motion for Discovery was not included in the record on appeal.

Rule 3.851(f)(5)(A) specifically states: "At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts." In Mr. Taylor's case, the circuit court did not schedule a case management conference, violating the rule. The requirement that capital postconviction defendants have the right to argue claims raised in a Rule 3.851 motion is not novel. Indeed, the rule was first promulgated in 1996, when this Court chose to make its decision in *Huff v. State*, 622 So.2d 982 (Fla. 1983), applicable "to all rule 3.850 motions filed by a prisoner who has been sentenced to death." See Comment to Fla.R.Crim.Pro., 1996 Amendment.

In *Huff v. State*, after Huff filed a Rule 3.851 motion, the following occurred:

> The State submitted a proposed order denying Huff all relief. The record does not reflect when the proposed order was submitted or what prompted the submission. CCR received a copy of the proposed order on Friday, September 6, 1991. The trial court signed the order as submitted on Monday, September 9, 1991, before Huff had the opportunity to raise objections or submit an alternative order.

622 So. 2d 982, 983. (Fla. 1993). Based on these facts, this Court held that Huff's due process rights had been violated and that:

> Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the

> order before the judge signed it. As this Court explained in *Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992), '[t]he other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.'

Id.

More importantly, this Court held that capital defendants be provided an opportunity for their attorneys to appear before the courts on initial motions. Id.; see also *Mordenti v. State*, 711 So. 2d 30, 32-33. (Fla. 1998)("The purpose of what has now come to be known as a 'Huff hearing' is to allow the trial judge to determine whether an evidentiary hearing is required and to hear legal argument relating to the motion.") Later, as Rule 3.851(f)(5)(B) makes clear, the due process right was expanded to include successive Rule 3.851s as well as initial motions.[8]

Further, Mr. Taylor's right to process, i.e., his right to be heard on his Rule 3.851 motion as well as his motion for discovery, and to have his motion ruled upon, derives from the United States Constitution itself. It is axiomatic that the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "notice and opportunity for hearing appropriate to the nature of the case."

[8] Even when this Court did not require that *Huff* hearings be held on successive Rule 3.851 motions, the Court did encourage *Huff* hearings in all cases: "it would have been the better practice for the court to have permitted legal argument on the motion." *Groover v. State*, 703 So.2d 1035, 1038. (Fla. 1997).

Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). Here, Mr. Taylor was not provided the opportunity to be heard on his claim or his motion for discovery. This was error. The Florida Rules of Criminal Procedure clearly and unambiguously provide for an opportunity for Mr. Taylor to argue his claim. This Court must reverse and remand so that Mr. Taylor may pursue his motion for discovery, amend his Rule 3.851 motion with what appears to be the consistent, favorable evidence that the recent forensic testing, including DNA testing revealed, and be heard on his many claims in accordance with Fla.R.Crim.P. 3.851(f)(5)(A).

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. TAYLOR'S SECOND SUCCESSIVE RULE 3.851 MOTION AND MOTION FOR REHEARING, WHICH WERE PREMISED ON NEW DNA EVIDENCE, AND AN INTERVIEW AND AFFIDAVIT FROM JAMES DIXON, WHO EXPLAINED TO AN INVESTIGATOR THAT HE KNOWS THE TRUE PERPETRATOR IS WALTER HOLTON – A MAN ORIGINALLY INTERVIEWED ABOUT THE INSTANT CASE, THEREBY VIOLATING MR. TAYLOR'S DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION TO A FAIR, FULL, AND IMPARTIAL POSTCONVICTION HEARING

I. Introduction

New evidence exists demonstrating that Mr. Taylor did not commit the crimes against Ms. Alice Vest; instead, it was Walter Holton – a man interviewed during the original police investigation in this case. (PCR-2 5).

When the murder of Ms. Vest occurred in the 1990s, Mr. Taylor was initially not a suspect. James Dixon, however, was a person of interest after he pawned a sailboat necklace that resembled the necklace Ms. Vest was known to have. (PCR-2 6). Mr. Walter Holton was also interviewed in connection with Ms. Vest's murder, but Mr. Holton's girlfriend, Angela Smith, provided an alibi for him (PCR-2 7).

Mr. Dixon and Mr. Holton were eventually excluded as suspects, and attention turned instead to Mr. Taylor, who was later convicted of these crimes. However, in 2017, new evidence concerning Ms. Vest's homicide came to light when James Dixon

spoke to Mr. Murray's (Taylor Co-defendant) investigator and signed an affidavit (PCR-2 23) explaining that he knows Murray and Taylor are innocent:

> I, James Dixon worked for Walter Holton in the early 90's doing odd jobs. Holton sold large amounts of cocaine with a Cuban friend from Miami, who drove a Porsche. Both men were dangerous if you crossed them and were known to put contract hits out on people who crossed them. I was questioned by Police about a sailboat necklace that was possibly connected to the homicide. I got the sailboat necklace from Angela Smith, who was the girlfriend of Walter Holton at the time. She told me that she got it from his Cuban friend, who told her to "never get rid of it." I did not tell police where I got the necklace from, because I was afraid of Walter Holton and his Cuban friend. My DNA was collected by the police and I was cleared of any involvement with the homicide case.

As explained in Mr. Taylor's second successive Rule 3.851 Motion: According to Dixon, he worked for Walter Holton in the early 1990s. Holton sold large quantities of cocaine, and Dixon helped Holton with the drug sales. Holton trusted Dixon. Holton was constantly in the company of a large Cuban man. Dixon explained that Holton had murdered Ms. Vest because she threatened him after one of her friends had a drug-related conflict with him (PCR-2 8). He took Vest's sailboat necklace and another item she kept in her bra. Dixon got the necklace from Holton's then-girlfriend, Angela Smith.

Smith told Dixon that the Cuban gave it to her and told her never to get rid of it. Mr. Dixon ultimately gave the sailboat necklace to a person named Deena Parker, who later pawned the

item.[9] Smith lied to the police when she provided an alibi for Holton. Dixon knows that her alibi was a lie because he was selling cocaine for Holton that night and knows that Holton wasn't with Smith. Dixon drove the vehicle from time to time – it was damaged after Holton and the Cuban man hit a mailbox at a house they robbed.

Dixon waited until after Holton had died to come forward; Dixon was afraid of Holton because he had murdered people before and once put a hit on Dixon. However, since Dixon knows that Murray and Taylor are innocent, he wants to come forward and do the right thing. Dixon was interviewed by detectives about Vest's murder. The detectives, Jim Spaulding, Keith Touchton, and Gayward Henry, informed him that Holton was a person of interest.[10] The police took hair and/or DNA samples from Dixon.[11]

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[9] Dixon and Holton's statements constitute admissions and therefore would be admissible on any retrial. Mr. Dixon resides at 10960 SW 63rd Street, Ocala, FL 34476, and his telephone number is 352-812-2826. Mr. Dixon has affirmed he will be available to testify under oath to the facts provided.

[10] Reports and/or notes from these detectives concerning this interview have not been turned over to the defense.

[11] These hair and/or DNA samples have not been disclosed to the defense.

Taylor's successive 3.851 also provided a detailed history of the police's initial investigation into Ms. Vest's homicide (PCR-2 10-13):

> On or about September 16, 1990, Walter Holton reported his Ford Ranchero vehicle was "stolen" from his home after he left the keys in the ignition. A report written by B.S. Dubberly on the same date noted a homicide occurred at a nearby residence during a similar timeframe. That report was written approximately at 9:10 a.m. That same day, Mr. Holton's vehicle was located at 6827 North Main Street by Jim Butler, found in back of Mr. Butler's used car lot. Det. Conn stated it was not necessary to have the vehicle processed by an evidence technician and the vehicle was stored at Tim Towing. The owner could not be located. This vehicle was suspected to be involved in another crime but that turned out to be unfounded.
>
> On September 17, 1990, the vehicle was processed by evidence technician Mr. Powers and three fingerprints were found. Det. Conn requested these be processed, although this request was administered a day after it was discovered and handled the evidence, thereby contaminating it. The location of this vehicle is approximately sixteen miles from the crime scene, 1.52 miles from KP Motors where Mr. Holton was employed, and .65 miles from Mr. Dixon's mother's residence, Ms. Barbara Gardner.
>
> On September 18, 1990, Edward Pierce was interviewed by police and stated around 4:30 a.m. on September 16, 1990, he was driving by the victim's residence and noticed a light sky-blue Ford Ranchero, early 70's model, parked in the field next to Ms. Vest's residence. He did not see anyone around the vehicle. This vehicle matched the description of the vehicle "stolen" from Mr. Holton. The police report indicates the author conducted a background check on Mr. Holton and learned that James Dixon was an associate of his. The report indicated "Mr. Dixon fit the profile done by the FBI. His arrest record was pulled and also a pawn shop computer check was done on Mr. Dixon. It was learned by this writer that James Dixon pawned a chain with a sailboat pendant on September 17, 1990, at

> Jimmie's Pawn Shop located at 43 Sailfish Drive, Atlantic Beach, Florida." This pendant was confirmed to look "exactly" like the one Ms. Vest owned.
>
> The officers then went to Mr. Dixon's mother's residence, Barbara Gardner. She informed them Mr. Dixon is known as "Little Jack." She saw him "this past Tuesday night" and "said he was leaving town and he wanted to say goodby." (sic). Ms. Gardner informed the police that Dixon "does have a split personality and he does get violent and in a rage at times." Mr. Dixon's sister, Latrell Dixon, told police that "if her brother had burglarized a place and someone was there, she believes that he would hurt them."
>
> Mr. Holton and his then-girlfriend Angela Smith were interviewed by police. Ms. Smith testified she noticed Mr. Holton's vehicle missing around 7:00 in the morning, almost two hours before it was reported stolen.
>
> Several empty liquor bottles were found on the kitchen floor of Ms. Vest's home, as well as the bedroom. On Ms. Vest's bed was a syringe, and also found was a bottle of Grenache, an empty green bottle of Seagrams, an empty bottle of rum, a Bols liquor bottle (with the bottleneck broken), an Ushers scotch bottle, and a pill bottle. It appears no evidence was submitted that the victim used a syringe or drank as heavily as the empty bottles in her home would indicate. Near the victim's carport was an empty Marlboro light cigarette pack and a cigarette butt of the same brand. This butt was previously examined without results. Mr. Dixon admitted to police he smoked Marlboro light cigarettes.

(PCR-2 10-13.)

II. The Second Successive Rule 3.851 concerning Mr. Dixon

In addition to alleging the above facts, Mr. Taylor's Second Successive Rule 3.851 motion provided Mr. Dixon's sworn affidavit (PCR-2 23), pursuant to the requirements concerning newly discovered evidence claims detailed in Fla.R.Crim.Pro.

3.851. Taylor's Second Successive 3.851 sufficiently alleged both prongs of the newly discovered evidence test. First, Taylor asserted that the evidence clearly could not have been discovered with due diligence as Dixon, for the first time, recently decided to come forward after learning Mr. Holton was deceased and Dixon's life was no longer in danger.[12]

Second, Taylor also explained the Dixon evidence would probably produce an acquittal on retrial for many reasons, including:

> Mr. Dixon's extremely detailed statements exculpate Mr. Taylor, affirming that he bears no responsibility for the crimes he was convicted of. Instead, Dixon's statements indicate that Mr. Holton and his Cuban friend committed these crimes. With these statements, all that is left of the State's case against Mr. Taylor is at the most, a suspicion that he may have been involved, which is derived from their snitch, Anthony Smith, who admittedly perjured himself in numerous judicial proceedings. However, a suspicion is insufficient to sustain a conviction:
>
> Evidence that furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence that clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence that leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even

[12] Taylor's second Successive Rule 3.851 Motion also provided a background of the police's initial investigation into Ms. Vest's murder.

though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956). Mr. Dixon's statements indicate Cowart lied against Mr. Taylor. Of course, Cowart admitted during Taylor's postconviction proceedings that the Prosecutor misunderstood his testimony and that Mr. Taylor did not confess to him. Mr. Dixon's affidavit and statements should finally put that issue to bed.

Additionally, Agent Dizinno, the other main witness for the prosecution, will be impeached with the false chain of custody previously argued in postconviction; his misleading testimony concerning the investigation into the FBI's microscopic lab and that the unit was operating in a scientifically unreliable manner; having no protocols for the hair and fiber exams; lacking quality assurance guidelines; each analyst was operating under different standards when examining hair and fiber; Agent Dizinno was not qualified in hair and fibers during Murray's last trial but did not disclose same to the parties; Agent Dizinno failed proficiency testing in hair and fibers; other possible contributors of hairs were not examined, such as the victim's boyfriend, Mr. Holton, Mr. Dixon, and; the defense was unable to have a defense expert examine and duplicate Agent DiZinno's findings because the hairs were destroyed.

Mr. Dixon's statements also provide credibility to Mr. Murray's statements made to the police that he had nothing to do with this crime and was home sleeping. Mr. Taylor has claimed repeatedly he could not have been involved where the evidence in this matter demonstrates the person(s) responsible for the crime got rid of the Ford Ranchero at 59th and Main Street. Mr. James Fisher also testified that Mr. Murray was his neighbor and was at his house the next day hooking up a car stereo.

Finally, with this new evidence concerning Mr. Dixon and the additional facts litigated in postconviction (Cowart's incredibility, hair and fiber, DNA et al.), the jury will find Mr. Taylor's actual innocence as

> the new evidence, together with the previously discovered evidence, leads to the other suspects that committed this crime – Mr. Holton, "the Cuban," and Angela Smith being an accessory to murder for lying about Mr. Holton's whereabouts the night of the homicide.

(PCR-2 13-15)

A newly discovered evidence claim requires a prospective analysis (the analysis includes all evidence to be introduced in a new trial, including evidence previously found to be procedurally barred). If Mr. Dixon testifies that Taylor is innocent, the Defendant will either be acquitted or, more likely, the State's case will not survive a JOA and Taylor will not be brought to trial at all. *See Hildwin v. State*, 141 So.3d 1178 (Based on the standard set forth in *Jones II*, 709 So.2d at 526, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial and conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case.") (quoting *Lightbourne*, 742 So.2d at 247). If Mr. Dixon's testimony exculpates Taylor and implicates Mr. Holton—a person of interest during the initial investigation—it is unclear how the prosecution could retry Mr. Taylor. In addition to the new Dixon evidence, this Court must also consider ruling on the materiality of this Newly Discovered Evidence claim that

Taylor's conviction was based on false evidence, including Timothy Cowart's testimony and scientifically flawed FBI hair and alleged semen testimony, resulting in a verdict that is fundamentally unreliable and a violation of due process. (PCR-2 15-16). *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (Holding a sentencing court's reliance on materially false information violates due process of law and observing that it is "a requirement of fair play" that a criminal sentence not be "predicated on misinformation"); *United States v. Guajardo-Martinez*, 635 F.3d 1056, 1059 (7th Cir. 2011) (stating that the "Due Process Clause of the Fifth Amendment requires that information used for sentencing be accurate," citing *United States v. Tucker*, 404 U.S. 443, 447 (1972)); *see also Lee v. Glunt*, 667 F.3d 397, 407-08 (3d Cir. 2012) ("If Lee's expert's independent analysis of the fire scene evidence—applying principles from new developments in fire science—shows that the fire expert testimony at Lee's trial was fundamentally unreliable, then Lee will be entitled to federal habeas relief on his due process claim.").

Taylor contends that Dixon's statements are powerful enough to produce an acquittal upon retrial since the prosecutor's evidence against Taylor is tenuous; the law requires the Court to consider all the new evidence, along with the evidence produced at trial, in deciding whether to grant a new trial,

including the newly discovered Dixon evidence. *see* Robinson v. State, 770 So.2d 1167 (Fla. 2000); *Nordelo v. State*, 93 So.3d 178, 186 (Fla. 2012).

The Successive Rule 3.851 Motion regarding Mr. Dixon

The lower court incorrectly denied Mr. Taylor's Successive Rule 3.851 Motion by finding that Dixon's statements did not sufficiently weaken the case against Taylor to render a reasonable doubt of his culpability. (PCR-2 40). However, the court's order is missing the required analysis that the Dixon claim be compared with the evidence introduced at trial, as well as the evidence Taylor previously litigated during his postconviction proceedings, or that the facts in the motion are refuted by the record. *See Hilwin*, 141 So. 3d 1178 (quoting *Lightbourne*, 742 So. 2d at 247).

The trial court's short order also discounts to irrelevance many facts that support the granting of a new trial, such as: Dixon and Holton were interviewed as persons of interest in this matter; monumental impeachment evidence when Cowart admitted to perjury—Taylor did not, in fact, confess to Cowart; the State's footprint expert did not say for certain that there were two different prints, or the state's hair expert opining that the hairs found at the crime scene, although similar to Murray's known hairs, did not indicate an absolute match and could be from some other person, and that Dr. Pollack violated FDLE

protocols in finding a DNA match to Taylor from evidence found on the blouse. *See Porter v. McCollum*, 558 U.S. at 43 (It is unreasonable to discount to irrelevance evidence that "may have particular salience for a jury…"). In addition, the trial court failed to consider that the DNA evidence utilized in Murray's case was found in violation of *Frye* on more than one occasion by this Court; however, this Court admitted it in Taylor's case because Taylor's counsel failed to hire an expert and make the necessary objections.

Further, the trial court's order does not contain a single record attachment refuting Mr. Taylor's claim. *See McLin v. State*, 827 So. 2d 948 (Fla. 2002) (Reiterating when a summary denial is not predicated on the legal insufficiency of the motion, a copy of that portion of the files and records relied on by the court should be attached to the order.).

This Court in *McLin* explained that "ordinarily an evidentiary hearing is required for the trial court to properly determine, in accordance with *Jones*, whether the newly discovered evidence is of 'such nature that it would probably produce an acquittal on retrial.'" *Id.* at 956 (citing *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). This Court also explained the trial court's required duty in evaluating such a claim:

> In making this determination, "the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial," so that the appellate court can "fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence." *Id.* at 916

McLin, 827 So. 2d at 956. Because the trial court's order did not properly evaluate Taylor's newly discovered evidence claim that was sufficiently pled and its allegations are not refuted by the record, this Court must accept Taylor's allegations as true and remand the claim with instructions to hold an evidentiary hearing, and the failure to do so will result in violations to Taylor's Fifth, Sixth, and Fourteenth Amendment rights under the Federal constitution corresponding Florida provision. *Id.* at 957-59 (Reversing summarily denied 3.850 newly discovered evidence claim as trial court failed to take the affidavit as true when determining whether a summary denial is proper and failed to evaluate any of the other exculpatory evidence so the appellate court could "fully evaluate the quality of the evidence which demonstrably [met] the definition of newly discovered evidence.").

In addition, the Trial Court's order does not find that the motion on its face is legally insufficient. When newly discovered evidence is asserted, the trial court should conduct an evidentiary hearing to determine the credibility of the claim. *Nordelo v. State*, 93 So. 3d 178 (Fla. 2010). The

Affidavit in *Nordello* is similar to this case in that the Affiant claimed he did not come forward because he was scared. The Court in *Nordelo* found that there was due diligence and remanded for a hearing. The fact that the Affiant refuted the Affidavit on remand is of no consequence here.

CONCLUSION

In light of the foregoing arguments, this Court must vacate Mr. Taylor's death sentence and at a minimum order an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic service to jennifer.donahue@myfloridalegal.com Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on this 28th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

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

/s/ Michael Reiter
Michael Reiter